THE EMERGENCE OF A MODERN INTERNATIONAL CRIMINAL JUSTICE ORDER

by

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PROMOTOR: PROF DR C P VAN DER MERWE FICK

Dedicated to the memory of my parents.

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To my wife and children, thank you for your patience and faith in me.

Lastly, to our God and Heavenly Father, my humble praise for immeasurable grace and blessing.

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List of abbreviations

DRC:	Democratic Republic of the Congo.
ECHR:	European Court of Human Rights.
ICC:	International Criminal Court.
ICJ:	International Court of Justice.
ICL:	International Criminal Law.
ICTY:	International Criminal Tribunal for the former Yugoslavia.
ICTR:	International Criminal Tribunal for Rwanda.
ICRC:	International Council of the Red Cross.
ILC:	International Law Commission.
IMT:	International Military Tribunal.
SOFA:	Status of Forces Agreement.
SADC:	Southern African Development Council.
TRC:	Truth and Reconciliation Commission.
UK:	United Kingdom.
UN:	United Nations.
US:	United States.
USA:	United States of America.
WW I:	World War One.
WW 2:	World War Two.

Chapter 1
The emergence of a modern international criminal justice order

1. Purpose

The purpose of the present research is to indicate to what extent an international criminal justice order has developed and to validate the need for such an order. In this process the establishment of international criminal tribunals, the jurisprudence that emanates from these structures, and attempts by states to exercise universal criminal jurisdiction are all factors that prompted the establishment of the International Criminal Court in terms of the Statute of Rome, signed on 17 July 1998.[1]

The present research illustrates the development of international criminal law, particularly from the International Military Tribunals for Nuremberg and Tokyo to the establishment of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.[2] The research refers to the development of international human rights and humanitarian law and the prominent position these currently occupy in international criminal law. It also illustrates how the jurisprudence that emanated from the international criminal tribunals has contributed towards the shaping and development of international criminal law in order to achieve a consistent, credible international criminal justice order. The research indicates that the United Nations, despite various shortcomings, has, especially since the end of the so-called "*cold war*", been more actively vigilant in its role as keeper of

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1 Further reference in this work to the International Criminal Court may be made by referring to its accepted acronym, namely the ICC.

2 Further reference in this work to the International Criminal Tribunal for the former Yugoslavia may be made by referring to its accepted acronym, namely the ICTY, and reference to the International Criminal Tribunal for Rwanda as the ICTR.

world peace: a fact which is viewed positively in the light of enforcement of universal values, norms and ultimately international law. This is important because international society is dependent on enforcement mechanisms, which are absent in the administration of international criminal law when compared to national jurisdictions. The establishment of both the International Criminal Tribunal for the former Yugoslavia (ICTY) and that of the International Criminal Tribunal for Rwanda (ICTY) was in response to Security Council resolutions. In contrast, the International Criminal Court was established in terms of the Rome Treaty. This is indicative of the fact that the international community is set on creating an international legal order that will finally end impunity for those who instigate and commit international core crimes. It further indicates that certain values and norms are universally held by all states and that the international community is determined that these values and norms be reflected and complied with in international law. The research will argue that as valuable as enforcement of universally held values, norms and law by international criminal tribunals may be, total and ultimate success in the establishment of a credible international legal order is much dependant on enforcement of these by national courts. The need for such an order is validated in response to the widespread atrocities witnessed by the international community over the past centuries and the often flagrant impunity enjoyed by the perpetrators of these atrocities.

In attaining the above objectives, the present research indicates the obstacles which face and currently challenge the development of an international criminal justice order, based on the rule of law, particularly with regard to aspects relating to the exercise of universal jurisdiction and the application of extra-territorial jurisdiction by states. Another obstacle faced by the International Criminal Court and therefore by the greater part of the international community, is the opposition it receives from the United States. Because of the United States' huge and influential role in world politics, the reasons for the objections need to be examined and evaluated. The research examines and evaluates various options available and employed in the quest for transitional justice where gross violations of human rights have occurred. It

finally examines and evaluates the South African position in relation to the emergence of an international criminal justice order.

2. Necessity

The world has generally been eager to declare its commitment to the extermination of gross violations of human rights and to bring perpetrators of such atrocities to justice. Yet, for almost half a century, since the end of World War II, the most serious violators of international humanitarian law and human rights law in various conflicts around the world have been allowed impunity. Bassiouni[3] highlights this as follows:

> "*Many of the international crimes for which the Court would have jurisdiction are the logical extension of international protection of human rights. Without enforcement, these rights are violated with impunity. We owe it to the victims of these crimes and to our own human and intellectual integrity to reassert the values we believe in by at least attempting to prosecute these offenders. When such a process is institutionalized, it can operate impartially and fairly. We cannot rely on the sporadic episodes of the victorious prosecuting the defeated and then dismantle these ad hoc structures as we did with the Nuremberg and Tokyo tribunals. The permanency of an international criminal tribunal acting impartially and fairly irrespective of whom the accused may be is the best policy for the advancement of the international rule of law and for the prevention and control of international and transnational criminality*".[4]

It has been a slow and cumbersome process to establish a tribunals like the International Criminal Tribunal for the former Yugoslavia (ICTY) for instance, or the International Criminal Tribunal for Rwanda (ICTR). Reflecting on the lessons of the ICTY in particular, Goldstone and Bass state:

> "*One of the most obvious signs of the initial weakness of the world's response to the wars in the former Yugoslavia was the amount of time it took to create The Hague Tribunal*".[5]

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3 Bassiouni 2003: ix.
4 Bassiouni 1991: 4.
5 2000: 51-59.

These authors identify timely justice as one of the most prominent lessons to be learned from the International Criminal Tribunal for the former Yugoslavia experience.

If a repetition of the horrendous slaughter of human lives is to be prevented in future, research needs to indicate the course the international community needs to take to prevent impunity and to ensure justice for victims. These objectives are largely dictated by world politics, but it is the lawyer who must push towards creating structures, and who must develop those already in existence, to meet these objectives. Research should indicate the weaknesses and strengths of the legal structures and principles already in place as well as those in the process of becoming accepted international law, in order to attain these objectives. Research must indicate the most suitable ways to punish perpetrators and also to seek justice for the millions of victims. Research must point out and record the lessons learned from previous jurisprudence resulting from prosecutions for core international crimes. This work will seek to attain these research objectives.

3. Focus

This research will focus on the development of international criminal justice through the mechanisms that have been created for the purposes of attaining justice in terms of gross violations of human rights and humanitarian law, namely the various international criminal tribunals and courts and also some national courts. In doing so, it will highlight the challenges that have faced and still face the international community in establishing mechanisms for accountability.

How does the traditional principle of the sovereignty of states for example, measure up to the current requirements of a twenty-first century world community? How does the notion inhibit, or in its emerging context, foster the need for the extra-territorial prosecutions of responsible individuals by states? Why is it important for states to exercise universal jurisdiction over international crimes?

How does the principle of sovereignty of states influence traditional immunity for heads of states and government officials? The validity of the emerging concept of a universal jurisdiction to be exercised by states was poignantly illustrated by the attempted prosecution of Pinochet.[6] Focus will further be directed towards the conception, emergence and establishment of the International Criminal Court and the bases of its existence in terms of the Statute of Rome.[7]

4. Design and sources

The research is designed to start with a chapter examining general principles relevant to international criminal law and particularly to the research topic. This will serve to contextualise the research subject. An examination of these principles is also necessary because, when compared with national legal systems, international criminal law is still in its infancy. This is so mainly because until fairly recently, its growth has been inhibited by the lack of an international judicial forum practising international criminal law and secondly, by the reluctance of nations generally to put perpetrators on trial for what are styled as international core crimes. When states in the 1800s initiated the codification process of their respective domestic criminal law, it was recognised that in certain circumstances this could extend to certain forms of individual conduct committed outside the territorial jurisdiction of a particular state.[8] The research therefore examines the principle of state sovereignty as well as the principle of legality as the latter is raised persistently in prosecutions for international violations of human rights. It also examines immunity and extradition as these principles bear directly on the ability to prosecute international crimes.

The early prosecutions for violations of the Laws of War and for Wars of Aggression are dealt with in Chapter 2. This chapter provides the general

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6 The attempted arrest of Pinochet will be dealt with at a later stage.

7 1998.

8 Bassiouni: 1980:3; De Than and Shorts: 2003: xi.

foundation for developments in international criminal law subsequent to World War II. Chapter 3 witnesses the first truly international criminal tribunal that was created at the end of the Second World War with the establishment of the International Military Tribunal (IMT). Although much criticised, it is widely recognised that the Nuremberg Charter provided a useful precedent to bridge the difficulties which, up to then, had successfully blocked any attempt to impose responsibility upon individuals. It was therefore a significant landmark in the history and development of international criminal law.[9] This in turn led to the acceptance of human rights and humanitarian law as integral components of international criminal law with amongst others, the adoption of Common Article 3 of the Geneva Conventions in 1949 and the Additional Protocol 11 in 1977, which is the subject of the next chapter.

From these developments, the research proceeds to 1992 when the United Nations Security Council established the Commission of Experts to Investigate Violations of International Humanitarian Violations of International Humanitarian Law in the then ongoing conflict in the former Yugoslavia, and which led to the establishment of the ICTY. This was followed in 1994 when the International Criminal Tribunal for Rwanda was established. The research indicates how these precedents opened up the way for other mechanisms of international criminal accountability and for the establishment of the long-awaited International Criminal Court.

The history and legal bases upon which the International Criminal Court was established are examined in the next chapter, which also introduces the principle of complementarity of jurisdiction between the International Criminal Court and national courts. It concludes that membership of the International Criminal Court places an obligation on states to be actively on guard for human rights violations and to prosecute those responsible for these

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[9] Garcia-Mora: 1962: 38. In this regard the author concludes: "*In thus clearing the way for the imposition of liability upon individuals, the Nurnberg [sic] judgment is a significant landmark in the history of the law of nations, and since this judgment may be a precedent for future legal action, it may confidently be asserted that international law imposes criminal liability upon individuals who plunge mankind into the scourge of war*".

violations when and where opportunity presents itself. This aspect of the research naturally leads to the question of how well South Africa is positioned in assuming the active role it professes it wants to play in a developing international criminal justice regime.

The research, which is intended to be a legal treatise on the establishment of international criminal courts and tribunals and their influence on the development of an international justice order, does so within the context of world politics. It does not distance itself from political and economical influences. To do so, would be unrealistic and in fact, impossible.[10]

Perhaps it is opportune to conclude this introduction with a quotation from the great international scholar, Cherif Bassiouni, because within the quotation lies much of what the international community is challenged with.

> "*It is shocking and a serious breach of international law that the international community failed to provide accountability for such crimes as genocide, crimes against humanity, war crimes and torture which constitutes jus congens international crimes. Lack of action can be blamed in part on 'cold war' dynamics and the indifference of the world's major governments to pursue post-conflict justice. Another explanation may be that most of the victims were from third world countries in Africa, Asia, Latin America, and the Middle East*".[11]

According to Bassiouni first world countries who possessed the power to prevent these serious crimes and to bring the perpetrators to justice, failed to do so because they had no compelling strategic or economic interests to protect. [12] These countries' so-called *realpolitik* simply did not include interests such as protecting humanistic values. This cynical situation, as a result of various factors, is changing and intervention in order to stop atrocities on a

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10 Shaw 1997: 10. The author indicates that there can never be a complete separation between law and policy. The author states: "*No matter what theory of law or political philosophy is professed, the inextricable bonds linking law and politics must be recognized".* See also Cassese 1995: v who states: *"I believe it is misleading to consider international law as a piece of reality cut off from its historical, political and ideological context*".

11 2003: vii.

12 2003: vii.

large scale and to establish accountability structures for at least the major perpetrators, has become a reality.[13]

5. Value

The value of the research lies in the fact that it systematically provides a historical perspective of the conception and evolution of each phase that preceded the establishment of an International Criminal Court. In reflecting such historical accounts, it highlights the evolution of international criminal law and records the significant impact each post-conflict modality has made. It highlights the obstacles of the past and currently that confront the evolution of a world criminal justice order. In so doing it hopes to achieve a perspective on the way forward.

[13] Bassiouni 2003: vii.

Chapter 2
International criminal law and certain fundamental principles of international law

1. Introduction

This chapter will examine and evaluate the concept of international criminal law with some of its inherent features such as the principle of state sovereignty, the exercise of universal jurisdiction, immunity, and extradition, the current view of state sovereignty, the principle of double criminality and the principle of legality. These concepts and principles contextualise the research subject and demonstrate their development within the context of an emerging international criminal justice order. They also highlights the problems with which international criminal law and justice grapple. Central to this chapter is the principle role that the concept of state sovereignty plays in international law. There are signs, which in terms of development must be welcomed, that the principle of absolute state sovereignty must head for a more realistic approach to the principle if the international community is serious about the prosecution of international crimes and the establishment of an international justice order.

2. International Criminal Law

When compared with national legal systems, international criminal law is still in its infancy.[1] This is in part because until recently its growth had been

[1] De Than and Shorts 2003: xi. See also in this regard, Schwarzenberger 1996: 263 on the six meanings of international criminal law, and the fact that it would be unduly optimistic to assume that international criminal law has now been established unequivocally as a technical term. It is used in at least six different meanings by those who consider international criminal law to form part of the existing laws of nations. See also Cassese 2003: 16.

stunted because of the absence of an international criminal judicial forum and the reluctance of nations to prosecute perpetrators of international crimes.[2]

Furthermore, until fairly recently, crime was viewed as mainly a national concern of states confined to within their borders. Crime was therefore viewed and treated as localised and courts would exercise jurisdiction only over crimes that were committed within their territory with only a few instances in which they were prepared to try their own nationals for crimes that had been committed abroad. The practice amongst states was thus that, for reasons of international comity and co-operation, states would rather return criminals to countries of origin in terms of extradition agreements.[3]

In recent times however, international criminal law and human rights have been at the forefront of global and political interest.[4] Is there however sufficient evidence to suggest that a mature independent body of *international criminal law* exists*?*

Not so, wrote Schwarzenberger in 1950. He stated at the time that:

> "*...international criminal law that is meant to be applied to the world powers is a contradiction in terms. It presupposes an international authority, which is superior to these States. In reality, however, any attempt to enforce an international criminal code against either the Soviet Union or the United States would be war under another name. Thus, proposals for a universal international criminal law fall into the category of the one-way pattern for the reorganisation of international society. With other schemes of this type they share the deficiency of taking for granted an essential condition of their realisation, a sine qua non which cannot*

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2 De Than and Shorts 2003: xi. See also in this regard Bantekas and Nash 2003 1. On the nature of international criminal law, the authors state that, "*International criminal law (ICL) constitutes the fusion of two legal disciplines: international law and domestic criminal law. While it is true that one may discern certain criminal law elements in the science of international law, it is certainly not the totality of these elements that make up the discipline of ICL. Its existence is dependent on the sources and processes of international law, as it is these sources and processes that create and define it*". See also Cassese 2003: 16. International criminal law is a branch of public international law. Public international law pursues in essence the purpose of reconciling as much as possible the conflicting interests and concerns of sovereign states.

3 Dugard and Van der Wyngaert 1996: xi.

4 Kittichaisaree 2002: v; De Than and Shorts 2003: xi.

> *easily be attained: the transformation of the present system of world power politics in disguise into at least a world federation*".[5]

He concludes:

> "*If, and when, the swords of war are taken from their present guardians, then, and only then, will the international community be strong enough to wield the sword of universal criminal justice*".[6]

Wise, on the "*name and nature of international criminal law*" describes international criminal law as*:*

> "*In its widest, most commodious sense, international criminal law covers all problems lying on the borderline between international and criminal law*".[7]

In turn, so it is observed, international criminal law can be subdivided into three main groups of topics, namely, international aspects of national criminal law,[8] criminal aspects of international law,[9] and international criminal law *stricto sensu*.[10]

Generally it can be said however, that international criminal law has developed on an *ad-hoc* basis over the past 175 years and includes over 300 instruments, known as treaties, which define international crimes and place a duty upon participating states to criminalise conduct proshibited by the treaties.[11] Such state duty includes the prosecution of accused offenders, punishing those convicted, or extraditing the accused to another state that is

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5 1996: 35. See also Harris: 1998: 1 and further.

6 Schwarzenberger 1996: 36.

7 1996: 37.

8 Wise 1996: 39. According to the author, this group will include questions of jurisdiction over crime, choice of law in criminal cases, and recognition of foreign penal judgments.

9 Wise 1996: 42. This, according to the author, concerns international standards of criminal justice, "*that is principles or rules of public international law that impose obligations on states with respect to the content of their domestic criminal law or procedure*".

10 Wise 1996: 43. According to the author, what should be included under this topic is quite controversial. In the strictest sense, international criminal law would be the law applicable to an international criminal court.

11 Karadsheh 1996: 244. See also Lee 2000: 1. The author notes that: "*The system of international law is a tangled mass of bilateral and multilateral agreements between States that has grown steadily over the years*". See also Cassese 2003: 18.

willing to prosecute.[12] The nineteenth century began to see international co-operation agreements between states for the return of fugitives and eventually, multilateral treaties encouraged nations to cooperate with law enforcement agencies of various nations to combat international crimes "*considered societal ills of international concern*".[13] Then in the twentieth century, international criminal law continued to develop to include more "*politically charged items*", as Karadsheh describes them, such as war crimes, genocide, apartheid and terrorist offences.[14]

War criminals have been prosecuted since time immemorial, albeit on a limited scale in comparison with recent times. However it was early recognised that the human spirit possesses certain fundamental values, which values are rooted in certain philosophical and religious beliefs, and serve to set, even in the most extreme circumstances of conflict, a basic standard for accountability for crimes against others.[15]

The technological advances in the field of communications and the increase in human contact, especially during the past two centuries, are factors that have contributed to an awareness of interdependence among all peoples and nations of the world. In addition, human experiences with various forms of natural hardships as well as hardships caused by fellow humans have heightened the level of a world social consciousness. This in turn has created the necessary condition for the emergence and the shaping of shared values and expectations of the world community.[16] These advances and human experiences contribute to the shaping of international criminal law and justice.

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12 Karadsheh 1996: 244.

13 Karadsheh 1996: 244. The author cites as examples the treaties, as early as 1815, in terms of which slave trade was abolished. Later treaties were concluded to abolish the trade in women and children, trade in obscene publications, forgery of currency and trade in illicit drugs.

14 Karadsheh 1996: 245.

15 Bassiouni 1980: 1.

16 Bassiouni 1980: 1; Van der Meijs and Orie 1980: 1. In this regard see also Garcia-Mora 1962: 1 where the author notes as follows: "*The shortcomings of the international legal order are all too obvious to any casual observer of the world scene. The need to eliminate friction between states in an atomic age is painfully clear. Past efforts to establish an effective international law have ended in disheartening failures. Witness the breakdown of the League of Nations and its attempts to establish a*

Accordingly, the world community has come to require of its participants a greater degree of conformity and compliance with certain minimum standards of behaviour in order to attain a shared goal of collective and individual security within the world environment.[17] Thus, the international legal system was and is today, confronted with the challenge of developing norms, structures, strategies and resources that are capable of achieving the preservation and protection of the world community, while at the same time affording it the opportunities of transformation and evolution, according to its needs.[18] These norms expressed through strategies and resources must establish international criminal law and justice.

International criminal law may further be viewed as a product of the convergence of the international aspects of what is referred to as municipal criminal law and aspects of international law. According to Bassiouni,

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collective security system carrying with it the high hopes of peoples everywhere. More recently, when mankind emerged from the 'social cataclysm' of 1939-1945, the rebuilding of the international order was viewed as the only available alternative to save 'succeeding generations from the scourge of war'. A new world order was not only conceived under a sense of deep frustration for the failure of the old, but also under the full realization that the survival of mankind depends on its effective operation. The reorganization of the international order was thus posed in terms of a desperate necessity, simply because mankind was compelled to choose between such antithetical alternatives as survival or destruction. Yet almost two decades after the termination of World War II, the community of mankind is still without any effective means of controlling international conflicts".

17 Bassiouni 1980:1. See also http://home.no.net/dawatnet/war_crimes_in_Afghanistan ignore.htm 5/20/2004 where in an article by Dr Rahmat Zirakyar he writes: "*In the early history of warfare the status of prisoners of war was not recognized and in general they were promptly slain, their property was plundered, and their cities were destroyed. From the later part of the Middle Ages until the second half of the nineteenth century, the rules of warfare initially took the form of customary international law (custom and practices accepted by state to be obligatory). For the purpose of sheer self-preservation, the human polity realized that if war cannot be abolished, its cruelty and destructiveness must at least be limited as much as possible. The laws of war evolved from the necessity to make the unavoidable war as humane as possible. Since the second half of the 19th century, the rules of warfare have been based on major multilateral international conventions such as the Declaration of Paris in 1856, various Hague and Geneva conventions (1899-1954), and the Charter of the Nurnberg [sic] International Tribunal (1945-46) law were transmuted into positive law by their inclusion in various treaties - such as mentioned above*".

18 Bassiouni 1980: 1. See also Garcia-Mora 1962: 1-3.

> "*Its origin and development must, therefore, be traced through these two branches of law, even though it is emerging as a discipline in its own right. Thus, this distinction, though historically valid, is becoming essentially of methodological significance*".[19]

Bassiouni notes that because as a discipline, international criminal law is the result of the convergence of two branches of the law, it has been affected by a dichotomy in its very basic doctrinal premises. Therefore:

> "*… the doctrinal divergences which exist between international law and criminal law gave international criminal law a 'split personality', which plagued its development as its history attests to*".[20]

As a result, so Bassiouni indicates, writers on the subject will differ in their approach depending on their choice of two doctrinal premises, being either "*publicists*", who will tend to frame international criminal law in terms of treaty obligations and customary practices amongst states, with emphasis on its consensual but binding nature of international obligations, or "*penalists*" who tend to devise

> "*...an international model of enforcement parallel to the municipal criminal model and will seek the codification of international criminal proscriptions and their implementation through an international system of criminal justice*".[21]

The above approach illustrates the differences between the two doctrines, such as: (i) what enforcement mechanism should be employed? (For example the establishment of an international system of criminal justice or the imposition upon states of the obligation to enforce international criminal law through their own municipal system of criminal justice); (ii) the question of

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19 1980: 2.

20 Bassiouni 1996: 90 continues as follows: "*Indeed, one has but to consider that international law is a legal system built on the assumption of consensus and voluntary compliance by its principal subjects (states) whose relationship is one of co-equals and where no superior authority enforces the mandates of the system. On the other hand, criminal law in all municipal systems is predicated on vertical authoritative decision-making processes which rely on coercive means to enforce the mandates of the system. The differences in the two systems are all too well known to be restated; suffice it, however, to conclude that they differ in their goals, approaches, methods and outcomes. This condition explains to a large extent the lack of cohesion and sense of direction so apparent throughout the development of international criminal law*".

21 1996: 90.

individual sanctions and how their execution should be carried out. (For example, should penalties be determined by international criminal law and executed by an international system or should international criminal law delegate that function to that state?); (iii) what sanctions should be devised for non-compliance by states of their obligations arising under international criminal law? (For example economic sanctions and boycotts.) It has also been indicated that the term *international criminal law* is currently used to denote the following six meanings: (1) International criminal law in the meaning of the territorial scope of municipal criminal law,[22] (2) international criminal law in the meaning of internationally prescribed municipal criminal law,[23] (3) international criminal law in the meaning of internationally authorised municipal criminal law,[24] (4) international criminal law in the meaning of

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22 Bassiouni 1996: 4 explains this meaning as follows: "*It follows from the principle of the independence of states that, to any extent to which subjects of international law are not limited by principles of international law, they are free to determine as they see fit the territorial scope of their municipal criminal laws. They may limit the scope of their criminal laws to acts committed in their own territories and territorial waters, on ships sailing under their own flag or on aeroplanes of their own nationality. They may, however, extend their criminal jurisdiction to acts committed by their own subjects or by foreigners abroad'.* He illustrates by citing from the Lotus case of the Permanent Court of International Justice in 1927*: 'all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State".*

23 Bassiouni 1996: 6 explains: "*The term 'international criminal law' is used in a second meaning when it refers to instances in which a State is bound under international law to visit upon acts of individuals the sanctions of its own municipal criminal law. Obligations of this kind may arise from treaties or from duties of States under international customary law'. Examples of international criminal law in this context, so the author indicates were e.g. the custom among the princes of the Christendom to bind themselves with reciprocal treaties to prevent and punish piracy or the taking of spoilage of a shipwreck. So also e.g. in the nineteenth century, the number of bilateral and multilateral conventions concluded between states on the initiative of Great Britain, by which slave trading was assimilated to piracy*".

24 Bassiouni 1996: 8 indicates that the examples under this category of international criminal law are cited as examples of the existence of an international criminal law. Perhaps these can be described as the true historical "*seeds*" for the eventual development of this branch of the international law. This is illustrated by citing as examples, "*Piracy jure gentium*": "*on the basis of a multitude of treaties, two different principles have gradually grown into the principles of international criminal law. The first is that every State is under an international obligation to suppress piracy within its own territorial jurisdiction. If a State should fail to do so or should associate itself persistently with piratical ventures, it would certainly violate this rule. It is liable for the commission of an international tort and, in an extreme case, may even forfeit its own international personality and be treated as an international outlaw. To the extent to which, for the purposes of countering piracy, a State requires of necessity the assistance of its municipal criminal law, such law may be considered to be internationally prescribed*". The second principle, which has assumed the status

municipal criminal law common to civilised nations.[25] (5) International Criminal law in the meaning of international cooperation in the administration of municipal criminal justice.[26] (6) International criminal law in the material sense of the word.[27]

Thus, it is to be expected that the first aspect of international criminal law was related to the need by states to enforce municipal or national criminal law, where individuals were sought for crimes committed against the internal order

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through custom of a recognised international law principle, can be summarised by the term piracy *jure gentium.* This means, so the author indicates, that "*in the interest of the freedom of the seas, every State is authorized to assume jurisdiction on the high seas over pirate ships. If it does so it may mete out to pirates any condign punishment, including the death penalty. Yet, the recognition of acts of piracy as 'constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. The grant to States, under international law, of jurisdiction over pirates is an apparent exception to the principle of freedom of the seas, according to which, in time of peace, States exercise on the high seas only jurisdiction over ships sailing under their own flag*". The second example cited by Schwarzenberger as historic principles through various treaties that have attained the status of recognised principles of international law relates to war crimes. He indicates: "*It is the purpose of the rules of warfare, as developed by the laws and customs of warfare and by international conventions, to draw the dividing line between legal and illegal forms of warfare. Every belligerent State is under an international duty to do everything in its power to ensure respect for the rules of warfare on the part of its armed forces and to punish such infractions as may occur*".

25 Bassiouni 1996: 10 indicates that under this meaning of the use of the expression international criminal law, the Constitution of the United States refers to the term of "*offences against the law of nations".* This covers acts, according to the author, which international law prescribes, or authorises, "*to be treated as criminal under the municipal law of the United States and crimes which, owing to their general noxious character, are punishable in most civilized countries".* Thus so, Schwarzenberger continues, any state is under international obligation, failing it will have committed an international tort, to punish common offences against life, property and liberty. The author is silent on what international law currently prescribes if so-called civilized nations are silent when another state clearly and with the knowledge of the former, does nothing to punish, or worse commit these common offences itself.

26 Bassiouni 1996: 271. Here, so the author indicates one is dealing with international criminal law in the sense of extradition treaties and other conventions by which states assist each other in the administration of criminal justice, and rightfully so, he points out the *raison d'être* is the territorial limitation of national sovereignty. Thus, "*without international co-operation between States criminals could defy the municipal criminal laws of most States with relative impunity*".

27 Bassiouni 1996: 272. The simple issue is "*whether international law knows of such rules which alone would constitute an international criminal law in the true meaning of the word'*. The difficulty for the existence of a true body of international criminal law is that a state (because of its sovereignty) "*cannot be the subject of criminal liability".* It is pointed out that for such a set of international criminal law to exist, *"such rules must be of a prohibitive character and be endowed with specifically penal sanction*".

of a particular state. Consequently, this related to inter-state cooperation from which the practice of extradition of individuals resulted.[28]

When states in the 1800s initiated codifications of their respective domestic or national criminal law, it was recognised that in certain circumstances it could extend to certain forms of individual conduct committed outside the territorial jurisdiction of a particular state. As a result it was realised that domestic law could apply extraterritorially and also that extraterritorial enforcement of the law occupied a material place within domestic and international law.[29] In short: the internationalisation of domestic criminal law brought about accommodation for rules of international cooperation in criminal matters.[30] The importance of this development however, in terms of this thesis, is that it indicated the need of the international community for an international criminal justice order.

The opposite side of the internationalisation of national criminal law is the criminal aspects of international law: international criminal law aims, through the establishment of custom or convention, to criminalise certain types of conduct, irrespective of whether it is enforced internally or externally. This it endeavours to achieve by way of several regulatory schemes which include the control of war, the regulation of armed conflicts, the prosecution of violations of the laws of war, and common crimes of international interest. As a consequence, for example, early efforts were made by the emerging world order to distinguish between just and unjust wars.[31]

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28 Bassiouni 1980: 2. Extraditions according to the author originated in the Egyptian civilisation, where the first extradition treaty in the world was signed 1280 BC. Since those early years, extradition has developed into one of the principal instruments relating to inter- state cooperation in order for states to seek compliance with their own internal criminal legal order.

29 Bassiouni 1980: 3. As a result of this, it was soon realised that a synergy or harmonisation of domestic law *vis-a- vis* international law was to be achieved. This aspect of international criminal law is as relevant today, perhaps more so as a result of increased interaction between states, as it was then. This by implication could only be achieved by greater co-operation between states, which also is an aspect which is still as relevant and imperative today, as it was in the 1800s.

30 Bassiouni 1980: 3.

31 Bassiouni 1980: 4. In Western civilizations, the philosophy on the control of war making was found in the writings of Aristotle, Cicero, St Augustine and St Thomas Aquinas. In other civilizations these efforts were paralleled to wit, the Chinese, Hindu,

A next historical phase was the formulating of normative prescriptions against wars, which had become rejected by the shared values of the world community. This was achieved by states after entering into various bilateral and multilateral treaties, particularly since 1648. A world consciousness on the prevention of war emanated.[32]

Wise concludes:

> "*Criminal law is a practice for assigning blame to members of a community who breached the 'particular conventions' prevalent in that community. The concept of criminal law makes sense only in the context of a relatively cohesive community. Thus the existence of international law strictu sensu depends on the existence of a relatively cohesive international community*".[33]

The final observations that are made regarding the nature and indeed the existence of international criminal law, are made by reference to Dugard. This author points out that there is no central legislative body in international law with the power to enact rules binding on all states.[34] In the second place, in

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Egyptian and Assyrian-Babylonian civilizations. According to the author, the Islamic civilization based on the Koran also set forth specific rules as to the legitimacy of war, which influenced the Western civilization through contact with the Muslim civilization in the Middle Ages.

32 Bassiouni 1980: 4. The major treaties were: The Hague Conventions of 1899 and 1907 on the Pacific Settlements of Disputes, the Treaty of Versailles of 1919, condemning aggressive war, the Covenant of the League of Nations which prohibited war of aggression in 1920, the Kellogg-Briand Paris Pact of 1928 on the renunciation of war as an instrument of national policy, the 1945 London Charter which criminalised war and the United Nations Charter of 1946 which prohibited war except in self defence.

33 1996: 67.

34 Dugard 2005: 3. The author notes that the General Assembly of the United Nations is only empowered to adopt recommendations that are not binding on member states. He points out that although the Security Council may make decisions in terms of article 25 of the United Nations Charter that are binding on all member states of the United Nations, action of this kind is limited to situations determined by the Security Council to threaten international peace and security. He shows that the Security Council is seriously restrained from making such determinations because of the veto power that is vested in each of the five permanent member states of the United Nations, to wit, China, France, the United Kingdom, Russia and the United States of America. This feature results in the conclusion that the United Nations cannot be called an international legislature. Because the rules of international law are to be found in agreements between states, that are known as treaties, and in international custom, in other words usage through time, these rules are not, as in a municipal

international law, there is no central executive authority with a police force at its disposal in order that the rules of international law may be enforced.[35] Thirdly international criminal courts are absent to enforce international criminal law.[36] The author investigates the dilemma regarding penal sanction in international law as an essential element for its existence and observes that international law is not without sanctions, although it is fair to observe that sanctions have lacked the comprehensiveness, regularity and consistency which have been associated with domestic law.[37] In the light of Dugard's demonstration that international law lacks some of the most basic features of a system of law in comparison with a domestic system of law, he refers, as the "*most satisfactory*" response to the statement that indeed international law is a system of law, to Sir Frederick Pollock who stated "…*that a legal system requires the existence of a political community, and the recognition by its members of settled rules binding upon them*".[38] Judged by the standards or the requirements for the argument that international law indeed exists as expounded by Sir Pollock, Dugard demonstrates firstly that there is indeed a community of modern states, "*over 185 in number*", and although there may exist serious political, economic and cultural divisions within the community of

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jurisdiction, imposed from above, but rather from a horizontal system of law in which the lawmaker and the subject are the same legal persona.

35 Dugard 2005: 3. The author points out that again the United Nations comes closest to being an executive body but falls short of the domestic counterpart on closer scrutiny: the United Nations is not a world government: it lacks a permanent police force to punish violators of the law. The closest it gets to the municipal model of enforcement is that the Security Council may, where a state's conduct threatens international peace, direct it to comply with its obligations under international law. Dugard points out that during the so-called "*cold war*" period of 1946-1990, this was a rare occurrence. The veto power was only employed to prevent action being taken against a state for non-compliance.

36 Dugard 2005: 4. He mentions that there are in existence a number of international courts. The first example is of course the International Court of Justice, which may be used to settle disputes between all states in the world. Then there are of course a number of regional, also called 'specialised', courts such as the European Court of Human Rights, which has jurisdiction over disputes arising from the European Convention on Human Rights. Despite their presence however, Dugard indicates that there is an important difference between domestic and international courts: international courts only have jurisdiction over states that have, because of the principle of State Sovereignty, consented to their jurisdiction. He notes that despite the fact that the International Court of Justice was created in 1920, it has heard relatively few cases and secondly has often heard cases that are relatively unimportant in terms of international stature.

37 Dugard 2001: 6 and further.

38 As quoted by Dugard 2001: 8.

states, it is probably not be less divided than many heterogeneous societies themselves. Secondly, he demonstrates that there is a body of rules and principles that comprises the international legal order and thirdly, that the members of the international community do recognise these rules and principles as binding upon themselves.[39]

3. Fundamental principles of International Law

Some of the fundamental principles of international law that contextualise and that are relevant to the research topic follow.

3.1 Sovereignty of states

Cassese makes the following observation regarding the sovereign equality of states which also stresses its central role in the development of international criminal law and justice:

> "*Of the various principles, this is unquestionably the only one on which there is unqualified agreement and which has the support of all the groups of States, regardless of ideologies, political leanings, and circumstances. It is safe to conclude that sovereign equality constitutes the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest*".[40]

The principle of the sovereignty of states is all the more relevant in relation to international criminal law and justice in that it has direct bearing on the ability, or the jurisdiction of, either a particular state to prosecute a perpetrator of gross violations of human rights which are committed on the territory of another state, or, the ability of an international tribunal to prosecute a citizen

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39 Dugard 2001: 9. The author recognises the fact that international law is sometimes violated in the most brutal manner and that such violations are sometimes left to go unpunished, particularly when they are committed by a major world power. Violations of this nature are however, according to Dugard, the exception rather than the rule and that this should not be allowed to breed a general cynicism about the existence of an international legal order. It is submitted that the modern world community is all too aware of what the consequences would be for all world citizens if the world rule of law were to be allowed to deteriorate into non-existence.

40 Dugard 2005: 48.

of a particular state which may not be a member of the body of states that created such an international tribunal.[41]

State sovereignty in the context of this thesis is fundamentally relevant because of the fact that it is accepted that the relatively slow development of international criminal law and justice can be ascribed to the assertion by states of their sovereignty and their assertion of their exclusive competence over criminal matters. Thus it has always been recognised that the argument advanced by states that they are, because of their sovereignty, accountable to no higher authority than themselves, highlights "*the underlying tension between state sovereignty and the need for international justice".*[42] In other words, independence of states in contrast to a global regime of justice that inevitably implies that states yield to some kind of authority higher than themselves. Indeed this tension or counter-play in the development of international criminal justice is a recurring subject throughout in writings on international criminal law and justice. Nations have vigorously asserted their sovereignty through the ages. The essence of statehood has been defined as: "…*the unity of its government under 'majesta' (sovereignty) from which a State's law proceeded*".[43] Notwithstanding this assertion of absolute sovereignty by states, it has also been asserted that absolute state sovereignty has never existed at all. In practical terms, state sovereignty has always been limited by the realities of power. It is pointed out that no state has ever had "*entire independence of others*".[44] To illustrate, no state has ever

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41 Dugard 2005: 126. The author makes the following observations regarding "*territory*": "*Territory occupies an important place in international law. A state will not qualify as a 'state' unless it has a defined territory. Moreover, the extent of a state's sovereignty or jurisdiction will in most instances be limited to the extent of its territory*". Dugard further comments that the term "*sovereignty*" is avoided wherever possible as it has an elastic meaning which varies according to the discipline and context in which it is used. He refers to the meaning of the terms as described by the commentator Max Huber in the *Island of Palmas* case: "*Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is a right to exercise therein, to the exclusion of any other state, the function of a state*".

42 Peter 1997: 179; Van der Vyver 1999: 9. See also Thorneycroft 1966: 4.

43 Kittichaisaree 2001: 4.

44 Bodley 1999: 419. See also Thorneycraft 1966: 5: "*Every king or emperor, however despotic at home, and however powerful abroad, has always had to consider the probable reactions of friendly or unfriendly neighbours to his foreign policy*".

had unlimited power to completely repulse invasion, (which by definition transgress state sovereignty), "*or to assure full authority within its borders*".[45]

However, the principle of state sovereignty has always been fundamental to the structure of international relations amongst states in that under international law, states have certain inviolable rights that are inherent to statehood. At first, state sovereignty was the assertion of states of the divine right to rule, and later, it developed into the absolute power of the state to rule.[46] Strydom remarks:

> "*Die gesag van die kerk en die invloed van die Corpus Christianum-idee [het] begin betekenis verloor teenoor die opkoms van nasionale state wat ongeneë was om hulle soewereiniteit af te staan of te deel met die kerk-instituut of die keiser".*[47]

With the latter development, there was therefore a transition from the supremacy of God to the supremacy of the state; this implied a transition from the supremacy of natural law to positivism in international law. In its barest essence, state sovereignty, as it was initially understood, had three main components.[48]

The first component was that the ruler of a particular state had the sole and exclusive authority and autonomy over its territory.[49] Secondly, that states were to be treated as legally equal to one another in relation to rights,

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45 Bodley 1999: 419.

46 Bodley 1999: 418; Kittichaisaree 2001: 5. See also Strydom 1989: 15.

47 1989: 15.

48 Kittichaisaree 2001: 5. See also Cassese 2005: 49 and further. The author describes the power of a state to exercise public functions over all individuals within its territory as jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce. Prescriptive jurisdiction normally extends to the territory over which the state is sovereign, but may also extend to legislation applicable to the state's nationals that are abroad, or may even extend so far as to include legislation applicable to acts performed abroad by foreigners against other foreigners. This extraterritorial legislation is for example adopted for the purpose of exercising universal jurisdiction over terrorism.

49 Schwarzenberger 1996: 5. See also Kittichaisaree 2001: 5. It will thus be noted that sovereignty is not defined but is described in terms of the use of the word "*autonomous*" which correlates with Dugard's reference to the *Island of Palmas case* and the description of "*sovereignty*" referred to previously.

obligations and autonomy.[50] Thirdly, as a consequence of the two previous notions, that states were subject to no higher law other than the law that was created by their consent through the conclusion of treaties of international customs, and the general principles recognised by them.[51]

A next stage in the resurgence of the concept of sovereignty came with the adoption of the United Nations Charter after World War II. Article 2(1) of the Charter provides that the United Nations "*is based on the principle of sovereign equality of all its members*".[52] Thus no nation was allowed in terms of the world opinion after World War II to ever again assert its hegemony over another state. This in itself represented an important development in international law, with definite implications by its nature on the general development of international criminal law. Undoubtedly world opinion in this regard was directly influenced by the events prior and during World War II, in particular the waging of aggressive wars by Germany and Japan against various states. In addition, article 2(7) of the Charter provides for United Nations intervention "*in matters which are essentially within the domestic jurisdiction of any State".*[53] The Charter does not provide for a compulsory settlement of disputes by states, and only in extreme cases of threats to the peace, breaches of the peace, and acts of aggression can the United Nations Security Council resort to enforcement measures in terms of Chapter VII of

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50 Kittichaisaree 2001: 5. See also Wise 1996: 45 on obligations of states. The author writes: "*The most rudimentary form of international obligation to punish crime derives from the law of state responsibility which, in effect, requires due diligence to suppress private acts of violence directed against foreign states or their nationals. Where individuals violate rights conferred on foreign states by international law, 'it is then the interest as well as the duty of the government under which they live, to animadvert them with a becoming severity', lest that government be regarded as 'an accomplice or abettor".*

51 Kittichaisaree 2001: 5. See also Thorneycroft 1961: 1. The author observes that it is noted that the sovereign person of modern international law is not an individual, the erstwhile monarch, but is a collective entity namely the nation state. Its sovereign authority is not exercised by a monarch but by men, presidents, prime ministers, foreign ministers, members of cabinet, senators and parliamentarians and so on.

52 Kittichaisaree 2001: 5. See also Cassese 2005: 47.

53 Kittichaisaree 2001: 6. See also Cassese 2005: 53 and further. The author states that together with the principle of sovereign equality of states the principle of non-intervention in domestic affairs of a state are designed to ensure that each state respects the fundamental prerogatives of the other members of the international community.

the Charter to compel compliance from the deviant states.[54] This implies some of the initial developments to regulate world affairs by imposing in certain serious circumstances, an obligation on states to refrain from these acts. This in turn logically had to impose on the principle of absolute state sovereignty meaning simply that by membership of the United Nations, states do yield, to a very limited extent some of its total autonomy or total independence to that organisation.

A third stage occurred during which there was again a reassertion of the importance of state sovereignty. It occurred with the de-colonisation of states, notably in the 1950 and 1960's. Interference in domestic affairs of newly independent states was decried in any form.[55] As far as imposing on the principle of absolute state sovereignty of states in order to create an international order of criminal justice, this development could arguably be seen as a step backwards.

Overall the principle of sovereignty of a state is very much entrenched amongst the nations of the world. The inroads that there has been on its absolute application, was necessitated by events in the world of which particularly the United Nations, by way of its nature and purpose, had to take cognisance of. The challenge facing nations favouring an international criminal justice jurisdiction is how an international regime may be forged to prosecute and punish perpetrators of atrocities committed within the territory of a sovereign state.[56]

3.2 Universal jurisdiction

Jurisdiction of a state with reference to its sovereignty refers to that state's sovereign right to exercise legislative, executive, administrative and judicial authority within a particular territory. As has been pointed out, sovereign

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54 Kittichaisaree 2001: 6.
55 Kittichaisaree 2001: 6.
56 Kittichaisaree 2001: 13.

equality of states and the prohibition on foreign intervention in the domestic affairs of a state is a feature and a founding principle of international law.[57]

If a state wishes to exercise its jurisdiction in respect of a crime, it is generally required that a certain link of attachment between the state and the crime exists, either through territory (the state exercises its jurisdiction because the crime was committed on its territory), nationality (the state exercises its jurisdiction because the crime was committed by a national of the state or against a national of the state), and interest (the state exercises its jurisdiction in respect of the crime because of its vested interest in the right(s) that have been violated by the crime.) Primarily however the usual basis on which a state exercises its sovereign jurisdiction is either through territoriality or nationality.[58]

However, in the case of certain crimes, the above link establishing a state's jurisdiction may be absent when the crime by its nature is so heinous that it is viewed as a crime against mankind, a crime *contra omnes.* This principle of universal jurisdiction, deriving from customary international law, has been codified through certain international conventions and has been adopted by almost all states such as the Convention on the Prevention and Punishment of the Crime of Genocide. As a result, these crimes may be punished by any state on behalf of the international community, regardless of the status of the offence and the nationalities of the offender and the offended. Particularly since World War II, there are certain crimes that are generally considered international crimes. These are violations under international law. National courts or international tribunals may try such crimes. Examples of such international crimes under customary international law are war crimes, piracy, slave trading, genocide, crimes against humanity and torture.[59]

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57 Mbaku and Mangu: 2005: 81. See also Bantekas and Nash: 2003: 143; Erasmus and Kemp: 2002: 67.

58 Bantekas and Nash 2003: 143 and further. See also Wise and Podgor 2000: 28.

59 Erasmus and Kemp 2002: 65, 66; Mbaku and Mangu 2005: 81, A relatively early attempt by a state to exercise universal jurisdiction was that of the *Eichmann* case by the state of Israel. See also Cassese 2003: 7, 284.

The degree to which any particular state will invoke the principle of universal jurisdiction will depend on that state's constitutional and criminal justice system. Importantly, it will depend on a state's approach to international law, especially conventional international law and whether this approach is monist or dualist. If the approach is monist, conventional international law will be self-executing or automatically incorporated in domestic law, prevailing over national legislation and enabling the courts of such a state to exercise universal jurisdiction without further ado. If however the state's approach is dualist, the exercise of universal jurisdiction will be subject to the "*transformation of international conventions and their enactment into law by national legislation*".[60]

It must be pointed out that universal jurisdiction under international law must not be confused with the validity of international law within a particular country, or the extra-territorial operation of a national criminal statute.[61]

Universal jurisdiction as a concept of international law applies to the implementation of international law within the domestic law of a country. It pertains to the most heinous crimes under customary international law that can be prosecuted in the municipal courts of any state: therefore irrespective of where (the locality) the crime was committed.

The historical roots of universal jurisdiction originated from a need to bring pirates and brigands to justice.[62] The pirate analogy for the historical justification for universal jurisdiction is a matter of controversy.[63] The

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60 Mbaku and Mangu 2005: 83. See also Van der Vyver 1999: 116, Maluwa 1998: 45.

61 Van der Vyver 1999: 115.

62 Van der Vyver 1999: 116-117. See also De Than and Shorts 2003: 257: "*Such is the accepted abhorrence of piracy worldwide, that it is now recognized as one of the few international crimes having universal jurisdiction as well as coming under the umbrella of customary international law*". Pirates put themselves outside the protection of all states, that is, they become what have been termed as *hostis humani generis.* See also Cassese 2003: 284. The author describes the *rationale* behind the departure of the traditional principles of territoriality or nationality as *'the need to fight jointly against a form of criminality that affected all States'*.

63 Van der Vyver 1999: 116. See also Dubner 1980: 1, 41 and further on sea piracy. The author quotes Professor Brierly who stated that: "*Any state may bring in pirates for trial by its own courts, on the ground they are 'hostes humani generis'...There is*

reasoning behind the piracy justification for the exercise of universal jurisdiction seems to be that because pirates practised their trade on the high seas, which are beyond the territorial jurisdiction of any state, the high seas were, for purposes of jurisdiction, regarded as not *res nullius* but as *res omnium communes.* The ratio thus being in the historical sense that because crimes by pirates were committed, no-man's land, on as it were, states could exercise universal jurisdiction in the prosecution of their crimes. The emphasis has however shifted from a purely formal justification for the exercise of universal jurisdiction, to a substantive legitimating of universal jurisdiction. This substantive legitimating refers to the reasoning that because certain crimes are so heinous by their nature, it is in the interest of all states to prosecute them. The justification for the application of the principle of universal jurisdiction is accordingly sought in the heinous nature of the crime and not so much in the absence of territorial jurisdiction of national states with regard to the locality of the crime.[64]

Cassese indicates that the universality principle has been upheld in two different versions, "*both predicated on the notion that the judge asserting universal jurisdiction so acts in order to substitute for the defaulting territorial or national State: the narrow notion (conditional universal jurisdiction) and the broad notion (absolute universal jurisdiction)*".[65] According to Cassese the more accepted version is the narrow version, namely that only the state where the accused is in custody may prosecute him/her. The presence of the accused on the prosecuting state's territority is therefore a prerequisite for the existence of jurisdiction. Under the broad notion of the universality principle however it is advanced that a state may prosecute persons accused of international crimes regardless of their nationality, the place of commission of the crime, the nationality of the victim and even whether or not the accused is in custody or present in the prosecuting state. Because however many legal

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no authoritative definition of international piracy, but it is of the essence of a piratical act to be an act of violence, committed at sea or at any rate closely connected with the sea, by persons not acting under proper authority".

64 Van der Vyver 1999: 117. See also Cassese 2003: 285 who describes the *rationale* for the exercise of universal jurisdiction as the joint safeguarding of *"universal values".*

65 Cassese 2003: 284 and further.

systems do not allow for trials *in absentia* the presence of the accused on the territory of the prosecuting state is a prerequisite.[66]

The principle of universal jurisdiction pertaining to war crimes and crimes against humanity was concretised by the Nuremberg and Tokyo trials, as will also be indicated in Chapter 4 of this work.

3.3 Immunity

A state has jurisdiction over all persons within its territory and further over all acts that take place within that defined territory. This stems from the doctrine of state sovereignty. However, state sovereignty is not without bounds or unfettered. This is the case with the doctrine of immunity of foreign states from the jurisdiction of national courts. The doctrine of immunity of a foreign state from the jurisdiction of the forum state is based on a two-fold rationale: first that states must not interfere with the public acts of sovereign foreign states out of respect for their independence, and second, that the domestic judiciary should not interfere with the conduct of foreign policy by either national or foreign governmental authorities, based on the principle of the separation of powers.[67]

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66 Cassese 2003: 286. Cassese points out that because the exercise of jurisdiction in terms of this notion is premised on the failure of the territorial or national state to prosecute, this jurisdiction should not be activated whenever one of the latter states does initiate proceedings. However it is notable that despite the fact that apparently the narrower version is more widespread amongst states, there are countries in which the broader version of universality is laid down in national legislation such as Spain and Belgium. See Cassese 2003: 287, 289. Also notable is the position of Germany which has introduced national legislation to the effect that international customary law at present authorises universal jurisdiction over all major international crimes even when the criminal conduct *occurs abroad and does not have any link with Germany.* The author investigates the merits and the flaws of the assertion of absolute universal jurisdiction and mentions as flaws *inter alia* the possibility of so-called 'forum shopping' by victims of atrocities, the ineffectiveness of investigating huge numbers of atrocities by national courts where an accused never enters the country, the possibility of charges of a lack of due process, the lack of power by national judges to issue arrest warrants against foreign state officials, the risk of inconsistent rulings by different national courts and the confusion of roles exercised by national judges in the political arena. The merit on the other side of unqualified universal jurisdiction is the possibility of such a principle for the prosecution of minor defendants, low ranking military officials and even civilians for international crimes.

67 Dugard 2005: 126; Cassese 2005: 98-99.

Labuschagne observes that:

> "*(T)he doctrine of immunity of a head of state originated in the political concept of sovereignty, which, in turn, represents an anachronistic remnant of the sacred and omnipotent status of the earliest leader (pater;oervader) in human society*".[68]

This, personalized sovereignty from the notion "*the King can do no wrong*" gradually developed into the abstract concept of state sovereignty.[69]

There are instances where a particular state will not exercise its territorial jurisdiction. This generally occurs where a foreign sovereign (state), its property or individuals acting on its behalf (its agents), are involved.[70]

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68 Labuschagne 2001: 181.

69 Labuschagne 2001: 182.

70 Dugard 2005: 238. See also *Mc Elhinney v Ireland,* application number 31253/96, *Al-A dsani v the United Kingdom* application number 35763/97, and *Fogarthy v the United Kingdom,* application number 37112/97. These cases were heard by the European Court of Human Rights and in all three cases judgment was passed by that court on 21.11.2001. The cases were accessed on http://www.echr.coe.int. *McElhinney* was an Irish national. He alleged that he had been assaulted by a British soldier in the Republic of Ireland following an incident on the Irish/British border.He lodged an action against the soldier and the British government in the Irish High Court in which he claimed damages. The latter court accepted the British government's application to have the summons set aside, applying the doctrine of sovereign immunity, on the grounds that the applicant was not allowed to bring an action in the Irish courts against a member of a foreign sovereign government. The decision was upheld on appeal by the Irish Supreme Court. The European Court of Human Rights declared the case partly admissible regarding Ireland and inadmissible regarding the United Kingdom. The facts of the other two cases are not set out here save to note that in all three cases the European Court of Human Rights noted that sovereign immunity was a concept in international law, by virtue of which one state was not subject to the jurisdiction of another. The court considered that by granting sovereign immunity to a state in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between states through respect of another state's sovereignty. See also Cassese 2005: 105 and further where he discusses the *Al-Adsani v UK* case. According to the claimant the general international rule that prohibits torture as well as the corresponding article 3 of the European Convention on Human Rights has the status of *jus congens,* that is, it is a peremptory norm which cannot be derogated from by treaty or customary rules. This means that if a foreign state is sued before a national court for the alleged violation of a rule that has the status of *jus congens,*as was the case in the case of *Al-Adsani,* a national court is barred from invoking immunity from jurisdiction. Cassese 2005: 106 claims that the European Court's judgment is open to objection. The author submits that admittedly there is not yet any consistent state practice or case law to the effect that the international rule on state immunity must yield to the norms of *jus congens*, particularly in the case of torture, but that trends in that direction of international law are discerned. (In this regard the author refers to an Appendix to the Annex to its report by a working group of the ILC in which the ILC noted that since the judgments in a number of cases, including the case of *Al-Adsani v Kuwait* certain developments

Immunity and its rationale therefore may be described as the principle in terms of which, although certain (foreign) persons or property within a particular state are not exempt from legal liability or immune against the obligation to observe the laws of the country in which they find themselves, international law exempts them from the exercise of territorial jurisdiction by the state they find themselves in.[71] The reason why they are exempted from the territorial jurisdiction of that state is ascribed to international comity or the sovereignty (equality) of nations.[72]

A ramification for the exercise of universal jurisdiction by an international criminal court is that atrocities during which gross violations of human rights and humanitarian law occur, and which gives rise to possible criminal prosecution, is often ordered, planned or condoned by the people in control of the particular state's national power, who are factually as well as from a legal point of view, immune from criminal prosecution and punishment under their national or domestic, legal systems.[73] One of the current debates in international law is whether international peremptory norms, *jus congens,* should be able to override treaty or customary international law where gross

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occured to support the view that a state should not be able to claim immunity in respect of gross violations of human rights. The ILC firstly referred to the amendment of the US Foreign Sovereign Immunities Act, which now includes this exception to immunity. Secondly it referred to the *Pinochet* case, which case emphasised the limits of immunity in respect of gross human rights violations by state officials.

71 Dugard 2002: 238. See also Barrie 2001: 156 and further. These sentiments are expressed in the maxim *par in parem non habet imperium* (an equal has no authority over an equal). Various other principles have been advanced as the basis for the principle of sovereign immunity. These are comity: that the judgment of a domestic court cannot be effectively and practically enforced against a foreign state or sovereign; or that allowing a foreign state to function within its territory implies a concession of immunity.

72 Dugard 2005: 238. See also Barrie 2001: 156 who observes as follows:
"*Traditionally international law grants immunity from the exercise of jurisdiction by domestic courts to a foreign state, its instrumentalities and its property in the forum state. This principle was embodied in Schooner Exchange v McFaddon by Chief Justice Marshall and has become accepted as a rule of international law. As set out by Marshall CJ, one sovereign is in no way amenable to another and can consequently not place itself or its sovereign rights within the jurisdiction of another sovereign. According to the judge, every sovereign has waived the exercise of a part of its exclusive territorial jurisdiction when dealing with the person of a foreign sovereign [which includes ministers, instrumentalities such as warships, etc*".

73 Kittichaisaree 2001: 13.

violations of human rights occur.[74] Cassese for one supports such a development for various reasons but most importantly for the reason that *jus congens* is intended to protect inviolable values of the international community and is regarded as more imperative than the protection of state immunity. Additionally, so Cassese argues, the immunity of state agents, the so-called functional immunity, is disallowed and the state agent is held personally accountable for the breach of an international rule of *jus congens.* The author justifiably poses the question as to why the same should not apply to state immunity.[75]

3.3.1 Types of immunity

Generally, immunity accorded to foreign sovereigns takes the form of either *sovereign immunity,* which involves the immunity of the head of a foreign state, the government of a foreign state, or a department of such a government, or *diplomatic and consular immunity*, which involves with the immunities and the privileges, granted to foreign diplomats and consuls.[76] In terms of these two types of immunity, there may be further differentiated between head of state immunity and sovereign immunity, which have

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74 Cassese 2005: 105 and further.

75 Cassese 2005: 108.

76 Cassese 2003: 264. The author identifies the following immunities: (1) those accruing under *customary* international law, or functional immunities, *ratione materiae* or organic immunity) that is that an individual acting on behalf of a sovereign state may not be called to account for violations of international law he/she may have committed while acting an official function. Here only the state may be held responsible at the international level; (2) immunities granted by *international customary or treaty rules* to some categories of individuals on account of their functions and also called *personal immunities (ratione personae)* which are intended to protect both their private and public life, to render them inviolable while in office. This immunity is enjoyed so that they can perform their official missions free from impairment and end when they cease to act in that official capacity, and (3) those immunities provided for in national legislation and normally granted to heads of state, members of cabinets or parliamentarians. These immunities usually also end when the person's functions come to an end. The rationale for these immunities is grounded in the principle of separation of powers and in particular to protect State organs (say, the Head of State) from interference from other State organs (say, courts) that could jeopardize their independence or political action. The latter immunities normally apply to ordinary crimes and whether they apply to international crimes it must be established whether there exist international customary or treaty rules that cover the matter. See also Dugard: 2005: 238.

developed into two distinct legal constructs.[77] Heads of state may therefore need a broader and more constant immunity than their diplomatic agents, but one less comprehensive than the immunity of the states they represent.[78]

One of the principle obstacles that is encountered where international prosecution is sought for international crimes, relates to immunity.[79] Cassese differentiates between immunity *ratione materiae* and immunity *ratione personae.*[80] Regarding the first, the following features inherent to immunity *ratione materiae* are identified: (1) The immunity relates to substantive law in that although the state agent is not exonerated from compliance with either international or national law, if he breaches either, this violation is not legally imputable to the agent, but to the state which the agent represents. (2) The immunity covers official or private acts carried out by the state agent while in office as well as private or official acts performed prior to taking office. This type of immunity therefore ensures total inviolability. (3) The immunity is intended to protect only certain categories of state officials like diplomatic agents, heads of state, heads of government, foreign ministers and possibly other senior members of cabinet. (4) The immunity ceases after the cessation of the official functions of the state agent. (5) The immunity may not be *erga omnes* and in the words of Cassese*,* "*in the case of diplomatic agents it is only applicable with regard to acts performed as between the receiving and sending state, plus third states through whose territory the diplomat may pass while proceeding to take up, or to return to, his post, or when returning to his own country: so called jus transitus innoxii*".[81]

This distinction according to Cassese brings home the realisation that the two classes of immunity coexist and overlap as long as the state official who invokes immunity *ratione personae* is still in office. While the agent is discharging his/her official duties, the agent always enjoys immunity *ratione*

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77 Labuschagne 2001: 182.
78 Labuschagne 2001: 182. See also Cassese 2005: 117 on immunities for heads of state.
79 Cassese 2003: 264.
80 2003: 266.
81 Cassese 2003: 266.

personae. In addition, the agent enjoys functional or immunity *ratione materiae* subject to one exception, namely when international crimes are committed.[82] The personal immunity prevails, however, even in the case of the alleged commission of international crimes, which has as a consequence, that the state official may only be prosecuted for the crimes after leaving office.[83]

From the above may be concluded that state immunity, that is, the question of whether a state or its representatives can be brought before another state's courts without its consent, falls within the context of the general principle of state sovereignty.[84]

3.3.2 The development from absolute to restrictive immunity

In the past the immunity of foreign states was absolute. Towards the end of the nineteenth century this started to develop into a more restrictive principle.[85] An exception was namely developed for acts performed *jure gestionis* or *jure privatorum* that is, acts performed by a foreign state in a private capacity as a legal person subject to private law.[86] In terms of the development of international criminal law and justice, this development served to break, even if only partly, the cycle of impunity that was inherent to an absolute interpretation of immunity.[87] In mentioning the trend, Barrie refers to the case of *Rahimtoola v Nizam* in which Lord Denning indicated his opposition to the granting of immunity to foreign governments in respect of commercial transactions.[88] Lord Denning is quoted as having noted that "*in all civilized countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts. Foreign sovereigns should not be in any different position*". Barrie also refers to the 1972 *European*

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82 Cassese 2003: 267.
83 Cassese 2003: 267.
84 De Than and Shorts 2003: 51.
85 Cassese 2005: 100.
86 Cassese 2005: 100.
87 Donoghue 1989: 615 and further. See also Cassese 2005: 100.
88 2001: 158.

Convention on State Immunity and Additional Protocol which was adopted at Basle, Switzerland and which gave effect to a concept of "*relative*" immunity and referring to situations in which immunity could not be claimed.[89]

Another example of the trend was in the United States where, in 1976, the *Foreign Sovereign Immunities Act,* was passed which aimed at establishing statutorily principles of restrictive immunity by way of exception to the doctrine of absolute immunity. This act stipulates that foreign states are not immune from the jurisdiction of the United States' courts where the proceedings are based on a commercial activity carried on by a foreign state in the United States. Other states have also followed this trend: the United Kingdom passed the *State Immunity Act of 1978* which provides for general immunity subject to a list of exceptions of which commercial transactions is one.[90] A host of other states have also followed the trend, assuming jurisdiction over foreign states for acts *iure gestionae.*[91]

The South African courts have endorsed the approach of restricting immunity to acts *iure imperii in* the judgment of *Inter-Science Research and Development Services (Pty) Ltd. v Republica Popular de Mocambique,*[92] and

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89 2001: 158.

90 Barrie 2001: 158.

91 Barrie 2001: 159. See also Budhu 2001:156 and further on acts *iure imperii* and acts *iure gestionis* and its differentiation.

92 1980 (2) SA 111 (T). In this case the applicant brought an application to find, alternatively confirm, jurisdiction against the Republic of Mozambique after the latter became independent from Portugal. The applicant sought to achieve this by asking the court for consent to attach certain immovable property in Johannesburg, South Africa in which the respondent held an interest, as well as to attach monies in a bank account in Johannesburg in which the respondent had an interest. The relief was sought following the alleged failure of the respondent to pay monies in terms of a contract for surveying services and damages forth flowing. Various legal questions arose of which the one of whether the respondent enjoyed state immunity under South African law is relevant here. The court in coming to its finding referred to British, Canadian and American case law as well as to modern writers and found that the restrictive doctrine qualifies for recognition as part of South African law. The court stated: "*In my view, it must be accepted that the rule of international law on sovereign immunity which prevails today is that reflected in the restrictive doctrine, and that, in the application of that doctrine, there is no longer any justification for distinguishing, in the case of commercial transactions, between claims in rem and claims in personam. That conclusion is based on the overwhelming weight of modern authority. It is also in accord with logic and with the requirements of justice*". 1980 (2) SA 111 (T): 124G.

the case of *Kaffraria Property v Government of the Republic of Zambia,*[93] after which South Africa passed the *Foreign States Immunities Act 87 of 1981.* The act is modelled on the *State Immunity Act* of the United Kingdom,[94] which act asserts the general immunity on the part of foreign states from the jurisdiction of South African courts, but proceeds to list instances in which sovereign immunity will not prevail in civil cases. One such circumstance is a "*commercial transaction*" which is defined in section 4 of the Act as "*any contract for the supply of services or goods; any loan or transaction for the provision of finance; or any other activity of a commercial, industrial, financial or professional character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign immunity*".[95] International trade and the process of globalisation thus brought about this development.[96]

In terms of the doctrine of restrictive immunity, a state now only enjoyed immunity for public acts of the state (*iure imperii)* and not private acts of the state, (*iure gestionis*).[97] The latter types of acts are referred to as "*commercial*

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93 1980 (2) SA 709 (E). In this case the United States Government through one of its agencies donated a quantity of mixed fertilizer to the Government of Zambia. The cargo was shipped to East London, South Africa where it was detained because the respondent had failed to provide the necessary letters of credit for the freight charges payable. The owners of the freight vessel ceded their rights to claim payment of the freight charges to the appellant. The appellant then brought an *ex parte* application for the attachment of the fertilizer in order to find jurisdiction in a proposed action against the respondent and for leave to sue the respondent by edictal citation. At the hearing of the *ex parte* application the court *a quo* considered itself bound by South African case law such as *De Howarth v The SS 'India' 1921 CPD 451:* 711 F-G in which case the doctrine of absolute sovereign immunity was held to be the norm at the time in international law. The application was thus refused in the court *a quo* and thus the appeal. The court also considered South African case law, South African literature and English case law and concluded that in previous South African case law on the point of state immunity, South African courts were stating and applying international law as was applicable at the time. However, that customary international law does change from time to time, as was the case on the issue of state immunity. The contract of carriage on which the appellant relied for its cause of action, according to the court, was a clear commercial transaction and in the light of the changed international law position on state immunity, the appeal was granted.

94 Barrie 2001: 159.

95 Barrie 2001: 160.

96 De Than and Shorts 2003: 52.

97 De Than and Shorts 2003: 52. The rationale appeared to be that there seemed to be little good reason why states should never have to face the consequences of their actions, whereas private individuals did. See also Mbaku and Mangu 2005: 78 and Cassese 2005: 100.

transactions".[98] The reason for the change in attitude is globalisation and the extension of international trade. Most cases have concerned civil actions against states or their governments, but the principle has also been applied to potential criminal trials.[99] The question of immunity usually arises before national courts, and this necessitates that in each case the domestic provisions regarding immunity be examined, as well as perhaps regional agreements, of which the *European Convention on State Immunity of 1972,* is an example.[100] As indicated above, most states now employ restrictive immunity.[101]

Immunity in civil cases and in some criminal cases, continues to exist for a state and its government. However, the position of heads of state and government officials who commit serious human rights violations or international crimes, has drastically changed, especially as a result of events and developments in international criminal law in the previous century, as this study will indicate.[102]

There is, however, the question of those international crimes which fall outside the territorial jurisdiction of national courts or are not included in their list of crimes.[103] How to indict a potential defendant that is currently a head of state, or currently a state official? What is the position of a former head of state, or former government official, in terms of liability for international crimes committed at any time?[104] Is there perhaps now the emergence of a principle that there is simply no such concept as immunity from prosecution from

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98 Dugard 2002: 181.

99 De Than and Shorts 2003: 52.

100 De Than and Shorts 2003: 52.

101 De Than and Shorts 2003: 52; Dugard 2001: 181; Mbaka and Mangu 2005: 79; Cassese 2005: 100. Only China and some Latin American states still cling to the old doctrine of absolute immunity.

102 De Than and Shorts 2003: 52.

103 De Than and Shorts 2003: 52.

104 Dugard 2001: 204 and further, indicates that to compromise the divergent attitudes regarding extradition of nationals is to include a treaty clause that gives either state discretion to refuse to extradite its own nationals. This would allow civil-law countries to refuse extradition of their nationals, thus allowing them to try such nationals themselves, and as far as the common-law countries go, allowing them to extradite their nationals for offences committed abroad beyond their criminal jurisdiction.

international crimes?[105] It would appear that international opinion is changing on this subject and it may be predicted that within the foreseeable future courts will hold that sovereign immunity does not extend to acts that constitute crimes under international law.[106]

A further problem that arises is how to distinguish between acts of states that are *iure imperiae* and those that are acts *iure gestionis,* and many uncertainties remain.[107] There seems to be no settled set of criteria in distinguishing between the sets of acts.[108] Barrie considers various authorities on the point and concludes that the distinction appears to be imprecise. He suggests that the general rule of immunity is to be stated and additionally that exceptions or limitations to the general rule be listed in great detail.[109]

These are the challenges the international community faces in the development of international criminal law and the establishment of a credible international justice order based on the rule of law.

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105 De Than and Shorts 2003: 53.

106 Dugard 2001: 204.

107 Dugard 2001: 160. See also Cassese 2005: 100. The author indicates that two different criteria have been suggested in order to distinguish between sovereign acts and acts performed in a private capacity. The one is based on the *nature* of the foreign act and the other on the *function* of the foreign act. The author however demonstrates that the application of these standards may lead to conflicting results and cites as example the case where a state purchases goods for use by its armed forces. This act if assessed by the first standard may be considered as a private act and a denial of immunity may follow logically. If in contrast, regard is paid to the *purpose* of this transaction, this ought to bring home the public nature of the transaction and hence immunity may be upheld. See further Budhu 2001: 156.

108 Barrie 2001: 162.

109 2001: 164. In this regard, he notes the following: "*It would appear that a practical course would be to state a general rule of immunity and then list, in some detail, exceptions or limitations to the general rule. This would be a preferable approach to that found in various national court decisions where attempts have been made to spell out some abstract test distinguishing acts iure imperii and acts iure gestionis which is then applied in all contexts, be it commercial contracts, contracts of employment, torts, etcetera*". See also Cassese 2005: 102 and further. The author refers to immunity of foreign states from jurisdiction in employment matters as was ruled by the European Court of Human Rights in the case between *Fogarty v UK*.

3.4 Extradition

It is common cause that international law does not recognise any general duty on the part of states to surrender criminals. In practice, therefore, the return of criminals is secured by means of extradition agreements between states.[110] There are various definitions of extradition. It has been defined as:

> "*…the judicial rendition, by one sovereign state to another, of fugitives charged with having committed an extraditable offence and sought for trial or already convicted and sought for punishment*".[111]

Another has been advanced as:

> "*… the delivery of an accused or a convicted individual to the state where he is accused of, or has been convicted of, a crime, by the state on whose territory he happens for the time to be*".[112]

In addition, extradition requires that it is only appropriate when formal charges have been made against the person sought and is inappropriate in the case of a mere suspect or a person whose presence is wanted as a witness or for the purpose of enforcing a civil judgment.[113]

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110 Bassiouni 1974: 1 and further. The author notes that the practice of extradition originated in earlier non-Western civilisations such as the Egyptian, Chinese, Chaldean and Assyro-Babylonian civilisations. In these early times, the delivery of individuals to a requesting sovereign was usually based on facts or treaties but they also occurred by reciprocity and comity as a matter of courtesy and goodwill between sovereign states. Undertakings involving the rendition of fugitives were deemed an essential feature of friendly relations between sovereigns. For a historical analysis of the political offence exception, see also Van der Wijngaerdt 1980: 4 and further.

111 Blakesly 1996: 147. See also Wise and Podgor 2000: 347 and Shearer 1971: 38 who define extradition as "*... the formal surrender, based on reciprocating arrangements, by one nation to another of an individual accused or convicted of an offence outside its own territory and within the jurisdiction of the other which being competent to try and punish him, demands the surrender*". According to this definition, the two important features distinguishing extradition from other modes of dealing with the problem are thus the conscious purpose to restore a criminal to a jurisdiction competent to try and punish him, and the principal of reciprocity secured by formal arrangements.

112 Dugard 2001: 155. See also Bantekas and Nash 2003: 179 and further.

113 Blakesley 1996: 147.

Extradition has many facets including a number of principles of international law. Again, it has direct bearing on the principle of state sovereignty.[114]

Blakesley aptly remarks:

> "*Extradition requires precision and cooperation between two sovereign systems, often different in fundamental legal theory and procedure. An extradition treaty represents an attempt by diplomatic and legal means to cooperate in rendering fugitive criminals to one another. It strives to accomplish this goal without seeming to diminish either party's sovereignty or to by-pass or demean either's institutions, processes, or basic theories of criminal justice, including the rights of the accused fugitive. This is no easy task, and it is not made any simpler by the fact that the terms of the extradition treaty have meaning only when applied to disparate legal concepts and processes. These, in turn, have meaning only within each country's given cultural, linguistic, and anthropological context*".[115]

Most states refuse to extradite political offenders. This principle in international law is usually codified or classified as the political offence exception. As a consequence of the latter, a standard clause in most extradition treaties provides that extradition shall not be granted in regard of political offences.[116] Again the *rationale* for this general rule is partly to be found in the principle of state sovereignty in that it has long been accepted

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114 Proust 2003: 295 and further on a modern commonwealth perspective on extradition. See also Bassiouni 1974: 2. The author states: "*In contemporary practice extradition means a formal process through which a person is surrendered by one state to another by virtue of a treaty, reciprocity or comity between the respective states*".

115 1996: 148-149. The author indicates that the failure of the extradition process may have implications beyond that of losing the fugitive. This is so because the extradition process calls parts of each country's entire criminal justice system into play. Each party's pride in the integrity and 'coherence' is often in the balance. Misunderstanding and rejection of an extradition request may be perceived as an insult to the requesting state's legal system. See further, De Than and Shorts 2003: 53. The principle of reciprocity, according to the authors, in international criminal law, is undermined by the different approaches held by civil-law countries, which exercise personal jurisdiction over their nationals for offences committed abroad and therefore prefer the exemption of their own nationals from extradition, and common-law countries, which in most instances do not exercise extraterritorial jurisdiction over their nationals, and consequently favour allowing their nationals to be extradited. Blakesley notes that "*continental countries insist on the active personality principle. They maintain consistently that nationality is a link so strong that the national state may prosecute any of its nationals for offences they commit anywhere in the world, so long as the offence is punishable in the place where it was committed and, of course, under national law as well*".

116 Van der Wijngaerdt 1980: 1.

that states should not interfere or intervene in the internal political conflicts of other states which interference or intervention may exist in the rendition of political opponents of the existing government back to that government.[117] A second rationale behind the exemption from extradition of the political dissident is that:

> "*…political offenders unlike ordinary criminals, threaten only the criminal justice system of the state from which they have fled and not that of the state granting asylum*".[118]

Over the years however, the initial romantic image of the lone political dissident fighting for a just political order in his country of birth, and finding asylum in a strange country, has become tarnished by the political terrorist fanatically determined to overthrow the regime of his home state, or determined to achieve whatever purpose, in the process employing any means, however revolting, such as hostage taking or plane hijacking.[119]

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117 Dugard 2001: 161 and 162. See also Shearer 1971: 169 and further, and Van der Wijngaerdt 1980: 2-3 who states: "*The rationale of the political offence exception is based on the three interests which converge in the rule: those of the requested person, the states concerned (requesting and requested state) and international public order*". The author proceeds to illustrate that under classical international law the rationale has been explained as follows: (1) The political offence exception in relation to the requested person, has a humanitarian function in that it is meant to protect that person against an unfair trial. (2) The political offence exception is based on the principle of neutrality, as the extradition of a person in a case where the exception is applicable may involve a judgment by the requested party on the political situation in the requesting party's country. (3) The third part of the rationale relates to the assumption that political crimes do not violate international public order and therefore states are supposed not to have a mutual interest in the suppression of such crimes. Having made these observations, the author, on 18 and further, in relation to the political offence exception in the contemporary context, states that the exception has had not only a clear political function but also a political limitation in that the rule was meant as a protection for those who had committed themselves to the cause of democracy. This however, according to the author, became untenable from the second half of the eighteenth century and the political offence exception finds itself today in a changed international framework. As opposed to the last century, the political and ideological divergences underlying the rule stand out against a background of an ever-increasing mutual interdependence between states. The relative shrinking of the globe as a consequence of the development of mass communication and transport media has shortened the bridge between nations.

118 Dugard 2001: 162.

119 Dugard 2001: 162. See also Hannay 1979: 381;and Van der Wijngaert 1980: 20 who addresses the reality that criminality has taken on an international complexion, and on 33 and further, the author addresses the theoretical approaches to the political offender, a multi-disciplinary survey with possible legal conclusions.

As a result of this, so Dugard states:

> "*…the political offence exception has become highly controversial and courts have sought to define the political offence in such a way that it excludes the political terrorist but does not abandon the protection of the genuine political dissident".*[120]

Courts throughout the world have experienced great difficulty in deciding when a particular offence is one of political nature.[121] It has been shown that virtually all extradition treaties between states either explicitly or by necessary implication, contain the political offence exception or some discretion for the requested state whether to extradite or not. Despite the universality of extradition treaties between states, no extradition treaty and virtually no legislative act, has attempted to define the terms "*political offence*" and "*offences of a political character*".[122] In this regard, Dugard quotes Lord Radcliffe in the case of *Schtraks v Government of Israel,* in which he stated:

> "*No definition has yet emerged or by now is ever likely to. Indeed it has come to be regarded as something of an advantage that there is no definition*".[123]

Case law has however, laid down a number of guidelines and tests over the years.[124] One of these is the so-called "*incidence test*" which was developed by the English court in the case of *In re Castioni.*[125] The courts in the United States have approved the incidence test.[126] A *dictum* from the case of *Quinn v Robinson,* where the test was formulated in the United States, reads as follows:

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120 2005: 208.

121 Dugard 2001: 162. The author indicates that clearly crimes such as treason and sedition are political crimes. The problem however arises with the so-called 'common crimes' such as murder or robbery when it is alleged that they were 'politically motivated'. He notes that although South African courts have not been called upon to examine this aspect, undoubtedly when that time comes, they will seek guidance from English law as well as the *Promotion of National Unity and Reconciliation Act (34/1995).* See further Van der Wijngaert 1980: 95.

122 Blakesley 1996: 167. See also Bassiouni 1974: 371.

123 2001: 163.

124 Dugard 2005: 219.

125 (1891) 1 QB 149 166. See also Van der Wijngaert 1980: 111 and further. According to the author, the main criteria of the theory are: (a) that there should be a political "*disturbance*" and (b) that the act should be part of it.

126 Dugard 2001: 163.

> "*First there must be an uprising, a political disturbance related to the struggle of individuals to alter or abolish the existing government in their country…Second, the charged offence must have been committed in furtherance of the uprising; it must be related to the political struggle or be consequent to the uprising activity*".[127]

In later case law, this test was judged to be too restrictive as far as the presence of a political disturbance or uprising was concerned and reasons of humanity compelled courts to adopt a wider and more generous meaning to the political offence.[128]

Three basic types of conduct have been found to exist in the political offence exception to extradition. Firstly, those offences that are styled purely political offences such as treason, sedition or espionage with which there seem to be no significant problem in application. Secondly, applying the exception to offences of a political character or common crimes like burglary or homicide when committed for political purposes in which scenario the exception may conceivably also apply when the requested state's officials believe that the extradition was made for a political purpose. Thirdly, the more difficult application of the defence relates to crimes, the circumstances of which give them a political character. It has been mentioned that this concept may be broken down into several more specific approaches incorporated by the judiciaries of various countries when deciding whether to apply the exception. These tests include the political motivation test which is subjective, the *injured* rights theory which is objective, the model of connectivity which is objective, the political incidence or disturbance test, which is an objective test, and a

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127 *Quinn v Robinson* (783 F 2d 776 (9th Cir 1989) quoted by Dugard 2001: 163.

128 Dugard 2001: 163. The author refers to the case of *Schtraks v Government of Israel* and quotes firstly Lord Reid: "*The use of force, or it may be other means, to compel a sovereign to change his advisers, or to compel a government to change its policy may be just as political in character as the use of force to achieve a revolution. And I do not see why it should be necessary that the refugee's party should have been trying to achieve power in the state. It would be enough if they were trying to make the government concede some measure of freedom but not attempting to supplant it".* Secondly Lord Radcliffe is quoted: "*In my opinion the idea that lies behind the phrase 'offence of political character' is that the fugitive is at odds with the state that applies for extradition on some issue connected with the political control or government of the country*".

mixed approach which combines the political incidence, connectivity and motivation tests.[129]

More recently, the more appropriate conception of the political offence exception has been based on the self-defence and laws of armed conflict model. There can be no political offence exception applied to attacks on innocent civilians.[130] Van der Wyngaert, in relation to the political offence exception to extradition, endeavours to indicate "*how to plug the terrorists loophole*" without departing from fundamental human rights. She notes as not surprising to see when it comes to cooperation between states to suppress terrorism by means of states' criminal laws, that many political and legal obstacles paralyse the process.[131] One of the most important obstacles in this respect is the political offence exception to extradition. The question that increasingly faces judiciaries throughout the world is whether, and to what extent, terrorist offences should be immune from extradition under the rule of political offences exception to extradition.[132]

Wise opines that extradition depends largely on the self-regarding behaviour of individual states rather than on the concept of an international common good. This according to Wise would help to explain the political offence exception. He further concludes:

> "*…objections to official acquiescence in terrorist acts may lose moral force unless tied to a general principle of state responsibility that would preclude all governmental complicity in acts of violence directed from one country against another*".[133]

Further problems surrounding the political offence exception are due to the fact that the:

> "*…rule is built on a triple rationale in which arguments of a very different nature converge: (1) the political argument that States should remain*

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129 Blakesley 1996: 169. See also Van der Wijngaert 1980: 120 and further.
130 Blakesley 1996: 169.
131 1996: 191.
132 Van der Wyngaert 1996: 192.
133 1996: 68.

> *neutral vis-à-vis political conflicts in other States and that therefore extradition of political opponents is to be a priori refused; (2) the moral argument , based on the premise that resistance to oppression is legitimate and that therefore political crimes can therefore be justified; and (3) the humanitarian argument, whereby a political offender should not be extradited to a State in which he risks an unfair trial".*[134]

It is the latter argument, the one based on human rights, which leads Dugard to state that extradition has not escaped the impact of human rights law. Some human rights principles have therefore been adopted by extradition agreements.[135] Other human rights principles have been used to obstruct extradition despite their absence from the extradition agreement. In the latter case, it has been claimed that human rights norms, whether they are based in treaty or custom, override treaty extradition obligations on the grounds that they enjoy a higher status as part of the public order of the international community or of a particular region. Two principle human rights norms that have been adopted by extradition treaties and legislation include the death penalty and non-discrimination.[136] Human rights doctrine teaches that despite the inherent seriousness of terrorist offences, it is not on its own sufficient to strip the terrorist of protection. Thus, so the argument goes, even the most heinous criminals are entitled to a fair trial.[137] To treat the most heinous terrorist otherwise than with a fair trial would mean that the prosecutor is descending to the same levels of disrespect for human sanctity and the rule of law.

In the *European Convention on the Suppression of Terrorism*, the introduction of exceptions *per se* to the political offence exception has been balanced by

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134 Wise 1996: 68.

135 Dugard 2005: 223. See also Van der Wyngaert 1996: 192. The author notes as follows: "*While no international criminal justice policy has been developed to suppress terrorism, many pragmatic efforts have been undertaken to cope with the problem of inter-State cooperation for terroristic [sic] offences. For example, treaties have been drawn up to restrict or even exclude the applicability of the political offence exception as far as terroristic [sic] offenses [sic] are concerned. Where such restriction or exclusion was not possible, States have undertaken an obligation either to extradite or to prosecute the offender, thus avoiding a situation where terroristic [sic] offences remain unpunished. Some countries have even unilaterally changed their extradition laws or policies to strengthen enforcement*".

136 Dugard 2005: 223.

137 Van der Wyngaert 1996: 204.

the introduction of a clause that reduces the political offence exception to its rationale of the terrorist receiving a fair trial.[138] The particular clause in the Convention prohibits extradition if the requested party has substantial grounds to believe that an extradition request made for an ordinary offence has really been made for the purpose of prosecuting a person on account of his race, religion, nationality or political opinion, or alternatively that the person's position may be prejudiced for any of these reasons. Because the protection is against discriminatory treatment and not against an unfair trial as such, the clause is often called the discrimination clause.[139]

3.5 A contemporary view of state sovereignty

So far it has become clear that the doctrine of state sovereignty is the major obstacle in the way of prosecuting perpetrators of human and humanitarian rights. Writing on truth commissions, state sovereignty and an emerging international criminal justice order for the new millennium, Van der Vyver reflects on the current or modern international view on state sovereignty, which is worthwhile referring to at the outset of this research.[140] He notes that the governments represented in New York (in preparation for the Rome Conference establishing the International Criminal Court) and in Rome where the conference for the establishment of the International Criminal Court took place, were sensitive to the general decline of the substantive enclave of state sovereignty in international law.[141]

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138 Van der Wyngaert 1996: 205.

139 Van der Wyngaert 1996: 205. See also Dugard: 2001: 167 and also Van der Wijngaert 1980: 80.

140 1999: 5-23.

141 Van der Vyver 1999: 9. He firstly cites Patricia Mckeon who stated that the doctrine that a state has absolute authority, independent of the affairs of other nations, is outdated and unrealistic, and "*[t]here is a balance between a society's right to its sovereignty and the right of the international community to ensure punishment of criminal behaviour for certain acts which otherwise would go unpunished"*. The author then quotes Oppenheim who states: "*the very notion of international law as a body of rules of conduct binding upon states irrespective of their internal law, implies the idea of their subjection to international law*". The International Law Commission as far back as in 1949 stated: "*Every state has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law*". See also Thorneycroft 1966: 6: who differentiates between de jure sovereignty and de facto sovereignty and

The author refers to Paul Marquardt, with reference to the Nuremberg trial:

> "*An individual has a legal duty, on pain of prosecution, to disobey his sovereign national government if it attempts to violate certain international legal principles*". [142]

He further quotes the International Criminal Tribunal for the former Yugoslavia (Appeals Chamber) in the case of *Tadic:*

> "*It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights*".[143]

Van der Vyver concludes that there:

> "*...can no longer be any doubt that persons committing crimes under international customary law cannot shield behind [the] refusal of their governments to submit to institutions and proceedings established to prosecute those crimes*".[144]

This conclusion is particularly interesting in the light of the position of non-states parties to the ICC Statute, which is dealt with in Chapter 9 of this work. In another article, Van der Vyver convincingly demonstrates the extent to which the principle of universal jurisdiction has been endorsed internationally,[145] which will also be further elucidated in chapter 9. Bodley opines that although it is possible to argue that sovereignty has a central place in an international order, it has nonetheless never reached the extent that some have claimed for it; in the sense that absolute state sovereignty has

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further between internal and external sovereignty. As early as 1966 the author observed that internal sovereignty of the vast majority of states remains intact while, in varying degrees, the de facto external sovereignty of nations is dissolving "*…into an inchoate tangle of agreements, economic pressures, military necessities and moral ideas*". The author observed that the existing system of international law was built around the concept of sovereignty. Its purpose was to control the relationships of supreme rulers and it was not designed to deal with the confused and uncontrollable relationships of governments, which are subject to so many conflicting pressures that no one of them can maintain a consistent separate policy.

142 Van der Vyver 1999: 9.

143 1999: 10.

144 1999: 11.

145 1999: 118.

never really existed because of the realities of power.[146] What is however true is that increasingly, states being the most important subjects of international law, do not claim that they are above the law and that international law does not bind them.[147]

McDonald, writing on the experience of the International Criminal Tribunal for the former Yugoslavia, (ICTY) and reflecting that experience onto the future of an International Criminal Court indicates that:

> "*...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 recognized in the jurisdiction and powers of the court".*[148]

De Wet, writing on the prohibition of torture as an international norm of *ius cogens,* is of the opinion that it would be illogical to uphold sovereign immunity when faced with *ius cogens* violations because these violations are illegal under the laws of every sovereign nation. She proceeds to indicate that sovereign immunity was not intended to enable a sovereign to escape accountability for *ius conges* prohibited acts such as torture.[149]

The original concept of sovereignty has also been described as outdated and there are increasing calls for a new approach.[150] In the chapters that follow, it

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146 1999: 29. See further Anghie 1999: 1.

147 Bodley 1999: 429. He states: "*Yet if sovereignty ever existed in its absolutist sense (which it probably did not), both doctrinally and practically it is waning in the twentieth century. Perhaps the unprecedented brutality of the World Wars convinced states to take steps to ensure that such horrors would never again be witnessed. Successive measures have been taken to create a system of 'collective security' in international relations, which arguably weakens the forces of sovereignty. A more likely reason, however, is the increased interdependence of states at many levels, including trade, travel, information transfer and diplomacy'. What is more, it has been recognized in international law that state sovereignty may in certain circumstances be temporarily suspended*". See also Yannis 2002: 1037 and further.

148 1998: 1438.

149 De Wet 2004: 106.

150 Jackson 2003: 782 and further. This author is of the view that often the term "*sovereignty*" is invoked in a context or manner designed to avoid and prevent analysis, to fend off criticism or justification for international infringements on the activities of a nation-state or its internal stakeholders and power operators. The author offers some theories or principles that could reach beyond the traditional sovereignty parameters but at the same time offer principled constraints to avoid

will be illustrated to what extent there have been limitations on the principle of state sovereignty, because of the need for international prosecution for core crimes.

Another very recent indicator that state sovereignty is not as inviolable as it was in the past is the recent release of the ex-Liberian leader and former war lord Charles Taylor by Nigeria to Liberia in order to stand trial before the UN-established Special Court for Sierra Leone.[151] Apart from the Serbian leader Slobodan Milosevic, Taylor will be only the second former head of state who has been indicted to stand trial for charges of war crimes and crimes against humanity before an international criminal tribunal.[152] In the not too distant past this would have been unheard of in international law and politics because of, amongst other things the inviolable sovereignty of states as is enshrined in article 2(7) of the UN Charter that prohibits interference in the domestic affairs of UN member states. The rise of an international human rights culture, especially in the post- World War II period, has been described as one of the most impressive ethical developments of the 20th century and one that has placed the inviolable right of state sovereignty gradually on the defence.[153]

3.6 Double criminality

3.6.1 Meaning and scope

Double criminality is an accepted rule of international law, and Van der Wyngaert describes the meaning of the rule as follows:

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inherent risks in simply discarding or severely changing the concept of state sovereignty which is so fundamental in the foundation of traditional international law. These are briefly (1) to recognise certain international institutions as the legitimate entities to decide on some of these parameters, (2) to use the concept of *'interdependence'* that is often most associated with economic policy and activity, to justify certain new norms. See also Cassese 2005: 21 on the traditional *Grotian* pattern in international law opposed to the more modern *Kantian* paradigm.

151 http://en.wikipedia.org/wiki/CharlesTaylor: 06/04/11.

152 http://news.bbc.co.uk/2/hi/africa/4856120.stm 06/04/11.

153 Du Toit 2006: 18.

> "*Double criminality as a condition to jurisdiction means that, for the criminal law of a state to be applicable to a given conduct, that conduct should also be punishable under the criminal law of another state, usually the state where the crime was committed. The conduct in question should fall under the criminal law of two states, the state where it is prosecuted, and the other state. Accordingly, the criminality of the conduct should be 'double'*"[154]

From the above it is clear in the context of extradition, that in order to be an extraditable crime, the crime should constitute a crime within the jurisdiction of both the requesting and the requested state.[155] The principle does not require that the particular conduct constituting the crime should have the same name in both the states; all that is required is that the conduct constituting the crime be substantially the same.[156] It further becomes clear that the principle of double criminality, as a condition to jurisdiction, would only apply practically where the crimes were committed outside the territory, in other words, outside the jurisdiction of a state (that is extraterritorial crimes), and that this condition obviously does not apply in the case of crimes committed within the territory of a state. In such a case, the presiding officer would always apply domestic law, regardless of any foreign elements in the case which may be, for example, the nationality of the perpetrator, the nationality of the victim or the nationality of the protected interest and so on.[157] It was common practice for states in their extradition treaties, to list the offences in respect of which extradition was to

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154 1996: 131. See also Blakesley 1996: 412, Cassese 2005: 9 and further on the need for most international rules to be translated into national legislation. This is so because most international rules cannot operate effectively without the constant help, co-operation and support of national legal systems.

155 Dugard 2001: 159.

156 Dugard 2001: 160. See also Van der Wyngaert 1996: 43. The author gives the following example: writing out a cheque with insufficient funds is a specific crime in Belgium, but not in France or the Netherlands. Nevertheless, the conduct prohibited in the Belgium statute may be criminal in France or the Netherlands as, for example, swindling or obtaining money by false pretenses. See however De Wet 2004: 114 and further on the double criminality rule where a *jus congens* violation is involved. In such circumstances, the author indicates, as has been suggested by other authors, the *jus congens* nature of the violation should exist in national legislation or national customary law. Thus, in such instances, in the absence of the prerequisite that the violation should in domestic law, *jus congens* would meet the prerequisite for criminality.

157 Van der Wyngaert 1996: 132. This aspect of the principle of double criminality is illustrated by the author by citing the examples of a Moroccan who commits bigamy on French territory, who may be punished in France, regardless of the fact that bigamy is not punishable under Moroccan law.

apply in the particular treaty.[158] Nowadays, it is the practice simply to provide for crimes that are punishable under the laws of both states with a sentence above a certain severity, without naming the crime.[159]

A question that may be controversial is whether the crime, for which extradition is requested, would have been a crime at the time it was committed or would have been a crime at the time that the extradition request was made. Dugard is of the opinion, and noting that the South African Extradition Act is silent on this aspect, that the critical date should be the time that the extradition application was made.[160] This view is of course, as the author also indicates, in opposition to the view of the House of Lords in the case of *Pinochet,*[161] where it held that the former Chilean leader could not be extradited to Spain for acts of torture committed in Chile before the United Kingdom enacted the 1984 Torture Convention into its own municipal law by reason of the principle of double criminality. The House of Lords interpreted double criminality in terms of the United Kingdom's own statute, to apply only to offences committed abroad that were punishable as crimes in the United Kingdom at the time of their commission.[162]

A later chapter deals with an analysis of the controversial case of *Pinochet.*

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158 Dugard 2001: 160.

159 Dugard 2001: 160. The author cites as example, the agreement between South Africa and Swaziland which provides for extradition as follows: "*in respect of offences which are under the laws of the requesting Party and of the requested Party and which are under both laws punishable by a maximum sentence of imprisonment for a period of six months or more or by a more severe penalty*". The author indicates that the South African Extradition Act, as amended in 1996, approves this approach when it provides that 'extraditable offence' means any offence which in terms of the law of the Republic and of the foreign state concerned is punishable by a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more.

160 2001: 160.

161 The Pinochet case will be dealt with at a later stage. Reference is made to the English High Court judgment in the case which case reference is Augusto Pinochet Ugarte (1999) 38 I.L.M. 68 (Q.B. Div'l Ct.1998), to the first House of Lords judgment in the case which reference is, *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Piochet Ugarte*, 3 W.L.R.1456 (H.L.1998), the judgment in which the latter judgment was set aside which reference is *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 2), 2 W.L.R.272(H.L..1999) and the second House of Lords judgment, which reference is *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte,* 2W.L.R.827 (H.L.1999)

162 Dugard 2001: 160-161.

3.6.2 Rationale

Van der Wyngaert points out that there are various factors composing the rationale behind the rule and these would apply depending on whether the rule is applied in an extradition or a jurisdiction case.[163] The author lists the following: state sovereignty,[164] international solidarity,[165] and the legality principle in international law.[166]

3.7 The principle of legality

Domestic legal systems tend to ground their criminal law on either the doctrine of substantive justice or that of strict legality. Under the former principle it is required that the legal order of the state must prohibit and punish any conduct that is socially harmful or causes danger to society whether or not that conduct has been legally criminalised.[167] The latter principle however holds that a person may only be held criminally liable and punished if at the moment the alleged crime was committed the act was criminalised in the domestic law of that state. At present most democratic civil law countries favour the doctrine of strict legality.[168]

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163 1996: 140 and further.

164 1996: 140: The author mentions that this rationale is particularly applicable in the case of extradition in that a state will not cooperate in the suppression of conduct which, according to its own concepts, is not criminal. This would also apply, according to Van der Wyngaert, to an inquiry into jurisdiction. She points out that states should, as a matter of principle, restrict their criminal legislation to their territories. By criminalising conduct outside their territories, regardless of the applicable law on the place of commission, states would interfere in the domestic affairs of the other state (*hineinregieren)* which is contrary to the principle of non-intervention. Restricting the extraterritorial application of criminal laws to the condition of double criminality is one of the practical embodiments of the principle.

165 Van der Wyngaerdt 1996: 141. This has to do, according to the author, with the fact that extraterritorial jurisdiction is not only a matter of sovereignty, namely a so-called "*extending the arm of the state abroad"*, but rather also based on the wish to cooperate with other states in order to suppress international crime.

166 Van der Wyngaerdt 1996: 141. According to the author the rule of double criminality exists because of the reason that a person should only be accountable for conduct that was punishable according to the law of the place where it was committed.

167 Cassese 2003: 139.

168 Cassese 2003: 141. The author points out that the principle entails four notions: (1) criminal offences may only be provided for in written law, that is legislation enacted by parliament, (2) criminal legislation must abide by the principle of specificity, that is prohibited conduct must be set out clearly and unambiguously, (3) criminal prohibition

Much that will be discussed below, regarding defences raised, especially pursuant upon the Nuremberg prosecutions, refers to the principle of legality, which is a principle peculiar to criminal justice. This principle, and in order to provide the necessary context to this thesis, is briefly examined. The principle of legality is linked to the notion of state sovereignty and has been seen as an impediment to the development of international criminal law.[169]

The principle of legality as a requirement for the successful prosecution of international crime is also sometimes referred to as the requirement of double criminality which is a requirement for jurisdiction, and which was discussed in the preceding paragraphs.[170] The Permanent Court of International Justice, the ICJ's forerunner, gave the following advisory opinion on certain legislative decrees that dealt with the principle of legality:

> "*The problem of the repression of crime may be approached from two different standpoints, that of the individual and that of the community. From the former standpoint, the object is to protect the individual against the State: this object finds its expression in the maxim Nulla poena sine lege. From the second standpoint, the object is to protect the community against the criminal, the basic principle being the notion Nullum crimen sine poena…..it must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment*".[171]

The principle of legality has lasted through time and its modern version is now enshrined in article 11(2) of the *Universal Declaration of Human Rights*.[172] In order not to offend the principle of legality, prosecution of individuals before an international criminal tribunal applying international criminal law would foremost require proof of two things: firstly that there was recognition that an individual, rather than a state, could be subject to criminal punishment by an international tribunal and, secondly, that the conduct for which the individual

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may not be retroactive and (4) resorting to analogy in applying criminal rules is prohibited. The purpose of these principles is to protect citizens as far as possible against the arbitrary power of government.

169 Kittichaisaree 2001: 13.

170 Van der Wyngaert 1996: 43.

171 Kittichaisaree 2001: 13.

172 It stipulates: "*No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed*".

could be guilty would have to be proscribed by the international community of states as a crime and subject to international sanction, with a clear set of penalties. Prior to the judgment of the International Military Tribunal which was set up to prosecute major Nazi war criminals after World War II, attempts were made to find such precedents, international recognition, or international proscription but with no success.[173]

It is ironic then that with hindsight, it is recognised that the Nuremberg and Tokyo experiences and the resultant actions by nations in response to the crimes committed during World War II, with the prosecutions that resulted, represented major developments in international criminal law. It is however, simultaneously recognised that the development of certain international norms and proscriptions did not develop on undisputed legal precedent as will be indicated below.

4. Conclusion

This chapter has addressed some of the most basic premises upon which international law is founded and has indicated that despite the fact that in international criminal law there are obvious differences from a domestic criminal law order, such as the absence of legislative authority and enforcement mechanisms, there does exist an international community to which international criminal law increasingly may be applied. It is submitted that despite the principle of state sovereignty and equality of states upon which the United Nations is founded, that body increasingly will have to play the role it was designed for, namely, amongst other things, to act as watchdog of international infringements of what is referred to as crimes *ergo omnes* and not to hesitate to exercise the powers it has in terms of Chapter VII of its Charter to act in the restoration of world peace and security.

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[173] Kittichaisaree 2001: 14.

Chapter 3
Early attempts to regulate and control war and the establishment of international criminal tribunals

1. Introduction

The criminal aspect of international criminal law can be traced through several regulatory schemes, which are: the control of war, the regulation of armed conflicts, the prosecution of violations of the laws of war (both in its initiation and its conduct) and common crimes of international interest.[1] The early regulatory schemes will be recorded in this chapter. The chapter will, from a developmental point of view, examine the early control of war making and the regulation of armed conflict. It may be noted that in these attempts also lie the highlights of the historical evolution of an international community.[2] The chapter will also refer briefly to the early and first prosecutions for the violation of the laws of war. It discusses international conventions and traditions amongst nations relating to war crimes before and after World War I, making reference to the efforts of the *Commission on the Responsibility of the War and Enforcement of Penalties,* the *Treaty of Versailles*, the *League of Nations* and its attempts to criminalise war, the *Pact of Paris* or the *Kellogg-Briand Pact* and other international efforts to codify the control of waging war.

The chapter concludes that the period under examination most significantly witnessed the development of the *jus ad bellum* into *jus contra bellum.* Thus the jurisprudential contribution of the era is to be found in the shift from the automatic right of states to engage in war to an obligation of states not to engage in war. Yet some important obstacles that remained at the end of this period are obstacles that remain in the way of an emerging criminal justice

1 Bassiouni 1996: 73.
2 See Cassese 2005: 22 and further.

order today. These obstacles pertain to the precise and accurate drafting of treaties and conventions such as was the case with the right to self defence in the Kellogg-Briand Pact and the problem of jurisdiction of the international community over non-contracted or non-members of international bodies and/or or conventions and treaties. This period further provided the general precursors for the further development of international criminal law and the establishment of an international criminal court. The international community's resolve to curb aggression and to hold perpetrators of gross crimes accountable was soon after this period severely tested after World War II,a matter which is addressed in the following chapter.

2. Control and regulation of war

It is trite that since the time of antiquity, it has been recognised that certain restraints should be placed on the limits of making war. In the Old Testament there are instances of limitations on making war ordained by God.[3] In Deuteronomy 20, verses 19 to 20 for example, it is stated that:

> "*When attacking heathen tribes among the inhabitants of Canaan the Israelites were enjoined that while they might eat the fruit from captured orchards, they were not to destroy the actual trees themselves*".[4]

Another example is to be found in the Book of Kings where Elisha advised the King as follows on whether to slay his prisoners:

> "*Thou shalt not smite them: wouldest thou smite those whom thou has taken captive with thy sword and with thy bow? Set bread and water before them that they may eat and drink and go to their master*".[5]

The writings of Aristotle, Cicero, St Augustine and St. Thomas Aquinas in Western civilization laid down the philosophical premise of legitimacy of war in their attempt to distinguish between just and unjust wars.[6]

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3 As quoted by Green 1993: 18.

4 As quoted by Green 1993: 18.

5 As quoted by Green 1993: 18. See also Shaw 1997: 13 who uses the Biblical prophet Isaiah as an example who declared that sworn agreements, even where made with the enemy, must be performed.

Similar efforts are reflected in civilizations such as the Chinese, Hindu, Egyptian and Assyrian-Babylonian. These civilizations likewise devised norms that were to regulate the legitimacy of making war.[7] Arab jurists, eight hundred years before Grotius, composed treatises that covered such topics as the sanctity of treaties, the treatment of diplomats, and the treatment of prisoners of war.[8] Also the Islamic civilization based on the Koran, laid down specific rules as to the legitimacy of war.[9] In the fourth century B.C., a Chinese writer Sun Tzu in a book entitled *"The Art of War"* described the prevailing customs of sparing the wounded and the elderly.[10] Sun Tzu maintained that in war one should attack the enemy armies, and the "*worst policy*" would be to attack their cities.[11] At around the same period, in the Hindu civilization, a body of rules regulating war on land was embodied in the *Book of Manu*.[12] In the Second Millennium B.C., the Egyptians had treaties with certain other peoples such as the Sumerians, regulating war and the manner in which it was to be conducted.[13] Likewise, the Ancient Greeks and the Romans had rules in existence on sanctuary, the treatment of wounded and that of prisoners.[14]

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6 Bassiouni 1996:73. See also Gallaroti and Preiss 1999:3 and further, on a historical background of the early efforts to regulate war.

7 Bassiouni 1996: 73.

8 Weeramantry 2000: 280. See further Best 1997: 26 and further and Shaw 1997: 13 and further.

9 Bassiouni 1996: 73. The author continues: "*These rules and practices had some influence on the development of Western civilization by virtue of Islam's contacts in the Middle Ages with the Crusades and with Spain and southern France and southern Italy when these areas were under Muslim control. Thus, by the seventeenth century, a strong philosophical foundation had been established particularly in Western civilization for the limitation of war (and its conduct)".* See also Sultan 1988: 29 and further.

10 1996: 75.

11 Green 1993: 19. See also Adachi 1988: 13.

12 Bassiouni 1996: 75. See also Adachi 1988: 13: According to the author, the Code of Manu was the basis for the laws, morals and customs of the people of India that were developed between 200 B.C. and 200 A.D. In its Chapter 7, it stated: "*a king must protect his people when an enemy declares war on them on the battlefield, a soldier must not kill an enemy by using a hidden weapon, hook-shaped weapon, poisonous weapon or fire weapon; a soldier must not attack an enemy who has surrendered; a soldier must not attack an enemy who is not ready for combat, who is severely wounded, is giving up fighting, or is fleeing*".

13 Bassiouni 1996: 75 and further.

14 Green 1993: 19.

Gallaroti and Preiss state:

> "*Laws and norms regarding international crime have traditionally pertained to the conduct of war. Principles governing international criminal conduct can be traced as far back as ancient Roman customary law, which made a distinction between combatants and non-combatants in wars within the Empire. Similarly, the ancient Greeks recognized limits on war and the means by which it was carried out. During the middle ages, chivalric code and Christian ethics bolstered and modified Roman custom regarding just and unjust acts of war. Grotius' De Jure Belli Ac Pacis, appearing in 1646, secularised and documented the above principles on constraint of warfare*".[15]

In the Middle Ages the Catholic Church likewise attempted to regulate war in its councils held in 1122, 1139, 1215, 1245 and 1274.[16]

A distinct historical phase was that of formulating normative prescriptions against these forms of war, which had come to be rejected by the shared values of the world community.[17] As manifestation of this phase, many states, since particularly 1648, entered into bilateral and multilateral treaties in order to regulate their relations in terms of preventing war between them.[18]

In the United States, the first Articles of War were promulgated in 1775, which contained explicit provision for the punishment of officers who failed to keep good order among the troops.[19] Another example of early modern codification of principles of war in the United States is to be found in the codification of the detailed text prepared by Professor Francis Lieber in the *Instructions for the Government of Armies of the United States in the Field, General Orders*, *No 100, 24 April 1863*.[20] Abraham Lincoln employed this codification in the Union

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15 1999: 75.

16 Gallaroti and Preiss 1996: 75.

17 Bassiouni 1996: 73.

18 Bassiouni 1996: 73. The author continues to illustrate that in the context of the control of war a host of multilateral treaties reflected the world community's shared values. See also Roberts and Guelff 2000: 4, who cite as an example in this regard, the 1785 Treaty of Amity and Commerce between the United States and Prussia for the observance of certain basic rules of war were to break out between the two parties.

19 Bassiouni 1996: 73. This provision was retained and strengthened in the Articles of War of 1806 and served as the basis for prosecutions for conduct against the law of nations.

20 Schabas 2001: 1. See also Bassiouni 1996: 77 and Meron 1997: 269 and further on *Lieber's Code and Principles of Humanity*.

Army in the American Civil War. It proscribed inhumane conduct and set out sanctions, including the death penalty, for pillage, raping civilians, abuse of prisoners and so on.[21] A similar view as expressed by the writings of Professor Lieber, is found in the Final Protocol of the Brussels Conference of 1874, which drafted a *Project of an International Declaration concerning the Laws and Customs of War.*[22]

In 1880, the Institute of International Law adopted its *Oxford Manual of the Laws of War on Land.*[23]

3. Early prosecutions for violations of the laws of war

The international criminalisation of violations of the laws, rules and regulations of war evolved gradually, and so did the international prosecution of the initiators of unjust or aggressive wars and violators of the conduct of war.[24] As early as 1268, in Naples, Conradin von Hohenstaufen, Duke of Swabia, was tried, convicted and executed for initiating an unjust war.[25]

However, the first genuine international trial for the perpetration of atrocities against civilians, or war crimes, is probably that of Peter Von Hagenbach, who

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21 Schabas 2001: 1. See also Green 1993: 15: The author indicates that Lieber is often regarded as having written the first acceptable modern code on war. Lieber, wrote amongst other things: "*War… by no means absolves us from all obligations towards the enemy, on various grounds. They result in part from the object of war, in part from the fact that the belligerents are human beings, that the declaration of war is, among civilised nations, always made upon the tacit acknowledgement of certain usages and obligations, and partly because wars take place between masses who fight for others, or not for themselves only*". See further Best 1997: 41 and further.

22 Green 1993: 15. This Declaration stated: "*It had been unanimously declared at [St. Pieterburg in 1868] that the progress of civilisation should have the effect of alleviating, as far as possible, the calamities of war; and that the only legitimate object which States should have in view during war is to weaken the enemy without inflicting upon him unnecessary suffering"*.

23 Green 1993: 15. The manual refers to such aspects as the needs of civilised nations and the fact that as long as the demands of world opinion remain indeterminate, belligerents are exposed to uncertainty. A set of certain rules would prevent the "*unchaining of passion and savage instincts*". It further stresses the need that all men of all armies must bear knowledge of a certain set of rules that regulate war making, etc.

24 Bassiouni 1996: 78.

25 Bantekas and Nash 2003: 325. See also Bassiouni 1996: 78; Gallaroti and Preiss 1999: 3.

was tried in 1474 for atrocities committed during the occupation of Breisach.[26] He was tried before a tribunal of twenty-eight judges from the allied states of the Roman Empire.[27] He was not tried for crimes committed during wars and was found guilty of murder, rape, perjury and other crimes "*against the law of God and man*" **/** in the execution of a military occupation.[28]

Landmark cases in history are those that occurred during the American Revolution.[29] The United States also convened war crimes tribunals after the Spanish-American War and the occupation of the Philippines.[30]

4. International conventions and traditions before World War I

It was not until the defeat of Napoleon that any attempt was made to declare war on those resorting to it as illegal or criminal.[31] In the early twentieth century, international laws of war were codified in *The Hague Conventions of 1899 and1907*.[32] These were the first steps that were designed to curtail the freedom of war in general through the conclusion of multilateral treaties.[33] The

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26 Schabas 2001: 1.

27 Bassiouni 1980: 8.

28 Bassiouni 1980: 8. See further Bantekas and Nash 2003: 325.

29 Bassiouni 1980: 8: These included the trial of a captain Nathan Hale, by a British military court, and Major John Andre by a board of officers appointed by President George Washington. Following the American Civil War, Confederate Major Henry Wirz was tried for his role in the death of several thousand Union prisoners in the Andersville prison.

30 Bassiouni 2001: 8.

31 Green 1993: 2. The author relates that Napoleon was formally declared an international outlaw for having invaded France in violation of the Treaty of Paris of 1814. Napoleon was deported to St. Helena. Then, by the Convention of 11April 1814, which was entered into between Austria, Prussia, Russia and Napoleon, he agreed to retire to Elba. After his escape and re-entry into France with an armed force, the Congress of Vienna on the 13 March 1815, issued a declaration that by having violated his agreement, Napoleon had "*destroyed the sole legal title upon which his existence depended...*" and had placed him outside the protection of the law. He was declared as "*Enemy and Perturbator of the World".*

32 Lippman 1991: 2. See also Gallaroti and Preiss 1999: 3. The Hague Convention was preceded by the Red Cross conventions on the treatment of the sick and wounded. The Hague Conventions represented the world's first penal code. See also Peter 1997: 180 and Roberts and Guelff 2000: 8 and further. Significantly, so the latter authors point out, is the inclusion in the 1899 Hague Convention of the so-called *'Martens Clause'* that clearly stipulated that despite the codification of international customary rules, much of the law continued to exist in the form of unwritten customary principles.

33 Dinstein 2001: 74.

regulations that were annexed to the Conventions sought to regulate such areas as the treatment of prisoners of war, military tactics and strategies and belligerent occupation of enemy territory.[34] These provisions were subsequently incorporated into states' pre-existing military codes and distributed to each nation's armed forces.[35] Article I of the Hague Convention II of 1907, which obligated contracting parties not to have recourse to armed force for the recovery of contract debts unless the debtor state refused an offer of arbitration, prevented agreement on compromise and rejected an arbitral award.[36] Under article 2 of both the 1899 and 1907 Hague Conventions, for the *Pacific Settlement of International Disputes*, contracting parties agreed that in the case of a serious dispute between them they would as far as possible first rely on mediation of friendly states rather than to resort to war.[37] Article 3 of the Convention provided that a belligerent party, which violated the provisions of the regulations, was liable to pay compensation to the aggrieved party. Negotiations over what the appropriate compensation would be often resulted in long and complex negotiations, and furthermore the payment of compensation was criticised as having little deterrent effect on individual combatants.[38]

Another traditional mechanism for punishing violations of the law and customs of war was by way of trial of those accused of war crimes by their state of nationality. Military reprisals were another mechanism with which to punish. Prosecutions were however rarely pursued and the appropriate scope, nature and justification for reprisals were subject to debate. Additionally, reprisals were criticised for simply escalating hostilities.[39] It therefore became custom at the end of hostilities, to grant amnesty to all combatants in the interest of comity.[40] Furthermore, even if a state desired to prosecute an enemy soldier, it may not have been legally permissible. It was thus uncertain whether a

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34 Lippman 1991: 2.
35 Lippman 1991: 2. See also Best 1997: 50 and further.
36 Dinstein 2001: 75.
37 Dinstein 2001: 75.
38 Lippman 1991: 2.
39 Lippman 1991: 2.
40 Lippman 1991: 3.

belligerent state could extend its jurisdiction over enemy combatants, particularly in the case of extra-territorial offences. States also differed on how to treat issues such as the status of the superior orders or that of command responsibility as a defence. As far as heads of states were concerned they were traditionally immune from trial or punishment before a foreign court under the defence of an act of state.[41]

It is recognised that even though the scope of the limitation on the freedom of war as formulated by The Hague Conventions was quite narrow, they represented a modest beginning in the shift away from the notion of the *jus ad bellum.*[42]

5. International conventions and traditions after World War I

The treatment of Napoleon served as a precedent for the decision of the principal allied and associated powers at the end of World War I when it considered the treatment that was to be accorded to those identified as the authors of the war.[43]

German strategies and tactics in World War 1 were a source of outrage to the international community at the time. A particular example was the execution of Captain Fryatt, an English commander of the civilian ship the *Brussels.* Captain Fryatt refused to permit a visitation and search by a German U-boat and instead, attempted to ram the German vessel. He was captured, tried and executed by the Germans as a war criminal. This incident prompted a 1916 analysis of the case in the *American Journal of International Law* which article concluded:[44]

> "*There is nothing in the law nor in the practice of nations which prevents a belligerent merchant vessel from defending itself from attack and*

41 Lippman 1991: 3.
42 Dinstein 2001: 75.
43 Green 1993: 3. See also Cassese 2005: 34 on the general repercussions of World War I in the historical emergence of an international community.
44 Lippman 1991: 3.

> *capture [and therefore] the execution of Captain Fryatt appears to have been without warrant in international law and illegal, whatever it may have been according to the municipal ordinances of Germany".*

Bellot, who warned that the Allies possessed "*a grim determination that in war even as in peace justice shall prevail and the reign of law.... [shall be] maintained",* also criticised the case in Britain.[45]

5.1 The Commission on the Responsibility of War and Enforcement of Penalties

At the conclusion of World War I, the *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War* which was established by the *Paris Peace Conference* in 1919, proposed that an *ad hoc* tribunal be set up to try those responsible for war crimes and violations of the laws of humanity.[46] The Commission opined:

> "*On the special head of the breaches of the neutrality of Luxembourg and Belgium, the gravity of these outrages upon the principle of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference. On the whole case, both the acts which brought about the war and those which accompanied its inception, particularly the violation of Belgium and Luxembourg, it would be for the peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ to deal as they deserve with the authors of such acts*".[47]

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45 Lippman 1991: 4.

46 Bantekas and Nash 2003: 325. See also Bassiouni 1996: 79 and Glueck 1966: 19. The Commission appointed sub-commissions to establish the facts regarding culpable conduct in the course of hostilities, to consider whether prosecution for such offences could be instituted and to point out the person deemed guilty and the courts in which they should be tried. Glueck indicates that the Commission summarized atrocity memoranda submitted by various Allied Governments that contained lengthy lists of breaches of the laws and customs of war committed by the forces of the German Empire and their allies on land, on sea and in the air. Some of these were murders and massacres, tortures, shields formed by living human beings, the arrest and execution of hostages, the arbitrary destruction of public and private property, the aerial bombardment of open towns without there being a regular siege, the destruction of merchant ships without previous visits and without any precautions for the safety of passengers and crew, the massacre of prisoners, attacks on hospital ships, the poisoning of springs and wells, the issue of counterfeit money. See also Cassese 2003: 327.

47 Green 1993: 3.

The above quotation illustrates a precursor of what, by the London Charter that later established the Nuremberg Tribunal in 1945, became known as "*the criminality of war of aggression*".[48] Although not many of the efforts of this commission came to fruition, it did perform important work in the general development of international criminal law. The commission, in an unprecedented recommendation, proposed for example that criminal liability should be extended to all individuals responsible for war crimes, including heads of state.[49] The commission contended that international law did not recognise the principle of sovereign immunity when war crimes are committed.[50] The Commission also noted that it would frustrate the enforcement of the laws of war if high-level officials were able to plead either act of state or superior orders as a defence to criminal liability.[51] As far as acts that would attract criminal liability were concerned, the Commission stated that the premeditation of a war of aggression did not violate positive law and therefore did not constitute a war crime, which could be tried before a judicial forum. The Commission further recognised that the belligerent nations were empowered to prosecute captured enemy civilians and militia that were responsible for the violation of the laws and customs that governed the conduct of war. In this regard it proposed that trials be consolidated and conducted before a single tribunal.[52] The recommendations of the Commission were not adopted and Glueck concludes that the "*failure to adopt them resulted in one of the less satisfactory pages of history*".[53] Reactions to the Commission's recommendations were varied. The United States expressed dissent over the recommendation that persons in high authority, in particular heads of enemy states, be subject to criminal prosecution and

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48 Green 1993:3.

49 Lippman 1991: 5. See also Glueck 1966: 20. The author indicates that the Commission was of opinion that: "*in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal*".

50 Lippman 1991: 5.

51 Lippman 1991: 5. Lippman points out that the Commission concluded that this would effectively mean that heads of state would be immune to criminal liability under the act of state defence while their advisors and subordinates would be able to plead superior orders.

52 Lippman 1991: 6.

53 1966: 22.

punishment.[54] The US argued that heads of state were responsible only to the populace of their countries and therefore only subject to domestic political and legal sanction. It also opposed the creation of an international military tribunal. It contended that such a creation seemed to be unfamiliar in the practice of nations. It further contended that no international statute or convention made a violation of the laws or customs of war an international crime and that an international tribunal applying new law, which carried with it a newly agreed upon penalty, would constitute "*an ex post facto law in violation of the United States Constitution and would therefore be unenforceable in the United States*".[55] The Americans were rather in favour of what may be termed a decentralised method of prosecution by allowing each state to prosecute internally for acts of war affecting that state's own citizens or property. Acts that affected more than one country, according to the Americans, should be prosecuted by amalgamating various national tribunals or by a joint commission.[56] A further objection by the US related to the alleged violation by the Germans of "*the laws and principles of humanity*". As opposed to the laws and customs of war, which the Americans argued were standard and fixed and to "*be found in books of authority and in the practice of nations"*, the novel concept of "*laws and principles of humanity",* was too unfixed and not sufficiently precise and definite to either guide the conduct of combatants or to form the basis of prosecution before a criminal tribunal.[57] Thus many of the commission's proposals did not come to fruition and were set aside.[58]

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54 Lippman 1991: 7. The US pointed out that hitherto in international law, heads of state were not legally responsible for the atrocious acts committed by subordinate authorities.

55 Lippman 1991: 7. The author records that the Americans pointed out that each of the Allied powers enjoyed domestic statutory provisions punishing violations of the laws and customs of war. It was therefore their view that each state should exercise jurisdiction over acts contrary to the laws of war that affected the persons or property of its own citizens.

56 Lippman 1991: 7-8.

57 Lippman 1991: 8.

58 Glueck 1966: 22 and further.

5.2 The Treaty of Versailles

In terms of the *Treaty of Versailles* in 1919, it was decided to try Kaiser Wilhelm before an international tribunal under the terms of this treaty. Germany was ordered to hand over to the allies all the Germans accused of war crimes, to be tried by military tribunals.[59] Article 227 of the *Treaty of Versailles* also stated that the Allied Powers intended to address a request to the Netherlands to surrender the ex-Emperor in order to be put on trial.[60] Lippman observes:

> "*Prosecuting the ex-Kaiser for 'a supreme offence against international morality' technically preserved the legal immunity of the Kaiser from prosecution and liability under international law. However, it also 'opened the trial of the Kaiser to charges of victor's justice to an even greater degree than a prosecution resting upon, at least, some principles of law, to which the Kaiser might also appeal in his defense [sic]* ".[61]

Other German officials were also to be formally prosecuted and article 228 of the Versailles Treaty provided that the German government recognised the right of the Allied and Associated Powers to bring before military tribunals persons that were accused of acts that were in violation of the laws and customs of war.[62] Article 229 of the Treaty reflected the American suggestion,

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59 Bassiouni 1980: 9. See also Lippman 1991: 8. The author indicates that Great Britain was intent on prosecuting ex-Kaiser Wilhelm in order to deter future aggression. The United States held the view as has been seen, that heads of state should not be exposed to criminal liability. The compromise was addressed in article 227 of the Treaty of Versailles and this provided that the Allied and Associated Powers publicly arraign William 11of Hohenzollern, formerly German Emperor, for a "*supreme offence against international morality and the sanctity of treaties*". The article proceeded to provide for the creation of a special tribunal composed of representatives from the United States, Great Britain, France, Italy and Japan. In its decisions the tribunal was to be guided by "*the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality".* See also Marquardt: 1995: 79 and further.

60 Lippman 1991: 9. See also Peter 1997: 180-181: At the conclusion of World War I, the Kaiser fled to the Netherlands which refused to extradite him on the grounds that the alleged crimes the Kaiser was accused of were political in their nature. The Netherlands did indicate however that it might be willing to extradite him if a permanent international tribunal was established. However, so Peter indicates, the Allies chose not to consider the establishment of a permanent tribunal at that time, and instead their attention was focused on a return to normalcy in world affairs. See also Green: 1993: 3.

61 1991: 9.

62 Lippman 1991: 9. See also Glueck 1966:23 and further.

which provided that persons accused of criminal acts against the nationals of any one of the Allied and Associated Powers was to be prosecuted before the military tribunal of that particular power.[63] By article 230 of the Versailles Treaty, the German government undertook "*to furnish all documents and information of every kind*", the production of which was regarded as necessary to ensure successful prosecution of those responsible.[64] The legality of prosecutions was thus found in international treaty and international consciousness had dictated punishability. It allowed the allies to establish national war crimes tribunals and further ordered the prosecution of Kaiser Wilhelm 11 by an international tribunal.[65] France demanded the surrender of 334 persons which included a certain General Stenger, who was commander of the 58th Brigade and the alleged author of the following orders that were dated 26 August 1914:[66]

> "*Beginning with today,*
> *(a) no more prisoners will be taken. All prisoners, whether wounded or not, must be destroyed;*
> *(b) prisoners are to be killed; the wounded whether armed or not, destroyed; even men captured in large organized units are to be put to death. Behind us no enemy must remain alive*".

The British claimed 97 Germans for trial.[67] Belgium called for the delivery of 334 Germans. Poland, Rumania, Italy and Yugoslavia also demanded the surrender of various highly-placed criminals for murders, arsons, thefts, pillage, wanton destruction of forests, and bombardment of towns and so on.[68]

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63 Lippman 1991: 9.See also Glueck 1966:23 and further.

64 Glueck 1966: 23.

65 Bassiouni 1980: 9: The Allies submitted 896 names through the specially created *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*. For political reasons the list eventually shrunk to 45. Of these, Germany tried 12 only before the Supreme Court of the Reich, sitting in Leipzig, six of whom were acquitted. Germany refused to extradite its nationals for prosecution by the Allies. See also Garcia-Mora 1962: 36 and further.

66 Glueck 1966: 24.

67 Glueck 1966: 24. Among those Germans that the British claimed was the Grand Admiral von Tirpitz and Admiral Scheer, for having ordered unrestricted submarine warfare, twenty former commandants of German prison camps, for excessive cruelty, and joined in its demand by Belgium, a certain Von der Lancken, for shooting the famous nurse Edith Cavell.

68 Glueck 1966: 24.

The prosecutions after World War I were for[69] (1) violation of laws and customs of war as established in customary international law and compiled in The Hague Conventions, and (2) initiation and waging of aggressive war in violation of international law. Briefly this amounted to a charge of either having committed war crimes or waging an aggressive war. In the resultant prosecutions, the principal defence against the charge of aggression was its lack of enforceability as an international obligation against Germany, and to the charge of war crimes the defence submitted was that of obedience to superior orders on the grounds that international law had not specifically barred it. It was furthermore argued that international proscriptions did not constitute normative proscriptions of a criminal nature and indeed that no penalties were ever promulgated.[70]

The mere fact that the Treaty of Versailles was established and that it did allow, according to international norms at the time, the prosecution of crimes committed during World War 1, was a major development in international criminal law. This is despite the fact that the trials, which became known as the Leipzig Trials,[71] more closely resembled disciplinary proceedings of the German army than that of a truly international reckoning.[72] Glueck describes the Leipzig trials as a "*tragi-comedy*".[73]

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69 Bassiouni 1980:10.

70 Bassiouni 1980:10. This obviously referred to the general principle of *nulla poena sine lege,* found in criminal law jurisdictions universally.

71 Glueck 1966: 28 gives a detailed account of the Leipzig Trials. A summary of the outcome of the Leipzig trials were:
Number of accused originally on the Allied list: 896
Number on "*abridged*" list: 45.
Number actually tried: 12.
Number actually convicted: Six nations protested the outcome of the Leipzig trials and in January 1922, a *Commission of Allied Jurists* that was established to inquire into the Leipzig trials which unanimously recommended to the *Supreme Council of the Allied and Associated Powers* that it was useless to let the German court continue. It recommended that no new cases be sent to Leipzig and that the German government be compelled to hand over accused persons for trial by the Allies in terms of article 228 of the Vienna Convention. This recommendation was received with great indignation by Germany.

72 Schabas 2001: 4. The perceived failure of this early attempt at international justice haunted efforts in the inter-war years to develop a permanent international tribunal and was support to those who opposed war crimes trials for the Nazi leaders. See also Garcia-Mora 1962: 36-37and Meron: 1993: 123: The author states: "*The Versailles Treaty after World War 1 illustrates the case of a defeated but not wholly*

Only history would indicate whether the lessons learned by the international community in its opposition to war and war crimes from the post World War 1 prosecutions were valuable. There were certainly attempts to circumvent the defences or some of it, in the years to follow, as will be seen later in this study. Commenting in hindsight on the Versailles Treaty, Lippman observes:

> "*It was a step towards the abrogation of sovereign immunity and the imposition of international criminal liability upon government leaders*".[74]

Glueck enumerates a number of lessons that may be learned from the Versailles Treaty and the unsuccessful exercise at Leipzig. [75] Amongst them are: the surrender of leading malefactors should be a condition precedent to the granting of an armistice, accused must be tried as soon as possible otherwise accused and witnesses disappear, die or suffer losses of memory; fair and lawful, but not long drawn-out judicial proceedings should be provided.[76] In addition, the failed efforts to prosecute German war criminals after World War I gave momentum to the argument of those who urged the need to establish institutional mechanisms for enforcing international law.[77]

Another development during the period under discussion was the *Treaty of Sevres* of 1920, which governed the peace with Turkey and also allowed for war crimes trials.[78] The developments surrounding the *Treaty of Sevres* were the embryo of what would later be called crimes against humanity. [79] This was so because the proposed prosecution of the Turks went beyond the prosecution of suspects whose victims were allied soldiers, and included victims who were civilians in occupied territories, including subjects of the

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occupied state. Germany was obligated to hand over to the allies for trial about 900 persons accused of violating the laws of war. But even a weak and defeated country such as Germany was able to effectively resist compliance. The allies eventually agreed to trials by German national courts of a significantly reduced number of Germans. The sentences were both few and clement. The Versailles model proved to be clearly disappointing". See also Glueck 1966: 27 and further.

73 1966: 34.

74 1991: 12.

75 1966: 34 and further.

76 Glueck 1966: 35.

77 Lippman 1991:12. See also Bodley 1999: 423.

78 Schabas 2001: 4. See also Marquardt 1995: 79.

79 Schabas 2001: 4.

Ottoman Empire. However, this development was even less successful than the Leipzig experience: Turkey never ratified the *Treaty of Sevres*, and the trials were never held.[80]

In the immediate post-World War 1 era, proposals for an international criminal code and an international court for the prosecution of war criminals dominated the academic international law literature.[81] Support for the establishment of an international criminal court gained momentum, despite the fact that the first Assembly of the League of Nations determined that the establishment of such a court was not feasible without the codification of the international penal code.[82] This movement gained a new urgency in October 1934 with the assassination of King Alexander of Yugoslavia. Thus in the wake of the incident, the League of Nations in 1937 adopted a *Convention for the Prevention and Punishment of Terrorism* and a *Convention for the Creation of an International Criminal Court.*[83] However, only India ratified the terrorism convention and no state ratified the treaty providing for an international criminal court.

5.3 The League of Nations

A more concrete attempt to prevent war is found in the Covenant of the League of Nations.[84] It qualified the right to engage in war in a more comprehensive way.[85] Article 10 bound members of the League of Nations to respect and preserve against external aggression, the territorial integrity and

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80 Schabas 2001: 4. The *Treaty of Sevres* was replaced by the *Treaty of Lausanne* of 1923 which contained a "*Declaration of Amnesty*" for all offences committed between 1 August 1914 - 20 November 1922. See also Nill 1999/2000: 121. Though charges were brought against Turkish officials for massive killings of Armenians in 1915, all were granted amnesty because the treaty on which the charges were based was never ratified. This occurred in part, due to the politics surrounding the rise of Communist Russia. The countries of the Western World needed an ally in that region of the world against Russia, and Turkey was earmarked for the role and past offences were forgotten.

81 Lippman 1991: 12.

82 Lippman 1991: 14. See also Marquardt 1991: 80.

83 Lippman 1991: 14.

84 See Cassese 2005: 36 and further on the League of Nations as an *"experiment in collective co-ordination of force".*

85 Dinstein 2001: 75.

political independence of all members.[86] Article 11 of the Covenant stated that:

> "*Any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern of the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations*".[87]

Article 12 required disputes to be submitted for arbitration, judicial settlements or inquiry by the League's Council who could make recommendations to settle them.[88] In accordance with article 15, disputes between members when they were not submitted to arbitration or judicial settlement, had to be brought before the Council, whose role was restricted to issuing recommendations as distinct from binding decisions. The Covenant of the League of Nations did not abolish the right of states to resort to war because subject to certain specific prohibitions, war remained lawful.[89] Significant gaps remained for a state to lawfully resort to war.[90]

Various attempts were hereafter made to close these gaps. In 1923 the League Assembly further drafted a draft *Treaty of Mutual Assistance* that

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86 Dinstein 2001: 75.

87 Green 1993: 4. See also Dinstein 2001: 75.

88 Dinstein 2001: 75. Members were bound not to resort to war until three months after the award by the arbitrators or the judicial decision or the report of the Council. The award by the arbitrators or the judicial decision had to be rendered within a reasonable time. The Council's report had to be arrived at no later than six months after the submission of the dispute.

89 Dinstein 2001: 76. So-called "*gaps*" to legally go to war existed according to Dinstein, in the following instances (a) Article 15(7) allowed a State to go to war if there was no unanimity in the Council or a proper majority in the Assembly, (b) Article 15 (8): the Council or the Assembly was incompetent to come to a recommendation if in its judgment the matter fell within the domestic jurisdiction of a party to the dispute, (c) it was implied in the wording of Article 12 that if the Council or the Assembly did not come with a recommendation within six months or an arbitral award or judicial decision within a reasonable time, the parties were free to take any action, including war, that they deemed fit. (d) The upshot of article 13 and 15 was that if a state failed to comply with an arbitral award, judicial decision or a unanimous recommendation of the Council within three months, war could be started against the 'failing' party. (e) All limitations regulated by the Covenant were only applicable to members of the League of Nations and could therefore not be enforced against non-members.

90 Dinstein 2001: 76 and further.

proclaimed that "*aggressive war is an international crime*".[91] It is therefore to be noted that at the time that the draft *Treaty of Mutual Assistance* was drafted, the criminal penalty was solely provided for by a financial penalty imposed on the aggressor state. There was no suggestion that there may be any kind of personal liability in connection with such aggression. Difficulties with regard to the definition of aggression resulted in that this remained a draft treaty only.[92]

In 1924, an American committee proposed a *Draft Treaty of Disarmament and Security*, which would not depend on the League of Nations for its enforcement (this is because America was not a member of the League of Nations).[93] Sanctions were directed against the offending state in terms of which all:

> "*…commercial, trade, financial and property interests of the aggressor shall cease to be entitled, either in the territory of the other signatories or on the high seas, to any privileges, rights or immunities accorded by international law, national law or treaty*".[94]

This attempt also, like its predecessor, remained a draft only. An equally abortive *Geneva Protocol for the Pacific Settlement* of *International Disputes*, was adopted by the League of Nations Assembly in 1924. Again, no provision was made for personal criminal liability.[95] This Protocol never came into force.

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91 Green 1993: 5. The parties declared that no one of them will be guilty of the commission of an aggressive war. The Covenant, so the author indicates, provided for the following penalty for the aggressor who would be required to carry: "*the whole cost of any military, naval or air operations…including the reparation of all material damage caused by operations of war…up to the extreme limit of [the State's] financial capacity [and] the amount… payable by the aggressor shall…be a first charge on the whole of the assets and revenues of the State*". See also Dinstein 2001: 72 and further for other such attempts.

92 Green 1993: 5.

93 Green 1993: 5.

94 Green 1993: 6.

95 Green 1993: 6.

5.4 The Pact of Paris (the "Kellogg/Briand" Pact)

In 1927, resolutions were introduced in the United States Senate for the "*outlawry*" of war, condemning it as "*a public crime under the laws of nations*".[96] In the meantime, United States Secretary of State, Kellogg, was negotiating with French Foreign Minister Briand, from which negotiations developed the *Pact of Paris*, also known as the *Kellogg-Briand Pact* or the *General Treaty for the Renunciation of War of 1928.*[97]

The Kellogg-Briand Pact comprised of only three articles. Article 1 bound contracting states to condemn recourse to war as a result of international disputes, and in article 2, it was agreed that the settlement of disputes with each other should never be sought except by pacific means.[98]

With the Kellogg-Briand Pact, international law progressed from *jus ad bellum* to *jus contra bellum.*[99] A number of the *lacunae* previously referred to that existed in consequence of the Covenant of the League of Nations were closed but it still remained lawful to resort to war under three circumstances: (1) A war of self defence,[100] (2) war as an instrument of international policy,[101] and (3) war outside the span of the reciprocal relations of the contracting parties.[102]

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96 Green 1993: 7. See also Dinstein 2001: 78 and further.

97 Green 1993: 7. The parties to this instrument condemned recourse to war for the solution of international controversies, and renounced war as an instrument of national policy in their relations with one another and committed themselves never to seek settlement of their disputes except by peaceful means. See also Dinstein 2001: 78. Before the outbreak of World War II, the Pact had sixty-three contracting parties, which was a record number during that period. See also Bailey: 1972: 41 who comments that its significance was not that it would or could or did prevent resort to war; but "… *that the initiative for it had come from the United States, which had decided to stay out of the League*".

98 Dinstein 2001: 78.

99 Dinstein 2001: 78.See also Kritsiotis 2004 52 and further.

100 Dinstein 2001: 78 and further. No provisions were made in the Pact regarding this vitally important subject. See also De Lupis 1987: 56.

101 Dinstein 2001: 79 and further. War remained lawful, as instrument of international policy, despite that it had now been declared as unlawful under national policy.

102 Dinstein 2001: 80. The author remarks: "*The renunciation of war in Article 1 was circumscribed to the relations between contracting parties inter se. Therefore, the freedom of war was preserved as between contracting and non-contracting parties (and obviously, among non-contracting parties)"*. Dinstein therefore concludes that

5.5 Other measures

The Pact of Paris was followed by a League of Nations resolution, which stated that:

> "*…it is incumbent upon the members of the League of Nations not to recognize any situation, treaty, or agreement brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris*".[103]

An attempt to provide punitive measures by way of sanctions was made by the International Law Association in 1934 when it adopted the *Budapest Articles of Interpretation.*[104] The Articles stated that a party could not release itself from the Pact of Paris by denunciation or non-observance. It then proceeded to provide that in the event of a resort to armed force or war by one party against another, third states could, without breaking any rule of international law, deny the aggressor any of the rights that would normally attach to a belligerent in its relations with neutrals. A neutral state was not obliged to observe towards an aggressor any of the duties of a neutral. At the same time it provided that third states could legally provide the victim with any assistance it may require, including armed forces. Finally, a violating state was liable to pay compensation for all damage caused by a violation of the Pact to any signatory state or its nationals.[105]

In addition to these multilateral efforts to control aggression and to condemn it as a crime, there was a series of bilateral treaties that sought to do the same. It was the breach of many of these treaties by Germany that laid the foundation for the charge of waging aggressive war against this country at the conclusion of World War II.[106]

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the *jus ad bellum* engendered by the Kellogg-Briand Pact was flawed in four ways: (1) the use of self-defence was not clearly addressed, (2) no agreed limits were placed on the legality of war as international instrument, (3) the prohibition of war did not embrace the entire international community and (4) forcible measures short of war, were not considered.

103 Green 1993: 7.

104 Green 1993: 7. The International Law Association was a non-governmental, but influential body of international lawyers.

105 Green 1993: 8.

106 Green 1993: 8.

6. Conclusion

This chapter has indicated that antiquity provides more than ample proof that the consciousness of mankind dictated that there should be some form of regulation and restraint regarding the waging of war. For the purpose mainly of self-preservation, treaties were concluded between nations as to the manner war was to be conducted as far back as the second millennium B.C.

Although the early proscriptions regarding warfare related mostly to the way in which a war was to be conducted, there are clear signs that the limits of war making emerged very early, as in the case of private reprisal by one nation against another, which was proscribed as an option only where the purpose thereof was to make the enemy desist from continuing with illegal practices of warfare.[107] As far as the prosecution of individuals was concerned for atrocities against civilians and war crimes, the prosecution of Peter Von Hagenbach in 1474, laid the early foundation for states collectively undertaking such prosecutions.[108] It is interesting to note that he was not tried for crimes committed during wars but rather for crimes against the "*law of God and man*" in the execution of military occupation.[109] This may very well be interpreted as the first precursor towards a universal morality on conduct that is internationally recognised as criminal.

The Hague Conventions of 1899 and 1907 saw the first general curtailment on the freedom of war making. It incorporates for the first time the concepts of negotiated settlements, compromises and arbitration as alternative options to the *jus ad bellum* in international law.[110]

In the efforts of the *Commission on the Responsibility of the Authors of War* and on the *Enforcement of Penalties for Violations of the Laws and Customs of War* further determination is witnessed by the international community to

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107 Bassiouni 1996: 76.

108 Bassiouni 1980: 8. A tribunal composed of judges from 28 Allied states of the Roman Empire heard the matter.

109 Bassiouni 1980: 8.

110 Dinstein 2001: 75.

prosecute those responsible for war crimes and importantly, violations of the laws of humanity.[111] Although most of the Commission's recommendations were not subsequently adopted, they laid the foundation for a number of novel concepts in international law, particularly international criminal law. In addition to war crimes and the crime of wars of aggression, crimes against humanity were now also recognised.

The Treaty of Versailles saw the legality of prosecutions of those responsible for waging aggressive war before International Tribunals established in treaty. The post-World War I era further witnessed the initial proposals for an international criminal code as well as an international criminal court.[112]

The efforts of the League of Nations witnessed attempts to close gaps occasioned between the hitherto *jus ad bellum* and *jus contra bellum* by attempting to qualify the right to engage in war in a more comprehensive way.[113]

The Kellogg-Briand Pact was successful in closing some of these gaps more comprehensibly but failed to define a war of self-defence, a war of international policy and of course had no remedy to the application of its proscriptions to non-member parties.[114] Commenting on these early attempts to regulate war and to establish an international criminal court, Cassese states:

> "*Such early attempts were laudable for their far-sighted recognition of the need for an international organ of criminal jurisdiction. Nevertheless, these initiatives could not bear fruit in a period which placed an exceptionally high premium on considerations of national sovereignty*".[115]

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111 Bantekas and Nash 2003: 325.
112 Lippman 1991: 14 and further.
113 Dinstein 2001: 75.
114 Dinstein 2001: 80.
115 2003: 329.

Many of the problems faced in the early period of international criminal law and justice are still faced today in the continuing process of shaping an international justice order.

Chapter 4
The Nuremberg and Tokyo Military Tribunals

1. Introduction

Was the international community ready to deal with the magnitude of the atrocities that resulted from World War II in a legal way? Does the way in which they were eventually dealt with leave the world with a worthwhile legacy rather than a travesty of justice? Did this horrific phase in the history of modern man bring the world closer to a new global order based on international rule of law? At the time the international community was dominated by considerations of national sovereignty.[1] Was the international community prepared however to act on that which it had so meticulously set out for itself as was documented in the previous chapter?

In this chapter, the background to the establishment of the International Military Tribunal will be recorded. It proceeds to record the law and jurisdiction of the International Military Tribunal. It then records and critically examine the criticisms that have been levelled against it. It concludes that the IMT contributed significantly to the development of international criminal law and justice, although the legal premise from which it proceeded may legitimately be described as unprecedented in international law at the time. Cassese aptly remarks:

> "*that it took the full extent of the atrocities committed during the war to demonstrate the pernicious consequences that could follow from the pursuit of extreme notions of State sovereignty and to jolt the international community out of its complacency*".[2]

1 Cassese 2003: 329.
2 2003: 330.

2. Background

In terms of the *Moscow Declaration* of 1 November 1943, the Allies of World War II affirmed their determination to prosecute the Nazis for war crimes committed during the war.[3] This followed the atrocities and barbarities committed by the soldiers and the leaders of the belligerents during World War II.[4] *The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*, *and Establishing the Charter of the International Military Tribunal* (IMT) was adopted on 8 August 1945 and was signed by the representatives of the four Allied powers, the United Kingdom, the United States of America, the Soviet Union and France.[5] It was referred to as the *London Declaration*.[6] The Charter of the International Military Tribunal was annexed to the Agreement.[7] The trial, known as the *Trial of the Major War Criminals,* began in November 1945, and a year later it concluded with the conviction of nineteen defendants and the imposition of sentences of death in twelve cases.[8]

Additional trials, referred to as the *Nuremberg Trials,* were held of Nazis involved in World War II and in the Holocaust. The trials were held in the German city of Nuremberg (Nurnberg) from 1945 to 1949 at the Nuremberg

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3 Schabas 2001: 5. See further Bodley 1999: 424, Frencz, 2000: 3 and further, Overy 2003: 1 and further and Cassese 2003: 330 who records that after the defeat of Germany, the British led by Churchill stated that it was enough to arrest and hang those primarily responsible for the atrocities committed during the war and to waste no time on prosecutions. It was further suggested that minor criminals could be tried by specially created tribunals. However, because of opposition from the US and indeed also the USSR, the IMT was established. The reasons advanced by the US at the time for due prosecutions were (1) how could the enemy be condemned without a due process of law, (2) that setting up the IMT, thereby "*dramatically rehearsing*" the Nazi crimes and of racism and totalitarianism would make a great impression on the world opinion and would serve to 'demythologise' the Nazi State, and (3) there was a desire on the part of the Allies to act for posterity leaving a record for generations to come.

4 For a general discussion see Best 1997: 60-64.

5 Schabas 2001: 5. See also Bodley 1999: 424.

6 Bassiouni 1996: 80.

7 Schabas 2001: 5. Nineteen other States were in favour of the prosecution, and although they played no active role in the Tribunal's activities, adhered to the treaty in order to express their support for the concept.

8 Schabas 2001: 6. See also Lippman 1991: 20 and further.

Palace of Justice.[9] Additional to the Nuremberg and Tokyo International Tribunals, the Allies established military tribunals in their respective zones of occupation. This was achieved under *Control Council Ordinance No.10 of 20 December 1945.* It decreed that each occupying power could try lower level German officials.[10] Lastly, several Allied nationals were prosecuted for collaboration with the enemy and for commission of war crimes and crimes against humanity.[11]

Germany itself further took up the task of prosecuting war criminals after the conclusion of the Nuremberg trials and the trials of the occupying powers, which cases were handled through its municipal courts.[12]

3. Law and jurisdiction

The Tribunals' jurisdiction was confined to three categories of offences, namely, crimes against peace, war crimes[13], and crimes against humanity.[14]

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9 http://en.wikipedia.org/w/wiki.phtml: 5/20/2004:1 the Palace of Justice was the only court in Germany that was large enough to host the event that had not been destroyed by Allied bombing.

10 Bassiouni 1980: 9. The author records: "*Prior, during and after the Nuremberg trials the United States convicted 1814 (450 executed) in its occupying zone; Great Britain 1085 (240 executed), France 2107 (109 executed), and the USSR an estimated 10 000 (number executed unavailable). The total number of additional prosecutions per allied power as reported by the United Nations War Crimes Commission were: United States, 806; Britain, 524; Australia, 256; France, 254; The Netherlands, 30, Poland, 24, Norway, 9, Canada, 4, China, 1*".

11 Bassiouni 1980: 9.

12 Bassiouni 1980: 10.

13 See Cassese 2003: 48 and further on the notion and elements of this crime.

14 Schabas 2001: 6. The author elaborates on the crimes within the IMT's jurisdiction: *Crimes against peace*: Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurance, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; *War crimes*: Namely, violation of the laws or customs of war. Such violation shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or from any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the sea, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators, and accomplices,

The judges for the Nuremberg Tribunal were provided by the four Allied powers: each providing one judge and one alternate. Defendants were not allowed to complain about the selection of the judges, with the result that it has been argued that the Tribunal was not impartial.[15] The Constitution of the International Military Tribunal for Nuremberg consisted of seven parts and comprised a total of 30 articles. Article 1 established an International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis Powers**.** It stated:

> "*Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [were to be held criminally] responsible for all acts performed by any person in execution of such plan*".[16]

Article 7 stipulated that the official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or of mitigating punishment. Later the Tribunal declared that:

> "*[h] e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law*".[17]

Article 8 stipulated that the fact that a defendant acted pursuant to order of his government or of a superior should not free him from responsibility, but that it could be considered in mitigation of punishment if the Tribunal determined that justice so required. According to the Tribunal the true test was to be found in varying degrees in the criminal law of most nations, not in the

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participating in the formulation or execution of a common plan, or conspiracy, to commit any of the foregoing crimes, or responsible for all acts performed by any person in execution of such plan. See also de Than and Shorts 2003: 273, and Lippman 1991: 26. The Charter's provisions resulting in the prosecutions for 'crimes against humanity', was a novelty in international criminal law and therefore constituted an *ex post facto* provision. See further Overy 2003: 15 and also Cassese 2003: 64 and further on the notion and elements of crimes against humanity. In the IMT trials, genocide was treated as a sub-category of crimes against humanity.

15 De Than and Shorts 2003: 275.

16 Lippman 1991: 26.

17 De Than and Shorts 2003: 275. See also Lippman 1991: 26.

existence of an order, but in whether a moral choice was factually possible in the circumstances.[18] The article 8 stipulations were undoubtedly inserted into the Nuremberg Charter as a result of the World War I experiences when such defences were raised in prosecutions.

Article 9 established organisational criminality. In terms of this article, the Tribunal was authorised to declare a group or organisation of which any defendant was a member, to be a criminal organisation. This will be referred to again at a later stage. Article 10, continuing on organisational criminality, stipulated that where the Tribunal had declared a group or organisation criminal, any signatory would consequently have the right to bring individuals to trial for membership thereof before a national, military or occupation court.[19]

In terms of article 26 of the Nuremberg Charter, the Tribunal was required to state the reasons on which it based its findings of guilt or innocence and was empowered to impose any punishment, including the death penalty, which it determined to be just.[20]

4. The International Military Tribunal of the Far East

Relating to the Pacific Ocean arena, the Allies established the International Military Tribunal for the Far East. In terms of article 1 of its Charter, it was established "*for the just and prompt trial and punishment of the major war criminals in the Far East*". The permanent seat of the Tribunal was in Tokyo. The bench of this Tribunal was more cosmopolitan than that of the Nuremberg Tribunal, consisting of judges from eleven countries, including India, China and the Philippines.[21] This Tribunal started its work in 1946, and twenty-eight persons were tried before it, of whom seven were sentenced to death.[22]

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18 De Than and Shorts 2003: 275. See also Lippman 1991: 26.
19 Lippman 1991: 27.
20 Lippman 1991: 27.
21 Schabas 2001: 7. See also Cassese 2003: 332.
22 Bassiouni 1980: 10.

In addition to the Tokyo war crimes trials, the United States established special military commissions in the Philippines to try Japanese officers for war crimes. The United States Supreme Court affirmed the decisions of those commissions.[23]

The Tokyo Trial, which commenced on 3 May 1946 and that lasted for two and a half years, was the source of much controversy during and after the trail. Some argued that the Trial was either a way for the US to take revenge for the treacherous attack on Pearl Harbour, or stilling American national guilt over using atomic weapons in Japan. The Trial was also attacked on grounds of its alleged illegitimacy.[24]

5. The main defences raised and the Tribunal's responses

The following were the main arguments presented at the trials pursuant upon World War II. (1) The creation of the tribunal and its composition by Allied decree was not in accordance with pre-existing international law and was therefore invalid. (2) The crimes that were charged, violated the principle of legality in criminal law, and were *ex post facto.* (3) The penalties imposed violated the principles of legality expressed in the maxim, *nulla poena sine lege.* [25] To the last argument the Tribunal responded that its jurisdiction was based upon the law of the Nuremberg Charter, and concluded that the:

> "*...drafting and implementation of the Charter was the exercise of 'sovereign legislative power by the countries to which the German Reich had unconditionally surrendered*".[26]

The argument continued further that these countries had the undoubted legal right to legislate for the territory they occupied at that time. The Tribunal avoided addressing the issue as to whether the charge of war of aggression

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23 Bassiouni 1980:10: Here, it is noteworthy that the only case brought by the Japanese citizens for war crimes, namely the use of atomic weapons by the USA, was rejected by the Supreme Court of Japan on jurisdictional grounds.

24 Cassese 2003: 332.

25 Bassiouni 1980: 11. See also Dinstein 1965: 130 and further.

26 Lippman 1991: 28.

violated the legal principles of *nullum crimen sine lege* and *nulla poena sine lege.*[27] It conceded that the pact did not include penal provisions. It observed that there existed no international legislature, that treaties must address general principles and "*usually are not concerned with administrative matters of procedure*".[28]

From the above it is clear that the Tribunal responded positively to only the first defence. Despite criticisms which will be evaluated below however, it must be commented that the trials began the process of applying international criminal law, whether existent or nascent, to protect fundamental human rights. The trials also demonstrated the need for a more permanent and authoritative body of laws to effectuate the systematic prosecution of war criminals.[29]

6. Criticisms

6.1 Legal justification

Academic commentators hoped that the eventual defeat of Germany and the trial of Nazi leaders would be the first steps in the establishment of an

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[27] Lippman 1991: 28. The Tribunal ruled that the prohibition on *ex post facto punishment* was not a limitation on the sovereignty, but was in general a principle of justice. In this instance, so Lippman indicates, the Tribunal argued that it was not unjust to punish *"those who attacked neighboring [sic] states without warning, and in defiance of treaties and assurances. In such circumstances, the attacker 'must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished*". The Tribunal suggested that the defendants must have known of the treaties that were signed by Germany requiring the pacific settlement of disputes. The Tribunal was certain that the Germans were aware of the international prohibition on the aggressive use of force. So for example according to the author, the Tribunal noted that the defendants must have been aware of the *Kellogg-Briand Peace Pact of 1928*, which pact was signed by sixty-three nations, including Germany, Italy, and Japan. In terms of this pact, the signatories had agreed to settle their disputes by pacific means and in terms of the pact, further condemned the resource to war for the solution of international disputes.

[28] Lippman 1991: 29. The author shows that as a result the Tribunal argued that the interpretation of treaties must be guided by the principle that international law is not "*static, but by continual adaptation follows the needs of a changing world*". The argument went further, according to the author, in that the Tribunal argued that in assessing these needs, it is vital to consider the customs and practices of states and the general principles of justice applied by jurists and military court.

[29] Latore 2002: 162. See also Marquardt 1995: 82.

international criminal code and court. The views of the late Professor Hersch Lauterpacht of Cambridge University at the time were notable. While most international law scholars at the time confined themselves to the practical task of developing a legal justification for the prosecution of Nazi combatants and leaders, Professor Lauterpacht disassociated himself from "*the juridically unsound and retrogressive*" view that international law prohibited German prosecution of Nazi war criminals. Lauterpacht argued that the experience of World War I

> "*Indicated that a defeated belligerent could not be counted on to punish combatants accused of war crimes*".[30]

Lauterpacht conceded that there was little practical prospect of an international court being established. As a result, the prosecution of war criminals, of necessity, had to be unilaterally assumed by the victorious parties. He added that it was essential though that such prosecution be conducted in an impartial fashion, which was in accordance with existing rules.[31] Lauterpacht was the author of what he styled a "*coherent legal justification for war crimes trials*":[32] According to Lauterpacht, the right of a belligerent to punish enemy combatants for violations of the laws and customs of war was recognised under the law of various states. This resulted from an application of the territorial principle of jurisdiction under which a state has jurisdiction over criminal acts which occur within its recognised boundaries. As for acts committed on the territory of an adversary, such as the maltreatment of prisoners of war, Lauterpacht argued that a belligerent could rely upon a rule, which international law has not held as illegal, that a state may punish criminal acts against its nationals committed by foreigners abroad. Thus in Lauterpacht's view, it would be legally permissible for either Great Britain or the United States to have extended their jurisdiction to encompass war crimes committed abroad by German against British or American nationals. As far as the prosecution of enemy soldiers and leaders in international law is concerned, Lauterpacht contended that it was permissible and did not

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30 Lippman 1991: 16.
31 Lippman 1991: 17.
32 Lippman 1991: 17.

constitute an *ex post facto* application of the law. Professor Lauterpacht pointed out that:

> " *…while international law traditionally imposed liability upon states to pay damages for violations of the laws and customs of war, such liability did not exclude the punishment of individuals. The provisions of the law of war are codified in international documents and incorporated into states' military codes. Combatants thus should be aware of the requirements of the law of war*".[33]

The decision to declare the German leaders personally liable for war crimes by the Allied forces was reached following relatively limited debate. The arguments of Professor Andre Gros of France, who argued that the fact that German aggression was an international crime did not mean that individual Germans could be held criminally liable, and that the imposition of such liability would be "*morally and politically desirable but is not international law*", did not receive Allied support.[34]

Because the Charter for the International Military Tribunal had been adopted after the crimes were committed, the Tribunal was attacked on the grounds that its action amounted to *ex post facto* criminalisation and, as has been referred to above, this was one of the main defences raised at the trials.[35] It is widely held, especially among German scholars, that the law that was applied at Nuremberg had its origins in the *Charter of London* rather than in pre-existing conventional and customary law.[36] Implicit in this assertion however, is a reliance on the doctrine of *rebus sic standibus,* which is the nullification of binding treaties because of circumstances.[37] This principle assumes that The Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1925 and 1929 ceased to bind Germany once it was at war with other signatories to the agreements.[38] Chaney[39] argues that reliance upon this principle is wrong in the context of the Nuremberg trials,

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33 As quoted in Lippman 1991: 17.
34 Lippman1991: 22.
35 De Than and Shorts 2003: 274.
36 Chaney 1995: 71.
37 Chaney 1995: 71.
38 Chaney 1995: 72.

> "*…if, as is often argued, the laws that the major war criminals were charged with violating may be held to have been jus congens [sic] law*".

He continues:

> "*If they were indeed pre-emptory norms, then neither subsequent agreement, nor circumstances, nor German policy or law could supersede these laws*".[40]

The Charter of London may then rightfully be construed as the legal basis of the IMT and may be looked upon as:

> "*…a restatement of the existing law. The instrument itself, however, clearly was not the source of the law*".[41]

Writers who acknowledge pre-Charter law as the foundation of the trials also often question the application of that law to *criminal* proceedings. In terms of this argument, it is recognised that although The Hague and the Geneva Conventions as well as the Kellogg-Briand Pact unequivocally declared aggressive war, war crimes and crimes against humanity to be immoral and illegal, they nevertheless possessed no penal element and thus no penal capacity. These arguments were rejected by the Tribunal and in doing so it referred to The Hague Conventions for war crimes and to the 1928 Kellogg-Briand Pact for crimes against peace.[42] A central issue at the drafting conference of the Nuremberg Charter was the American proposal to follow the suggestion of the World War I *Commission of the War and on Enforcement of Penalties* to penalise the launching of a war of aggression.[43] Differences of opinion however existed regarding this aspect: Professor Gros pointed out that:

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39 1995: 72.

40 Chaney 1995: 72.

41 Chaney 1995: 72.

42 Chaney 1995: 72; Schabas 2001: 6: "*The Kellogg-Briand Pact was an international treaty that renounced the use of war as a means to settle international disputes. Previously, war as such was not prohibited by international law. States had erected a network of bilateral and multilateral treaties of non-aggression and alliance in order to protect themselves from attack and invasion".* See also De Than and Shorts 2003: 274. This defence was countered by the argument that those states which attack another state in contravention of existing treaties, e.g. the Pact of Paris, The Hague Conventions and the Geneva Conventions to which the attacker was a party, must be aware that they were doing wrong and that it was in violation of a treaty agreement, and therefore their conduct must be judged as illegal.

43 Lippman 1991: 23.

> "*International law generally had not limited states' use of force and did not recognize a just war doctrine*".[44]

Professor Gros contended:

> "*…that while an aggressive state may agree to compensate an aggrieved state or to repair damages, there was no criminal sanction imposed upon government officials initiating or waging a war of aggression*".[45]

This was simply not international law according to Gros.[46]

American Justice Jackson on the other hand, was intent on penalising the Germans for waging an aggressive war. To him, Germany had launched an aggressive war against the international order and it clearly threatened the world order, thus constituting an international crime. The aggressive war charge also provided justification to the English and the Americans for the expansion of the tribunal's criminal jurisdiction to include acts against civilians, acts which otherwise would fall within Germany's domestic jurisdiction. The aggressive war charge was eventually included in the Nuremberg Charter but the definition of aggressive war was left to the Tribunal.[47]

6.2 Novelties in international criminal law

An inordinate amount of time was devoted, when the Nuremberg Charter was formulated to the American proposal dealing with what is referred to as "*organisational*" criminality. This is also sometimes referred to as the charge of conspiracy or common plan.[48] In terms hereof it was envisaged that the tribunal declare certain voluntary Nazi organisations as criminal.[49] In turn, occupation courts could hold low-level members of such organisations criminally liable simply because of their membership in terms of this

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44 As quoted in Lippman 1991: 23.
45 As quoted in Lippman 1991: 23.
46 Lippman 1991: 23.
47 Lippman 1991: 25.
48 Chaney 1995: 72.
49 Lippman 1991: 25.

declaration. This American proposal was accepted, but the conferees clarified that only voluntary and knowing membership would be considered criminal. Not only was the indictment of organisations novel under international law, the principal of conspiracy was exclusive to Anglo-American jurisprudence. What was also criticised as novel, "*and in violation of Rousseau's Social Contract*", was the International Military Tribunal's practice of subjecting individual actors, including heads of state, to the law of nations.[50] German scholars have often argued that heads of state act on behalf of their governments and should consequently only be held accountable under the law of the particular nation.[51]

6.3 Selective indictments

It has been indicated that one of the probably most valid criticisms against the International Military Tribunal was its failure to indict Allied offenders guilty of war crimes. Even the American chief prosecutor, Robert H. Jackson, who in his opening address before the International Military Tribunal noted:

> "*While this law is first applied against German aggressors, if it is to serve any useful purpose it must condemn aggression by other nations, including those who sit here now in judgment*"[52]

recognised this.

6.4 Moral justice

The Nuremberg trials have drawn their strongest support from English and American jurists and legal scholars who generally take a traditional approach to the proceedings in frequent reference to the role of the International Military Tribunal in the administration of moral justice. The Tribunal held that the prohibition of retroactive crimes was not against a principle of justice, and:

> "*…that it would fly in the face of justice to leave the Nazi crimes unpunished*".[53]

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50 Chaney 1995: 73.
51 Chaney 1995: 73.
52 As quoted in Chaney 1995: 89.

These writers according to Chaney,

> *"...generally convey what Professor Ole R. Holsti may label a global-realist perspective. While they appear to hold realist views regarding the central problems and the key actors within the international system, their writings at the same time elevate the conception of a global society and recognize a degree of complex interdependence. Additionally, this group, while maintaining a realist commitment to the geographically based nation-state, evinces an acknowledgment of a commitment to the emerging global values and institutions that transcend the nation-state".*[54]

These writings are often characterised by "*an implicit acknowledgement of Anglo-American exceptionalism*".[55] According to this group of scholarship on the Nuremberg trials, a new era of interdependence between states emerged following World War I, and modern advances in technology placed unprecedented destructive powers in the hands of individuals and that this very destructive capability:

> "*…demanded heightened international interaction and cooperation, as well as further development of substantive and procedural international law, to ensure global stability and national security. Increased global interaction brought the conclusion of numerous treaties and agreements codifying international custom and aspiration*".[56]

This group of scholars on Nuremberg would argue that because Germany was a signatory to The Hague and the Geneva Conventions as well as the Kellogg-Briand Pact, it endorsed the very law invoked at the Nuremberg proceedings.[57]

The moral justice argument was particularly important for the crimes against humanity, as for this crime, there was little precedent.[58]

7. Impact

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53 A s quoted in Schabas 2001: 6.
54 1995: 77.
55 Chaney 1995: 78.
56 Chaney 1995: 78.
57 Chaney 1995: 79.
58 Schabas 2001: 6.

In order to prevent the recurrence of similar arguments should prosecutions arise in future, efforts were made after World War II to codify some of the principles and norms that were challenged.[59] Notably, one of such efforts was the *Principles of the Nuremberg Tribunal, no 82 of 1950.*[60] The Nuremberg principles fundamentally shaped the fabric of the future international criminal justice.[61] This is so because, amongst other things, it expanded the list of international crimes beyond war crimes to new areas such as crimes against peace, referring mainly to wars of aggression, and crimes against humanity, namely the inhumane acts perpetrated against civilian populations, and genocide. This meant that by extending the jurisdiction of international criminal law, the Nuremberg principles became the first articulation of general international human rights. It also introduced the expectation that political leaders could no longer hide behind national sovereignty, but were accountable to the international community and that following orders was no longer an acceptable defence.[62] In its introductory note, the General Assembly directed the International Law Commission to formulate the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal. The International Law Commission proceeded to state that instead of considering to what extent the principles stated in the Charter and the judgment of the Tribunal constituted International Law, it would rather, and because these principles had been affirmed by the General Assembly, merely formulate them.

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59 Bassiouni 1980 11 comments on the impact of the Nuremberg trials: "*In 1947, the General Assembly of the United Nations adopted the International Law Commission's draft of a Formulation of the Nuremberg Principles, in 1948, the Genocide Convention was drafted, in 1949, the International Committee of the Red Cross opened for signature four Geneva Conventions in 1953, the United Nations Committee on the Creation of an International Criminal Jurisdiction submitted a 'Draft Statute for an International Criminal Court' (tabled); in 1954, the General Assembly was presented with the 'Draft Code of Offences against Peace and Security of Mankind'(tabled); and in 1968, the General Assembly passed a resolution entitled 'Convention on the Non-applicability of Statutes of Limitations to War Crimes and Crimes against Humanity*"

60 Bodley 1999: 424.

61 Gallaroti and Preiss 1999: 4. See also Clapham 2003: 31 and further. The author indicates that the Nuremberg trials represented a very 'radical' moment in the history of human rights and humanitarian law in that there occurred a paradigm shift in international law. It moved to beyond the obligations on states and attached duties on individuals.

62 Gallaroti and Preiss 1999: 4.

7.1 Formulation of international criminal law

The following seven principles, known as the "*Nuremberg Principles*" were formulated by the International Law Commission and approved by the United Nations.[63] They were formulated by the directive of the General Assembly:[64]

> "*(1) …any person who commits an act which constitutes a crime under international law is responsible therefore and liable for punishment,*
> *(2) The fact that internal law does not impose a penalty for an act that constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law,*
> *(3) The fact that a person who committed an act, which constitutes a crime under international law, acted as Head of State or responsible Government official does not relieve him from responsibility under international law,*
> *(4) The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him,*
> *(5) Any person charged with a crime under international law has the right to fair trial on the facts and law,*
> *(6) The hereinafter-set are punishable as crimes under international law:*
> *(a) <u>Crimes against peace:</u>*
> *(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;*
> *(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i),*
> *(<u>b) War crimes:</u> violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity,*
> *<u>(c) Crimes against humanity:</u> murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime, complicity in the commission of a crime against peace, a war*

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63 Van den Wyngaerdt 2000: 203-204. See also Bailey1972: 43 who comments that it is without doubt that the Nuremberg procedure was partially defective and that the United Nations General Assembly "*was careful not to endorse the entire Nuremberg procedure, but only to affirm 'those principles of international law' which are to be found in the Charter and the judgment of the Tribunal*".

64 Bailey 1972: 43.

crime against humanity as set forth in Principles VI is a crime under international law".[65]

In a further reaction to the crimes of the Nazi regime, the four Geneva Conventions of 1949 came into being which served as a further major development of international criminal law. The four Geneva Conventions of 1949 expanded on earlier treaty law "*to create a vast body of legal provisions governing conduct during wartime*".[66] They established the "*grave breaches system*" under which state parties are required to criminalise certain acts and must either prosecute perpetrators for the acts in their national courts or extradite them to another state that is willing to prosecute them.[67]

7.2 Establishment of individual responsibility

It is recognised that the Nuremberg Charter provided a useful precedent to bridge the difficulties, which up to then, had successfully prohibited any attempt to impose responsibility upon individuals.[68] It therefore cleared the way for the imposition of liability upon individuals, and the Nuremberg experience is thus for this reason, a significant landmark in the history and development of international criminal law.[69]

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65 Article 8 of the Charter's proviso read: "*…but may be considered in mitigation of punishment if the Tribunal determines that justice so requires"*. See also Lippman 1991: 22. The Bailey 1972: 43 indicates that the agreement to prohibit the act of state and superior orders defences in drafting the Nuremberg Charter, although the latter could be taken into account for purposes of mitigation, was motivated by the concern that "*the combination of these two doctrines means that nobody is responsible*".

66 Marler 1999: 827.

67 Marler 1999: 827.

68 Garcia-Mora 1962: 38 state that… "*Insofar as criminal responsibility was attached to certain Nazi leaders at Nuremberg, international law was eminently successful in punishing individuals for the violations of its tenets. The Tribunal left no room for doubt when it said that 'international law imposes duties and liabilities upon individuals as well as upon states…*". See also De Than and Shorts 2003: 273.

69 Garcia-Mora 1962: 38. See also Dixon and McCorquodale 2003: 148 where Lord Browne-Wilkinson in the case of *Pinochet* is quoted as follows: "*Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth. The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after 1939-45 War, the international community came to recognize that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity. Although there might be legitimate doubts as to the legality of the Charter of the International Military Tribunal appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter)… in my judgment those doubts were stilled by the Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal*

7.3 Crimes against humanity rooted in international law

For the first time individuals were held responsible not only for war crimes which were until then held to be contrary to international humanitarian law, but now also for conduct which amounted to crimes against humanity.[70] They were enumerated in article 6(c), and included:

> "*Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated*".[71]

7.4 Precise definitions

For the first time, precise definitions were set out in the Nuremberg Charter, in article 6, which set out the meanings of these crimes and the circumstances according to which these offences could be committed.[72] What is perhaps further significant is that because the principles of the Nuremberg Charter were recognised by the UN General Assembly in 1946, the Nuremberg Charter's definition of persecution as a crime against humanity, led to the adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide* in 1948, which allowed for possible trials of alleged perpetrators before an international tribunal.[73] Furthermore, the definition of war crimes that was contained in the Nuremberg Charter was codified and further

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adopted by the United Nations General Assembly on 11 December 1946. That affirmation affirmed the principles of international law recognized by the Nuremberg Charter and the judgment of the tribunal and directed the committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognised in the Nuremberg Charter. At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law".

70 De Than and Shorts 2003: 273. See also Mettraux 2002: 237: The author notes as follows on the significance of the Nuremberg trials: "*The creation and development of the offence crimes against humanity initiated at Nuremberg has been an important piece of the humanitarian historical puzzle, marking the end of the all-powerful state, critically re-framing the relationship between the state and its citizens, and furthering the recognition of individuals' nascent role in international law*".

71 Lippman 1991: 34. See also Cassese 2003: 333 and Cassese 2005: 59.

72 De Than and Shorts 2003: 273.

73 Bodley 1999: 424.

developed in the four Geneva Conventions for the protection of war victims that was adopted by the UN General Assembly in 1949.[74]

7.5 Sovereignty and the exercise of universal jurisdiction

It may be stated that while states were willing to sign general statements of principle until then, they resisted efforts to interfere with what they regarded as sovereign jurisdiction of a state.[75] However, the atrocities committed in World War II would change this forever. Therefore a further significance of the World War II prosecutions is that these prosecutions additionally served to pave the way towards the exercise by states of what is referred to as "*universal jurisdiction*". In recent years, courts around the world have relied on universal jurisdiction with increasing frequency in order to justify proceedings against alleged perpetrators of human rights offences in foreign countries.[76] Until after the end of the Second World War, piracy was the sole "*universally cognizable*" offence in international law.[77] Because the victorious Allied powers wanted to prosecute Axis leaders for their unprecedented atrocities, and because it was recognised that not all of the crimes committed were committed against the Allied nations, it was unclear whether the Allies had, under traditional jurisdictional rules, a sufficient connection to prosecute all the Nazi crimes.[78] Thus several of the Allied tribunals justified their proceedings through invocation of the principle of universal jurisdiction.[79] These tribunals cited piracy as example and thus precedent, for exercising universal jurisdiction.[80] This represented the first judicial use of the piracy analogy in support of universal jurisdiction over crimes other than piracy.[81]

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74 Bodley 1999: 424.

75 Cassese 2003: 333. The author comments as follows on the impact of the IMT: "*First, they broke the 'monopoly' over criminal jurisdiction concerning such international crimes as war crimes, until that moment firmly held by States. For the first time non-national, or multi-national, institutions were established for the purpose of prosecuting and punishing crimes having an international dimension and scope*".

76 Kontorovich 2004: 183.

77 Kontorovich 2004: 194.

78 Kontorovich 2004: 195.

79 Kontorovich 2004: 195.

80 Kontorovich 2004: 195.

81 Kontorovich 2004: 195. The author indicates that the authority or jurisdiction of the tribunals could have been sustained without invoking universal jurisdiction, the most

Despite the charge often levelled at the Nuremberg and Tokyo Tribunals that it reflected so called victor's justice, they promoted the development of international criminal law.[82]

8. Conclusion

The Nuremberg trial will remain controversial, and it is submitted that this is so because the international community was faced with an unprecedented, horrific and flagrant violation of everything it had so meticulously endeavoured to proscribe in the years preceding World War II. What were the alternatives to the Nuremberg model often so vehemently criticised? Had an international rule of law developed to such an extent at the time that it was possible that the prosecution of Nazi war criminals could have occurred in a substantially different way? What, in conclusion, was the justification and the impact of the Nuremberg trials? The Nuremberg model inevitably conjures up the "*most familiar vision of an international criminal court*" as Paul Marquardt,[83] writes, namely that it intervenes against the wishes of a national government, or as is often described, represents victor's justice. Justification of the Nuremberg trials must therefore of necessity lie in the question as to how else those in control were to be held criminally responsible for the most heinous international crimes, if that repressive government was not disposed of from within or without, or unless it unlikely consented most unlikely, to the prosecution of its leaders?[84] It is submitted, as Marquard does, that it is often only in defeat or disgrace that criminals such as Hitler and the rest of his top hierarchy, are handed over by the governments they control.[85] The

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promising being the so-called 'delegated territoriality' jurisdiction. In terms of this principle, so the author indicates, they might have argued that as successors-in-interest to Germany's sovereign power, they had the right to prosecute offences committed on its soil or by its citizens. The author shows that the piracy analogy for the exercise of universal jurisdiction in relation to the so-called core crimes is faulted in that amongst others things piracy co-existed with privateering in earlier times, the latter being a 'legitimised' form of piracy. He indicates that because piracy was not regarded as being uniquely heinous that heinousness therefore could not possibly have motivated its unique jurisdictional status.

82 Charney 1999: 464.

83 1995: 96.

84 Marquardt 1995: 96.

85 Marquardt 1995: 96.

justification for the Nuremberg trials thus lies in the necessity of the moment, and not in technically correct international legal precedent. Dugard submits in response to the charge that the Nuremberg trials offended the principle of *nullum crimen sine lege* by prosecuting crimes against humanity in particular, that certain acts are *mala in se.*[86] No legal system or superior order can ever justify the type of conduct that is denounced as a crime against humanity.[87]

As to the impact of the Nuremberg trials, it remains a fallacy to argue that these trials contributed in any significant way to deter future violations of heinous international crimes. History after Nuremberg simply does not support such a contention.[88] That Nuremberg has "*come to represent a moral imperative for individuals to act to prevent governmental illegality"*, remains an idealistic dream. Self-interest of nations and power politics simply will never support such a contention. [89]

The real and substantial legacy of Nuremberg must thus be sought elsewhere, and it has been demonstrated that it is often a legacy that has been born of necessity, and that it has often not followed the route of proper legal precedent. It is submitted that although this may be so, the five to six million lives lost as a result of the atrocities committed out by the Hitler regime did not allow the Allied powers the luxury of an overly legalistic approach. Thus it is ironic that an adherence to international legal order is sought on a foundation that sometimes does not reflect the characteristic of strict adherence to the rule of international law itself. But this charge is often not as disastrous as would appear. For example, although the novel crime against peace that was introduced at Nuremberg is met with much scepticism[90] because it was unprecedented, and a pure legalistic approach therefore supports the scepticism of its existence at Nuremberg, it appears on closer scrutiny of its definition in the Nuremberg principles, as simply an attempt, amongst others, to prohibit the:

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86 2005: 310.
87 Dugard 2005: 310.
88 Davidson 1972: 295 and further.
89 Lippman 1991: 63.
90 Lippman 1991: 63.

> *"…planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances".*[91]

Even to the casual observer it is clear that there was nothing novel or unprecedented in adding "*crimes against peace*" as per this definition. Aggressive war making was perhaps simply clad in a different name. It has always been prohibited. What perhaps is then unconsciously hidden in the minds of the objectors to the crimes against peace as introduced in the Nuremberg trials is the inability of the legal community once and for all to define satisfactorily the crime of aggression. Even the newly established International Criminal Court has failed to define this.

Perhaps the greatest direct impact of the Nuremberg era is found in the fact that individual criminal liability for an international crime was firmly established. This meant that international law was no longer concerned only with states and their mutual relations.[92] This is exemplified by the development of human rights law following World War II; individuals are also now regarded as the holders of rights and obligations under international law and the latter entitles them to the concern and protection of international law.[93] From this evolves the important notion that whereas traditionally the protection afforded individuals by the laws of war in international armed conflict, should be extended, and in fact now has been extended, to the protection of individuals in internal armed conflict as well.[94] In this context, one may safely conclude that since 1945, international criminal law is developing along parallel lines with human rights law[95] and international humanitarian law.[96] The one by necessity includes the other.[97]

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91 Van der Wyngaerdt 2000: 203 and 204.

92 Moir 2002: 2.See also Dugard 2005: 309.

93 Moir 2002: 2.

94 Moir 2002: 2.

95 See Dugard 2005: 308 who states that today one of the "*principal aims*" of international law is the protection of the individual against her or his own government.

96 See Dugard 2005: 309. Humanitarian law seeks to reduce the suffering of combatants and civilians in times of war.

97 De Than and Shorts 2003: 12: "..*there is clear, visible cross-pollination and cross-referencing between international criminal law, international humanitarian law and international human rights, the first and last of which are really different perspectives on the same problem*".

Dugard[98] states as follows:

> "*The enormity of the atrocities committed by the Nazi regime dramatically changed the nature of international law. This experience compelled statesmen to accept the need for a new world order in which the state was no longer free to treat its own nationals as it pleased. This new orderwas proclaimed by the Charter of the United Nations, which recognized the promotion of human rights as a principal goal of the new world organization, and by the London Charter of 1945, which provided for the trial of the major Nazi war leaders*".

98 2005: 309.

Chapter 5
The development of international law through the development of international humanitarian law

1. Introduction

The previous chapter concluded that the most important legacy of Nuremberg was the impetus it provided to the development of human rights and humanitarian law. For the reason that modern armed conflict substantially occurs within the context of internal or domestic conflict as opposed to international armed conflict, and historically, international law is only concerned with the relations between states,[1] this chapter will record the development of humanitarian protection of civilians in internal armed conflicts.

International humanitarian law is sometimes described as comprising "*the law of The Hague*" and the "*law of Geneva*".[2] The former determines the rights and duties of belligerents in the conduct of their military operations and limits the choice of the means of doing harm.[3] The latter aims to protect either combatants no longer engaged in combat as well as civilians not involved in the conflict.[4] This chapter will deal with the latter branch of humanitarian law that is referred to as "*the law of Geneva*" in the context of civilian protection in armed conflicts and in the context that it was a post-Nuremberg effect on the development of international criminal law and the establishment of an international criminal justice order.

The chapter will conclude that although a fairly comprehensive *corpus* of international law exists for the purpose of affording sufficient protection to

1 Green 1993: 52. See also Draper 1983: 253, De Schutter and Van der Wyngaerdt 1983: 279, and Meron 1978: 272.
2 Dugard 2005: 527.
3 Dugard 2005: 527. According to the author it seeks to strike a balance between military necessity and humanitarian considerations.
4 Dugard 2005: 531.

civilians caught amidst internal conflicts, enforcement of international justice depends on the political will of the international community and each member state of that community.

2. The International Committee of the Red Cross and the drafting of Common Article 3 of the four Geneva Conventions of 1949

Humanitarian law is generally premised on the distinction between combatants and civilians.[5] Whereas combatants are legitimate targets in armed conflicts, civilians are not.[6] This also implies that if combatants are captured in armed conflict they are to be treated as prisoners of war and are seen neither as criminals nor as hostages. The state that detains prisoners of war is under strict international obligation not to mistreat them and to release and repatriate them after the hostilities have ceased. Contrary to the position of prisoners of war, civilians are unprotected by the law of armed conflict and are not entitled to prisoner of war status if captured. At the time when wars were fought by regular armies, it was not difficult to distinguish between combatants and civilians. However, guerrilla groups and groups engaged in national liberation have resulted in obscuring the distinction between combatants and civilians.[7] It is therefore important to establish to what extent the international community has reached consensus on the humanitarian protection of civilians amidst armed conflict.

Humanitarian law contains special rules for the treatment of civilians in occupied territories, which rules are contained in the fourth Geneva Convention of 1949.[8]

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5 Dugard 2005: 531.

6 Dugard 2005: 531.

7 Dugard 2005: 532.

8 Dugard 2005: 533. These rules provide for the protection of civilians which includes the right to respect as a person and to respect for the individual's religious practices, the prohibition of torture and other cruel, inhuman or degrading treatment, hostage taking, reprisals, intimidation and collective punishment. Further, the wounded and sick shall be the object of particular protection and respect and there are various judicial guarantees to ensure due process.

The protection of victims and civilians is particularly acute during internal armed conflict because the established authorities resist either regulation or outsiders in favour of its own rebellious nationals.[9] This however does not mean that attempts were not made on humanitarian rather than legal grounds to assist such victims. In this regard no international body has exerted as much influence as the International Committee of the Red Cross, which has played a vital role in codifying the rules of war. Although its draft rules, regulations, reports and so on, are not legally binding on governments they vastly contributed in clarifying existing law and influencing future development.[10] Attempts by the International Council of the Red Cross (ICRC) to provide humanitarian relief in internal conflicts were made as early as 1912, although the prevailing mood amongst nations at the time was that they believed it would be improper for the Red Cross to impose any duty upon itself to work for the benefit of rebels regarded as criminals by the laws of their land.[11] However, the International Council of the Red Cross, together with national societies, was able to render some limited support in certain internal conflicts and by 1921 it had adopted a modest resolution, which affirmed the right of all victims of civil wars to relief in conformity with the general principles of the Red Cross.[12]

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9 Moir 2002: 21. Apart from the consensual recognition of belligerency, states were strongly opposed to any compulsory international regulation of internal armed conflict. See also Dugard: 2005: 526. The author records the following: "*The starting point of modern humanitarian law was the battle of Solferino in 1859 between Austrian and Franco-Italian forces, in which thousands of wounded combatants were allowed to die without medical attention. Appalled by this sight, a young Swiss banker, Henry Dunant, started a movement which led to the Geneva-based International Committee of the Red Cross (ICRC), a non-governmental organization committed to providing relief to the victims of armed conflict, and to the first multilateral humanitarian treaty-the Geneva Convention on the Amelioration of the Condition of the Wounded in Armies in the Field of 1864*".See also Shaw 1997: 24.

10 Moir 2002: 21. See also Draper: 1983 260. See further Sassoli and Bouvier 1999: 97-104 on the historical development of humanitarian law and on 117-120 on the fundamental distinction between civilians and combatants. See also Zahnd 2000: 43 and further.

11 Moir 2002: 22. See also Elder 1979: 41; Draper 1983: 261.

12 Moir 2002: 22. See also Elder 1979: 41. Undaunted and encouraged by its limited successes, the ICRC again placed the issue on the agenda of its Tenth Conference in 1921 which passed a resolution which affirmed the rights of all victims of civil wars or revolutionary disturbances to humanitarian relief. Thus, at the Sixteenth Conference of the ICRC, held in London in 1938, the following resolution was passed: "*The XVI th International Red Cross Conference requests the International Committee and the National Red Cross Societies to endeavour to obtain:*

The Geneva Conventions of 1949 were promulgated against the backdrop of Nazi Germany and the non-compliance with the traditional law in some respects by both sides. Such non-compliance was attributable in part to the ambiguity of the classical law of war,[13] general evidence of non-compliance by the opposition, and the legal argument of desuetude.[14]

(a) the application of the humanitarian principles which were formulated in the Geneva Conventions of 1929 and the Tenth Hague Convention of 1907, especially as regards the treatment of the wounded, the sick, and prisoners of war, and the safety of medical personnel and medical stores;
(b) humane treatment for all political prisoners, their exchange and, so far as possible, their release;
(c) respect for the life and liberty and non-combatants;
(d) facilities for the transmission of news of a personal nature and for the reunion of families;
(e) *effective measures for the protection of children*". See further Elder 1979: 42 and further for what he describes as 'the torturous' history of Common Article 3".

13 Elder 1979: 38 and further. Under traditional international law, only sovereign states, and not half, or part, sovereign entities could legally wage a war. With time there developed awareness in the development of international law that non-qualifying entities did in fact have the power and authority to wage war. Recognising this *de facto* ability of such entities to wage war, an attempt was made to reconcile existing theory with the imposition of the obligations of the law of the war. This resulted in the practice of recognition of belligerency whereby briefly, once certain conditions were met, the parent state as well as other states were permitted to acknowledge the factual ability of the opposition by recognising their status as belligerents. This situation was to be differentiated from political upheaval and once off riots. Once the status of belligerency was recognised, then the full range of international law rules applicable to international conflicts entered into effect and each of the parties to the conflict had the right to exercise belligerent rights such as the search of ships on the high seas, seizure of contraband, and confiscation of ships running an effective blockade. It also meant that if a member of a belligerent faction was captured, that person had the status of a prisoner of war, instead of that of a common criminal in the parent state's jurisdiction. If the status of belligerency was recognised prematurely, prior to certain conditions, then the recognising state would be guilty of an international offence of impermissible interference in domestic affairs. It has to be noted here that apart from the recognition of belligerency theory, there was also a theory of recognition of insurgency whereby the recognising state could deal with the insurgents in practical matters of mutual importance, while not recognising their legal status as belligerent or as the *de jure* government. Both these principles have been intensely debated and their viability questioned. It is recognised that neither has mandatory status in international law. See also Draper: 1983: 262. The author observes as follows: "*They were being asked by the ICRC to accept binding legal obligations restraining their actions in seeking to repress an armed rebellion overtly aimed at their overthrow and suppression, or secession. That entailed a major inroad upon the existing domain of state sovereignty*".

14 Elder 1979: 37. See also Dugard 2005: 531. The 1949 Geneva Conventions have their roots in the The Hague Regulations of 1907 and the Geneva Conventions of 1929, which provided for the protection of prisoners of war and the wounded and the sick. These conventions have now been replaced by the four 1949 Geneva Conventions which aim at: (1) to relieve the condition of the wounded and the sick in armed forces in the field, as well as (2) the wounded, sick and shipwrecked members

At the time in 1949, when the *Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War* convened in Geneva, the common understanding of the delegates was that they would be concluding Conventions that were applicable to international armed conflicts. The efforts by the International Council of the Red Cross to make these conventions applicable to internal armed conflicts was rejected by the nations as an attempt to interfere in the internal affairs of states which would protect all forms of insurrection, rebellion, anarchy and the disintegration of states. As a compromise however, the Conference approved Common Article 3 as it now appears in all four Geneva Conventions. Common Article 3 has since attained the status of a rule of customary international law and the International Court of Justice has ruled that Common Article 3 serves as a minimum rule to be imperatively applied to all types of armed conflict and represents the elementary considerations of humanity.[15] The outcome of the Diplomatic Conference was the first legal regulation of internal armed conflict that is contained in an international instrument, which provides that:

> *"In case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*
> *(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*
> *(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
> *(b) taking of hostages;*
> *(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;*
> *(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilised peoples.*

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of armed forces at sea, (3) to regulate the treatment of prisoners of war and (4) to protect civilians in times of war.

15 Kittichaisaree 2001: 188.

(2) *The wounded and sick shall be collected and cared for.*
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict.
The parties to the conflict should further endeavour to bring into force by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the parties to the conflict".[16]

Thus, in terms of the text of the article and relating to internal armed conflict, one discerns two separate criteria for the applicability of the article. The first is that there is a positive requirement as regards the geographical location of the conflict, which must take place "*in the territory of one of the High Contracting Parties"*. This criterion poses no problem, as there are 189 states that are party to the Geneva Conventions, which amounts to a virtual universal level of acceptance.[17] The second criterion is to establish whether an armed conflict exists. There is a lack of authoritative definition of the term but certain commentators view this as a strength as opposed to a weakness in the sense that it permits humanitarian protection in as many situations as possible through a broad interpretation of its provisions.[18] Because of the absence of a requirement to apply the actual provisions of the Geneva Conventions themselves, Common Article 3 is therefore an attempt to impose the underlying humanitarian principles to all four Conventions upon the parties to internal armed conflicts as a result of which it is often referred to as a "*Convention in miniature*".[19]

3. The applicability of Common Article 3

Determining to what kinds of conflicts Common Article 3 applies is despairingly difficult and it lacks jurisdictional precision as expressed by the following statement by Bond:

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16 As quoted in Moir 2003: 30.
17 Moir 2002: 31.
18 Moir 2002: 33.
19 Elder 1979: 38.

> "*One of the most assured things that might be said about the words 'armed conflict not of an international character' is that no one can say with assurance precisely what meaning they were intended to convey".*[20]

The answer to what kinds of conflict article 3 applies to may be sought in the following three sources: legislative history, state practice and the function and purpose of article 3.[21] On the function and purpose of article 3, it becomes clear that the laws of war reflect a certain tension between principles of necessity (for example, that defence does justify a resort to violence) and humanity (that fundamental human rights must be protected).[22] It is argued that because the protection of certain human rights is the chief purpose of article 3, it should come into force in any internal conflict which endangers those rights and that inquiry should thus rather focus on the nature of the human rights that are being threatened instead of the nature of the conflict, that is whether the situation may be typified as a riot, insurrection, insurgency or belligerency.[23]

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20 Bond 1971: 266. See also Draper 1983: 264: The draft Article 3 was wider in its scope with the words, *'civil war, colonial conflicts, or wars of religion'.* This, delegates were not prepared to accept, which has resulted in a quite severe limitation of the scope of applicability of the article.

21 Bond 1971: 48 and further. The author indicates that if one studies the Geneva Convention Conference committee reports, it seems that delegates intended Article 3 to apply to belligerencies, civil wars and perhaps to insurgencies like in Angola at the time, but not to bandits, riots or insurrections. If state practice is examined, there emerge two conclusions: (1) states, which quell riots, insurrections or revolts, do not feel bound to respect Article 3. In these situations and where there is no widely held expectation of the international community that they should abide by Article 3, they are quick to act under emergency or martial law. Thus often, the internal conflict is over before the international community can appraise itself of the facts and generate any kind of pressure. (2) If the conflict continues beyond several weeks or months however, states do feel obligated to feel bound by Article 3 and therefore treat opposing forces humanely.

22 Bond 1971: 273. This then necessitates that the parameters of military necessity be staked out and that is according to legal scholars like Professor Baxter, not unlimited, in that while it is necessary to accept that situations of internal violence may necessitate tactics not legitimate in international conflict it can never imply a wholesale denial of human rights. See also Draper 1983: 267. The author laments that the root of the difficulty lies in the phrase armed conflict, not of an international character. Does 'international' refer to the parties that are engaged in the armed conflict or does it refer to the legal consequences as to which rules of conduct are then brought to bear?

23 Bond 1971: 274. See also Draper 1983: 268 and further. The content of Article 3 demands according to the author, a high degree of organisation, administration, military command, and discipline for its observance. It is therefore not available for rebel elements to agree or decline acceptance of the applicability of Article 3.

Other criteria that may be applied to determine whether Common Article 3 is applicable to a given situation, some of which are borne out by state practice in the past are: the duration of the conflict, whether there is foreign troop participation in the combat, and the intensity of the conflict in that the bloodier the conflict, the greater the need for application of article 3.[24] Much has been written on the scope of application of Common Article 3 of the 1949 Conventions but perhaps it will suffice to suggest as Bond does,[25] that it should be the nature of the human suffering that should determine applicability and not the nature of the conflict. The latter would allow too much political posturing for the intended purpose of common article to be anything more than paying lip service to the protection of fundamental human rights. The obvious and salient weakness of article 3 is thus the method of monitoring its implementation and securing its enforcement.[26] Despite its weakness Common Article 3 establishes beyond doubt the legitimacy of the concern of modern international law with internal war.[27]

Although attention to the International Criminal Tribunal for the Former Yugoslavia (ICTY) is only addressed in the next chapter, it must be noted here that the Appeals Chamber of that Tribunal in the 1997 case of *Prosecutor v Tadic (appeal on jurisdiction)* has given a definition of "*armed conflict*", which by implication applies to internal armed conflict as well:

> "*…an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental*

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24 Bond 1971: 274. See also Moir 2002: 35. The author states that several delegations at the Diplomatic Conferences have pressed for certain factual criteria to be met before the Article became applicable. The view was eventually abandoned but the main thrust of the suggestions that were received may be useful to determine the issue of when Article 3 ought to apply. Moir 2002: 35 refers to Pictet who summarised these.

25 1971: 285.

26 Draper 1983: 270. See also Forsythe 1978: 273 and further. The author states as follows: "*The vagueness of the 1949 article,the so-called 'humanitarian convention in miniature'- and the resultant confusion regarding its meaning have led to widespread belief that this law had gone largely unnoticed. According to a U.S. delegate at the 1975 session of the Geneva Conference, 'the non-observation of article 3 common to the Geneva Conventions of 1949...was an almost universal phenomenon*". Despite article 3, according to Forsythe, internal war has lost little of its savagery in the observed conflicts in the post 1949 period.

27 Forsythe 1978: 274.

authorities and organized groups or between such groups within a State. International humanitarian law applies from the initiation of such conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States, or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there".[28]

4. Additional Protocols II of the Geneva Conventions of 1977

The International Council of the Red Cross (ICRC), with the support of the United Nations General Assembly, endeavoured to improve upon Common Article 3 at the *Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law in Armed Conflicts*, which was held in Geneva between from 1974 to 1977.[29] This resulted in Protocols II and I. Protocol I deals with international armed conflicts and Protocol II with internal armed conflicts.[30]

The 1977 Protocol II to the Geneva Conventions was intended to reaffirm and further develop the principles that were enshrined in Common Article 3.[31] It further became apparent at a very early stage that the frustration associated with the drafting of Protocol II was an indication of the waning enthusiasm for

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28 As quote in Moir 2002: 42.

29 Draper 1983: 272. See also Moir 2002: 89 who states: "*Common Article 3 stood alone in the sphere of internal armed conflict for twenty-five years, but as demonstrated, it had become evident that some amendment or clarification of the rules governing internal conflict was necessary".* See further Bailey 1982: 19.

30 Junot 1983: 29 and further. See also Dugard 2005: 534.The author points out that in terms of the 1949 Geneva Conventions for those engaged in hostilities against government forces, that is the case of an armed conflict not of an international character was to be found in Common Article 3 of the conventions. The concern for human rights in the post World War II legal order together with the prevalence of wars of national liberation led to demands for the revision of humanitarian law to include armed conflicts not of an international character. This led to the 1977 inclusion of article 1(4) in Additional Protocol I and the adoption of Additional Protocol II on non-international armed conflicts. Article 1(4) of Additional Protocol I extends the application of the 1949 Geneva Conventions to 'armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination.

31 De Shutter and Van der Wyngaerdt 1983: 284. See also Forsythe 1978: 272 and further. It was pointed out at the Diplomatic Conference that eighty percent of the victims of armed conflict since World War II have been in non-international armed conflicts. See further Junod 1983: 30 and further.

and in some cases opposition to it.[32] This was also a result of the fact that conflicts of national liberation were included under Protocol I instead of Protocol II.[33] This had occurred because of the inclusion of article 1(4) in Additional Protocol I which extended the application of the 1949 Geneva Conventions to:

> "*[a]rmed conflicts in which people are fighting against colonial domination and alien occupation and against racial regimes in the exercise of their right of self-determination*".[34]

Additional Protocol II on the Protection of Victims of Non-International Armed Conflicts aimed at developing and supplementing Common Article 3 of the 1949 Geneva Conventions. It contains more detailed provisions on the fundamental guarantees, the treatment of the wounded and the sick and the protection of the civilian population. However, the threshold for application of Protocol II is very high and internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature are excluded. This means that the provisions of Additional Protocol II apply only to civil wars in which both sides to an armed conflict control parts of the territory of the state. This is opposed to Common Article 3 which comes into operation as soon as the conflict qualifies as an armed conflict and which is without the requirement of territorial control.[35]

Adherence to and the enforcing of Common Article 3 is very difficult if not impossible. There have resultantly been many suggestions, such as introducing codes of conduct in areas where compliance with norms is difficult to obtain through the traditional conduit of international conventions, requiring a moral instead of a legal compliance; seeking compliance through what is

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32 De Shutter and van der Wyngaerdt 1993: 284.The authors continue as follows: "*The 'convention in miniature' of 1949, which was revolutionary at that time, would be even more revolutionary if drafted today. Many states that subscribed to it in 1949 would probably no longer be willing to accept it under present circumstances. Developing countries have lost their interest in Protocol II since anti-colonial and anti-racist wars have become accepted as international conflicts".*

33 Moir 2002: 90. The author indicates that the first session of the Diplomatic Conference achieved the inclusion in Protocol I of Article 1(4), which extends the provisions of the instrument beyond international armed conflicts.

34 Dugard 2005: 535.

35 Dugard 2005: 536; De Shutter and Van der Wyngaerdt 1983: 284.

referred to as "*mobilisation of shame*": embarrassing the government concerned by turning public opinion against it. Enforcement through penal enforcement domestically has also been viewed as a viable option but it soon becomes apparent that although it is likely that the actions of the insurgent will be punished, it is unlikely that corresponding actions of the incumbent government will meet the same fate. The norms for the protection of victims of international conflict established in the 1949 Conventions and Additional Protocols require that contracting parties either prosecute or extradite persons accused of grave breaches of those norms. However, violations of Common Article 3 are not given the status of grave breaches, and therefore the contracting parties are under no obligation to prosecute or extradite persons alleged to have committed violations of the norms protecting victims of non-international conflicts.[36]

5. Conclusion

Article 3 represents the first internationally agreed protection for those not taking part in armed conflict and are equally binding on states as well as insurgents. The provisions of Common Article 3 may be regarded as a customary international legal norm, also binding upon states that are not party to the Geneva Conventions. This in itself represents a major development in international criminal law and justice. Yet, it is recognised that the article is not adhered to sufficiently in practice.[37] Additional Protocol II, adopted in 1977,

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[36] De Shutter and Van der Wyngaerdt 1983: 286, 287. The authors indicate that this distinction is however theoretical because prosecutions and extraditions of persons accused of having committed grave breaches of the four 1949 Geneva Conventions have been very rare, as have been prosecutions for Article 3 violations committed by the incumbent government. See however Dugard 2005: 536 who notes that here state practice is changing too with specific reference to the Appeals Chamber of the ICTY judgment in the *Prosecutor v Tadic* case. The further 'blurring' of the distinction between international and non-international armed conflicts in the field of punishment for violations of humanitarian law is confirmed by the ICC Statute which dictates that genocide and crimes against humanity can be committed in times of peace as well as war.

[37] Moir 2002: 273-274. This may be so according to Moir for several reasons, one being that states do not wish to apply the article immediately, at the inception of an internal struggle, as this may impair its ability to crush it swiftly. Likewise, insurgents are unlikely to feel obligated where the government in these situations disregards the provisions of Article 3.

does develop and supplement Common Article 3, providing more detail but unfortunately, given the reasons behind its adoption, regulates only the most extreme internal conflicts. The current status of the law regulating humanitarian protection of civilians is viewed as fairly extensive and affording civilians adequate protection were it to be applied. Thus, until the international community accepts its responsibility and obligation to arrest those accused of grave international crimes, the world community is paying lip service alone to the enforcement of universal criminal justice.[38] There are however positive signs that this is happening as will be indicated in the next chapter.

[38] Moir 2002: 274-275; Meron 2000:239 and further.

Chapter 6

The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda

"*In the Akayesu Judgment, the ICTR found that one million people were slaughtered in a period of one hundred days in Rwanda; untold numbers of women and children were sexually assaulted, for some, a fate worse than death. I saw skeletal remains of many at a genocide site I visited on an official visit to Rwanda and that experience haunts me to this day. The work of the tribunals will not undo the carnage, but it does offer a way to vindicate the worth of the many innocents who needlessly lost their lives. You too can take up the challenge and make a difference*".
Gabrielle Kirk McDonald, former President and Judge of the International Criminal Tribunal for the former Yugoslavia.[1]

1. Introduction

In this chapter the background and the establishment of the International Criminal Tribunal for the former Yugoslavia as well as that of the International Criminal Tribunal for Rwanda are examined. Attention is given to the crimes within the jurisdiction of the ICTY indicating to what extent international criminal law and international humanitarian law have developed particularly since World War II and the end of the so-called Cold War. Particular attention is afforded to lessons that may have been learned as a result of the establishment of the criminal tribunals and particularly the impetus the establishment of the tribunals and its jurisprudence has had on the development of international criminal and humanitarian law. The chapter traces the influence of the United Nations in the establishment of the tribunals and concludes that the latter have been a positive development in terms of ending the perception that the international community is indifferent to the prosecution for core crimes. It is further concluded that states are increasingly urged to exercise universal jurisdiction, which is the subject of Chapter 7.

[1] McDonald 2000: 17.

2. The International Criminal Tribunal for the former Yugoslavia

2.1 Background

One is chillingly reminded of the internal and international conflicts[2] in the last century:

> "*The commission of atrocities during times of internal and international conflict is a sad and familiar story. The last century witnessed some of the worst acts of genocide and crimes against humanity in human history. From the Nazi holocaust to mass executions by Khmer Rouge in Cambodia to the Rwandan genocide, and from torture and forced disappearances in Argentina to brutal 'ethnic cleansing' in the Balkans to disfiguring atrocities in Sierra Leone, the examples of human cruelty and violence are chilling*".[3]

After the Holocaust of the Second World War the world community pledged that this would never again be allowed to happen, and expressed the hope that the legacy of Nuremberg "*would be the institutionalisation of a judicial response to atrocities throughout the world*".[4]

Yet, despite the bold international prohibitions against mass atrocities, the world continued to witness bolder and bolder incidences of mass atrocities, many of them barely attracting world attention. Stalin murdered four million people in his 1937-1953 "*purges*", five million were annihilated in China's Cultural Revolution of 1966-1976, two million butchered in Cambodia between 1975-1979, 30 000 people disappeared in Argentina's "*dirty war*" between 1976-1983, 200 000 were massacred in East Timor between 1975-1998, 750 000 exterminated in Uganda between 1971-1987, 100 000 Kurds gassed in Iraq between 1987-1988 and 75 000 peasants were slaughtered by the death squads in El Salvador.[5] This led Goldstone, the first prosecutor of the

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2 Moir 2002: 1 quotes Koffi Annan, Secretary-General of the United Nations, as follows: "*wars between sovereign States appear to be a phenomenon in distinct decline'.* Moir states that: *'Unfortunately, this is not true of internal armed conflict and, to make matters worse, time has witnessed an apparent diminution in the application of the laws of war to internal armed conflicts*…"

3 Stromseth 2003: 1. See also Bodley 1999: 430.

4 Scharf 2000: 926.

5 Scharf 2000: 926.

International Criminal Tribunal for the former Yugoslavia, to conclude that the world's failure to prosecute Cambodia's Pol Pot, Uganda's Idi Amin and Iraq's Saddam Hussein, among others, encouraged the Serbs to launch their policy of ethnic cleansing in the former Yugoslavia and the Hutus to commit genocide in Rwanda.[6] They simply believed that they too, would not be held accountable for their international crimes.[7] Gradually over time, as in the case of the establishment of the ICTY, the international community's response to these atrocities changed.[8]

It was not until the early 1990s that the international community again called out for a judicial resolution to the horrific crimes against humanity which were perpetrated in the Federal Republic of Yugoslavia.[9] The then Secretary General of the United Nations, Boutros Boutros-Ghali, reported to the Security Council from the observations made by his own special envoy in 1992, that the Serbs of Bosnia-Herzegovina, with the support of the Yugoslav National Army, were making concerted efforts to create ethnically pure regions in the republic and that the technique used was the seizure of territory by military force and the intimidation of the non-Serb population.[10]

It is common knowledge that in the preceding years many serious violations of humanitarian rights were committed elsewhere in the world, which would have warranted prosecutions of heads of government and high-ranking military

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6 Scharf 2000: 926-927. See also Cassese 2003: 335. According to the author various factors led to the eventual establishment of the *ad hoc* criminal tribunals, such as the end of the cold-war which *inter alia* implied an acceptance and respect for some basic principles of international law and an unprecedented agreement in the UN Security Council making that organ more effective.

7 Scharf 2000: 927.

8 De Than and Shorts 2003: 1.

9 De Than and Shorts 2003: 279. See also Bodley 1999: 430, Tocker 1994: 527 and further.

10 Bodley 1999: 430. The full extent of the atrocities were later revealed which Bodley accounts: the world learned of mass forced population transfers of Muslims in convoys of cattle trucks, of organised massacres and the physical destruction of whole towns, including the destruction of major historical, religious and cultural monuments throughout Bosnia and Croatia; of the systematic and repeated rape of approximately 20 000 Muslim women and young girls, of over 400 Serb-run detention centres where Bosnian Muslims were tortured and killed.

officials.[11] However, before 1993 there was a great apathy and failure to prosecute individuals for their violation of international crimes, which undoubtedly was aided by article 7(2) of the United Nations Charter preventing the United Nations to intervene in matters, which were essentially within the national jurisdiction of the offending state.[12]

With the break up of the Soviet Union in 1989, and essentially the end of the so-called "*cold war*", the role of the Security Council became more poignant. Under article 29 of the United Nations Charter, the Security Council is given wide powers in terms of which "*it may establish such subsidiary organs as it deems necessary for the performance of its functions*". Because the Security Council is furthermore charged with the maintenance of international peace and security, this seemingly includes the power to create judicial tribunals with the object of prosecuting individuals who pose a threat to international peace and security in violation of international law under Chapter VII, particularly Articles 39, 41 and 42 of the Charter.[13]

Prior to the beginning of the civil war in the Balkans, the Socialist Federal Republic of Yugoslavia consisted of the six republics of Croatia, Slovenia, Serbia, Bosnia-Herzegovina, Montenegro and Macedonia as well as the two autonomous regions of Kosovo and Vojvodina.[14] This multinational state had been created by the Allied powers in 1918 after World War I, and according to Tocker,[15] from its inception, Yugoslavia was destined for disaster. First an oppressive Serbian monarch ruled the country, to be replaced by communist leader Josip Broz Tito who reigned for nearly forty years.[16] His death in 1980 spelled the gradual beginning of the end of communism in the country and in 1990 Croatia and Slovenia voted new, non-communist parties, into office.[17] The primary source of contention was the federal policy of developing the less

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11 De Than and Shorts 2003: 279. See also Bodley 1999: 431.
12 De Than and Shorts 2003: 279.
13 De Than and Shorts 2003: 279.
14 Tocker 1994: 12.
15 1994: 12.
16 Tocker 1994: 12.
17 Tocker 1994: 12.

developed republics (LDRs) at the expense of the more developed republics (MDRs.)[18]

As the influence of communism declined, ethnic and religious rivalries intensified which ultimately were to culminate in a vicious civil war.[19] Before the establishment of the International Criminal Tribunal for the Former Yugoslavia, a period followed in which the world community increasingly noted the deteriorating situation in the former Yugoslavia. The final impetus for war in the region was the politics conducted by former Yugoslav president, Milosevic, who, having gained tight control of the Serbian media, "*disorientated Serbian people with a diet of suspicion and intolerance*".[20] Various attempts were made to stabilise the situation including attempts at

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18 Zic 1998: 508.

19 Tocker 1994: 12. According to the author, the crisis that arose in the former Yugoslavia was not a new or surprising one. The antagonism between Serbia and Croatia arose centuries ago at the time of the Ottoman and Hapsburg empires that drew the lines between the two republics. There have been ethnic and religious differences between the republics for centuries and this was kept under control for four decades by communist rule. Slovenia and Croatia are predominately Roman Catholic and Western-orientated populations and they clashed with Serbia's dominant Orthodox Christian population. In Croatia there is further a large Serbian minority who declared their union with Serbia. While the six republics of the former Yugoslavia are of common Slav origin, the territories share no other common elements of a conventional nation like history, language religion, economic status, etc. As fighting in Croatia escalated, the Bosnians feared that Serbia and Croatia would attempt to divide Bosnia-Herzegovina (Bosnia) between them. Bosnia is a 'melting pot ' of Muslims, Serbs and Croats. The Bosnians sought international recognition when it became clear that Serbian President Milosevic had no intention of protecting their rights in his quest for a 'greater Serbia'. A referendum was consequently held in 1992 in which an overwhelming majority of Bosnian Muslims and Croats supported independence from Yugoslavia in the belief that their sovereignty would preserve their republic. In response to this break-up of Yugoslav unity, Serbian president Milosevic declared that all Serbs from all areas of the former Yugoslavia had to join together to form a single Serbian state. This resulted in the Serbs enacting their land grabbing plan for a "*Greater Serbia*" which involved 'taking' areas of Bosnia that were inhabited primarily by Serbs and annexing them to its own territory. The Croats meanwhile, developed a similar plan for the creation of a "*greater Croatia*". By 1992, Bosnia had practically ceased to exist as a nation after either Serbs or Croats seized large parts of Bosnia. In April 1992 the United States and other nations recognised Serbia, Croatia and Bosnia-Herzegovina's independence. The result is that the territory that once comprised the nation of Yugoslavia was transformed into five separate entities including the three countries of Slovenia, Croatia and Bosnia-Herzegovina; the republics of Serbia and Montenegro and the secessionist republic of Macedonia make up the remnants of the Yugoslav state. See also Bassiouni and Manikas 1996: 2 and further.

20 Zic 1998: 509.

agreements implementing cease-fires, economic sanctions and embargoes, and the settlement of a UN peacekeeping force in the area.[21]

2.2 Creation of the Commission of Experts and the International Tribunal

As a result of the failed attempts to restore peace in the region, the Security Council considered the establishment of a tribunal in order to prosecute Croats, Serbs and Muslims for the now countless atrocities that had been committed against thousands of civilians and so-called "*prisoners of war*".[22] In October 1992, the UN's Secretary-
General established a *Commission of Experts* to examine and analyse evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the former territory of Yugoslavia. The Security Council also requested the Secretary - General to submit a report on the possibility of establishing a tribunal, including specific proposals and options for its implementation. In his May 1993 report, the Secretary-General noted that the normal procedure for establishing an international tribunal involved an international body drafting and ratifying a treaty. However, and because of the lengthy process involved in ratifying a treaty and the urgency of the situation, the Secretary-General was prompted to recommend that the Council establish the international tribunal under its powers of Chapter VII of the UN Charter.[23]

The International Criminal Tribunal for the former Yugoslavia (ICTY) was set up by the United Nations Security Council in 1993, in pursuance of Resolution

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21 Tocker 1994: 531-534.

22 Tocker 1994: 534. The author indicates that all three ethnic groups, the Croats, Serbs and Muslims committed crimes that included beatings, killings, rapes, torture, pillage and the deliberate destruction of property. Additionally, a policy of 'ethnic cleansing' had been carried out in Croatia and Bosnia, a form of genocide and which has entailed razing cities to the ground, torturing prisoners of war, and forcibly removing civilians from their homes because of their religious and ethnic backgrounds. A horrific and large part of this ethnic cleansing also included the rape of Muslim women, which constituted another form of genocide.

23 Tocker 1994: 536.The procedure has the advantage, so Tocker points out, that the Council's decision immediately becomes operative since all United Nation members are required to carry out the Council's decisions in terms of Chapter VII. See also Bassiouni and Manikas 1996: 202 and further.

808 of 22 February 1993 and also Resolution 827 of 25 May 1993.[24] It was preceded by Resolution 764, adopted in July 1992, which declared that all parties to the Yugoslav conflict must comply with international humanitarian law, particularly the 1949 Geneva Conventions, and further ordered that persons who had committed or ordered grave breaches of those conventions were individually responsible for war crimes. The Security Council regarded the widespread violations of international humanitarian law and the practice of so-called ethnic cleansing within the territory of the former Yugoslavia as a threat to international peace and security. For these reasons the Security Council exercised its powers under Chapter VII of the United Nations Charter, to set up the ICTY as its subsidiary organ in order to contribute to the restoration and the maintenance of peace in the former Yugoslavia. The Security Council adopted the ICTY Statute following the submission of the report by the UN-Secretary- General on 3 May 1993. Only one country, not surprisingly, the Federal Republic of Yugoslavia, denied the Security Council the power to establish the tribunal, arguing that its state sovereignty would be unacceptably violated by the establishment of a tribunal that "*held the prejudicial goal of prosecuting the Serbs*".[25]

The Federal Republic of Yugoslavia also challenged the mandate of the Security Council to establish the tribunal, arguing that neither the Charter of the United Nations nor Chapter VII specifically grants the power to the Security Council to create tribunals as a means of maintaining international peace and security. This challenge was not unreservedly rejected by world opinion at the time and other alternatives, like involving the United Nations General Assembly and creating the Tribunal by treaty were uttered. This resulted in the international community being presented with a difficult choice. It could either maintain the principle of state sovereignty, but in this process it would allow horrific acts of war to go untried and unpunished. Establishing the tribunal by treaty or by way of amending the United Nations Charter so as to allow the Security Council to establish it would simply be too time-consuming.

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[24] Kittichaisaree 2001: 22. See also Schabas 2001: 11, Goldstone 1996: 487 and Resolution 808 (1993).

[25] Bodley 1999: 432, 435; Kittichaisaree 2001: 22.

The urgency of the situation in the former Yugoslavia dictated the course in which the ICTY was established. Not without controversy, the international community, with the United Nations Security Council at its helm, decided that the creation of an international tribunal empowered to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 was extremely important and therefore a worthy precedent to set, even to the extent that it subjugated the state sovereignty of the states that were involved.[26] Again the world witnessed, as in the case of the International Military Tribunal at the conclusion of World War II that the necessity of the moment may result in the need to impose upon state sovereignty.

2.3 Composition

The Tribunal is based in The Hague, Netherlands and it is composed of sixteen permanent independent judges and a maximum at any time of nine *ad litem* independent judges, elected by the General Assembly from a list of nominations received from the states submitted by the Security Council, taking account of the representation of the principal legal systems of the world. The Appeals Chamber of the ICTY is comprised of seven judges, and for every appeal, the Appeals Chamber shall be composed of five of its members.[27]

2.4 Rules of Procedure and Evidence

The Rules of Procedure and Evidence adopted by the judges in terms of the ICTY Statute, regulate the proceedings of the ICTY.[28] Significant are the words of McDonald, one of the first judges of the ICTY:

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26 Bodley 1999: 439-441.

27 Kittichaisaree 2001: 23. See also Levie 1995: 4.

28 Kittichaisaree 2001: 23. See also McDonald 2000: 5 on the development of the rules of procedure for the ICTY.

> "*By the application of these rules, which have been amended several times, the tribunal essentially has established the first international code of criminal procedure*".[29]

The rules of procedure and evidence represent an ambitious attempt to create a fully developed set of international rules for the conduct of, amongst other things pre-trial proceedings, trials and appeals. For the reason that the Tribunal is an international institution, its Rules attempt to combine the procedural traditions of the major law systems that prevail in the developed nations, to wit the civil and common law systems.

The Prosecutor is an independent organ of the ICTY, and responsible for the investigation and the prosecution of persons responsible for the offences. The prosecutor is appointed by consensus of the United Nations Security Council on nomination by the UN Secretary-General. A judge of a Trial Chamber, who must review and confirm an indictment submitted by the prosecutor, checks the prosecutor's power.

There is no trial *in absentia,* but the Appeals Chamber of the ICTY has held that in exceptional circumstances and in cases of contempt for the ICTY, or where the administration of justice is obstructed, an *in absentia* hearing may take place.[30]

Penalties that are imposed by the ICTY are limited to imprisonment.[31] Imprisonment is enforced in a state designated by the ICTY from a list of states, which have indicated to the United Nation Security Council, their

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29 McDonald 2000: 6.

30 Kittichaisaree 2001: 23.

31 Kittichaisaree 2001: 23. See also Schabas 2000: 521 and further. The author highlights the problems on sentencing that have been experienced by the ICTY and the ICTR. Both the charters of the two *ad hoc* tribunals require judges to establish prison terms in terms of the national practice in the place where the crimes took place. Both Yugoslav and Rwandan law have provided for capital punishment. As a consequence of this, according to the author, judges at the Rwanda Tribunal have applied the provision in support of harsh sentencing, suggesting that those convicted are being treated favourably compared with those judged by the Rwandan courts, where sentencing options include the death penalty. The result is according to Schabas, that "...*a legal provision intended to protect the accused from abusive punishment has been twisted into an additional argument in favour of severity*".

willingness to accept convicted persons for the purpose of serving jail sentences. The imprisonment is to be served in accordance with the law of the state concerned, but is subject to the supervision of the ICTY.[32]

The nature of the ICTY[33] as opposed to the Nuremberg and Tokyo Military Tribunals, is considered as the "*first truly international tribunal to be established by the United Nations to determine individual criminal responsibility under international humanitarian law*". The Nuremberg and the Tokyo Tribunals were considered multinational in nature, and representing only part of the international community. It is important to note that being concerned with the principle of *nullum crimen sine lege,* the Security Council decided from the outset that the framework for the jurisdiction of the Tribunal *ratione materiae* would be based on customary international law in contrast to creating new offences.[34] Thus the Secretary-General of the Security Council observed that in assigning to the Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law,

> "*...the Security Council was not creating or purporting to 'legislate' the law. Rather, he continued, the ICTY would apply existing international humanitarian law*".[35]

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32 Kittichaisaree 2001: 23.

33 On the nature of the ICTY, see Robinson 2000: 569 and further. The author remarks as follows: "*The debate as to the nature of the legal system established by the International Criminal Tribunal for the former Yugoslavia's Statute and Rules of Procedure and Evidence is ultimately unproductive and unnecessary. It is neither common law accusatorial nor civil law inquisitorial, nor even an amalgam of both; it is sui generis*". The author, who is a judge of the ICTR (on page 570 and further), points out that the Tribunal has on several occasions had resource to Article 31(10 of the Vienna Convention on the Law of Treaties which states that *'… a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the treaty in their context and in the light of its object and purpose'*. Thus in the *Kanyabashi* decision the Appeals Chamber stated that although the Statute is not a treaty, it is a *sui generis* international legal instrument resembling a treaty and that recourse by analogy is appropriate to Article 31(1) of the Vienna Convention when the Statute provisions are interpreted.

34 Kittichaisaree 2001: 24; Mettraux 2002: 241.

35 Mettraux 2002: 241. The author notes that this may have been considered as the only viable option because national laws were inadequate to tackle crimes of such a scale and some aspects of treaty law were outdated.

The quest to bring international criminal justice to a world that is occupied by different political aspirations was not an easy one. In the case of the ICTY, this has certainly been the case.[36]

2.5 Jurisdiction

The ITCY is not subject to any national laws and has concurrent jurisdiction with, as well as primacy over, national courts to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[37]

2.6 Crimes within the Tribunal's jurisdiction

In terms of the Statute of the ICTY within Articles 2-5, there is an exhaustive list of categories of crimes for which individuals may be prosecuted, namely (1) grave breaches of the Geneva Conventions of 1949 against protected persons and property in terms of article 2, (2) violations of the laws or customs of war in terms of article 3, (3) genocide in terms of article 4, and (4) in terms of article 5, crimes against humanity.[38]

2.6.1 Grave breaches of the Geneva Conventions (Article 2)

Before the twentieth century, a civilian population which was caught up in the hostilities resulting from war, was largely unprotected against violence by armed forces. There were no clear rules, which distinguished between and applied respectively to civilians and combatants, to protecting the former from ill treatment. The first Geneva Convention adopted in 1864 aimed at granting victims of war some form of protection during armed conflicts, which included care for the sick and wounded military staff. However, the real impact and

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36 Meron 1993: 122. The author argues that the Security Council's decision to establish a war crimes tribunal reflects the failure of the Security Council's primary mission to end the conflict and the atrocities. Meron 1993: 123 however states: *"Reaffirming the Nuremberg tenets and the principle of accountability should deter those in Yugoslavia and elsewhere who envisage 'final solutions' to their conflicts with ethnic and religious minorities*".

37 Kittichaisaree 2001: 23. See also Levie 1995: 6.

38 De Than and Shorts 2003: 281.

development of international humanitarian law came in 1949, as was seen in the previous chapter, with the adoption of the four Geneva Conventions. The first three Geneva Conventions dealt with the protection of the sick and wounded military staff. It was however the fourth Geneva Convention *Relative to the Protection of Civilian Persons in Time of War* which became particularly important. As overriding criteria for article 2 to apply, three essential ingredients must be met:

(1) The acts must have been grave breaches of the Geneva Conventions.

(2) The acts must be committed against protected persons and property, and

(3) any alleged offence must be closely related to the armed conflict.[39] A chief concern of the Statute's drafters was that no state should object to the law applied by the Tribunal. Grave breaches include the following: wilful killing, serious injuries and torture or inhuman treatment, unjustifiable destruction of property, unlawful deportation and confinement of a civilian and the taking of hostages. The real impact of the Geneva Conventions is further that it is now well established that state parties to the Geneva Conventions have jurisdiction to try such breaches in international armed conflicts. In the absence of an International Court, state parties have the power and have the duty to enact legislation and to initiate criminal proceedings against those persons that are responsible, irrespective of what their nationalities might be, or the duty to extradite to a foreign state on condition that the latter has made a *prima facie* case against the accused.[40]

A difficult question relating to article 2 of the Geneva Convention is whether the article relates strictly to international armed conflicts, that is, where two or more states are officially at war, or whether it can it also apply to an armed conflict which is internal in its nature. That it was perhaps originally intended

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39 De Than and Shorts 2003: 281. See also Zic 1998: 516.

40 Zic 1998: 514; De Than and Shorts 2003: 282. See also Levie 1995: 8.

that article 2 relate only to the former, is borne out by the common article 2 of the Geneva Conventions which states that,

> "*…the present Conventions shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them*".[41]

However under customary international law it has been judicially decided that certain rules and principles protecting the civilian population apply to both kinds of conflicts. Arising from this question is the question as to when an internal conflict is to be regarded as being of international nature.[42]

2.6.2 War crimes (Article 3)

Article 3 of the Statute of the ICTY deals with war crimes *via* The Hague Convention IV, as well as the early Geneva Conventions of 1864 and 1907, which were used by the Nuremberg Tribunal as a basis for its jurisdiction. It refers specifically to violations of the laws or customs of war and includes, but is not limited to, the use of poisonous weapons; the deliberate destruction of cities and the like not justified by military necessity; attacks on undefended towns or buildings; and the plunder, seizure or damage to private property. Its wording and therefore applicability, is wider than that of article 2 in that it does not relate only; to grave breaches, protected persons or property.[43]

2.6.3 Genocide (Article 4)

Genocide is now recognised as one of the most heinous crimes in international criminal law; it is not only recognised as a crime under customary international law and treaty law, but is also recognised as having attained the status of *ius cogens.* The Statute of the ICTY regarding genocide is directly based on the 1948 Genocide Convention. The International Court of Justice

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41 De Than and Shorts 2003: 282.

42 De Than and Shorts 2003: 283.

43 De Than and Shorts 2003: 286. See also Zic 1998: 515 on the tribunal's application of Article 3 in the *Tadic* trial.

has advised in its Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, in 1951,[44] that that Convention has become customary international law.

2.6.4 Crimes against humanity (Article 5)

Article 5 provides that the ICTY has the power to prosecute persons for such offences when committed either in international or internal armed conflict.[45] This article is based on the Charter and Judgment of the Nuremberg Tribunal and on Law No. 10 of the Control Council for Germany.[46] Crimes against humanity comprise the separate offences of deportation, imprisonment, enslavement, murder, extermination, torture, rape, persecution and other inhumane acts.[47] Rape is therefore the only crime of sexual violence explicitly listed in the in the Statute of the ICTY (as well as in that of the ICTR.)[48] The requirement that the Tribunal is to apply customary international law is undoubtedly so that it cannot be attacked on grounds of legality in that a specific international treaty does not bind a party to a conflict at the time of the alleged offences.[49]

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44 De Than and Shorts 2003: 286; Zic 1998: 515.

45 De Than and Shorts 2003: 286. See also Zic 1998: 515 and further on 526 on the application of article 5 in the *Tadic* case.

46 Zic 1998: 516. See also Mettraux 2002: 238. The author notes that crimes have *'now come of legal age, dragged out of its* [sic] *historical and philosophical context by national and international courts of law, which in turn have helped to identify and to shape this concept into an international offence. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have played a crucial role in its transformation'.*

47 De Than and Shorts 2003: 287.

48 McDonald 2000: 11. The author indicates that like Control Council Law No 10, it is included as a crime against humanity. However, she points out, the tribunals have held that rape and other forms of sexual violence can also constitute grave breaches of the Geneva Conventions of 1949, laws or customs of war, genocide, as well as crimes against humanity. In doing so, she justifiably points out that therefore these judgments have "*substantially advanced the jurisprudence of crimes of sexual violence*".

49 Kittichaisaree 2001: 23.

3. Legal and other issues raised by the establishment of the ICTY[50]

3.1 What constitutes a threat to international peace and security

Both Security Council Resolutions 808 and 827 of 1993, which created the Tribunal, stated that the situation in Bosnia at the time constituted a threat to international peace and security. The internality versus internationality characterisation of the conflict was a difficult question and the eventual decision did not satisfy all the legal arguments against it.[51] This is a question which, according to Bodley, remains largely unsolved:

> "*Given its complexity - with a federation breaking apart into units roughly along the lines of its former republics, regional chaos among the different ethnic groups that had lived within its borders, and the former Yugoslav republics of Serbia and Montenegro retaining a sort of unity (insisting, unsuccessfully, on maintaining the name and status of the Socialist Federal Republic of Yugoslavia) and given that declarations of independence were often not recognized by the international community until some six months later, it is understandably difficult to distinguish the 'internal' from the 'international'*".[52]

It could be argued that once the republics, which declared independence, had become independent, hostilities between them and the Federal Yugoslav Army were clearly international in nature.[53] However, it was not clear when the former republics became independent states. Equally complicated is the characterisation of the hostilities between the Bosnian government and the

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50 Cassese 2003: 337. The author summarises the objections to the establishment of the ICTY as: "*(1) the Tribunal was established to make up for the impotence of diplomacy and politics, and revealed the inability of both the Great Powers and the UN Security Council to find a swift and proper solution to the conflict in the former Yugoslavia; the Tribunal was therefore conceived as a sort of 'fig leaf'; (2) by establishing the Tribunal the Security Council exceeded its powers under the Charter, adopting an act that was patently ultra vires; (3) by the same token, by creating a criminal court dealing only with crimes allegedly committed in a particular country, instead of granting to the new court jurisdiction over crimes committed everywhere in the world, the Security Council had opted for 'selective justice' and (4) the Tribunal was clearly based on an anti-Serbian bias. It has also been argued that (5) there was no complete separation at the Tribunal of the prosecutorial function from the judicial one (the prosecutors and the judges working in the same building and being served by the same administration, the Registry)*".

51 Bodley 1999: 442.

52 1999: 442.

53 Bodley 1999: 443. See also Zic 1998: 516.

Bosnian Serbs or between the Croatian government and the Serb minority in Croatia.[54]

What started in the former Yugoslavia as an internal dispute among the republics of the former Yugoslavia, took on the character of a threat to international peace. This threat included not only the suffering of individuals and groups within the former Yugoslavia but also included dangers to neighbouring territorities:

> "*If violence were to spread to Kosovo, the predominantly Albanian province in southern Serbia, refugees and fighting could cross into Macedonia and Albania. Greece and Bulgaria might then renew their rival claims to the Yugoslav republic of Macedonia, and ethnic Hungarians in the Yugoslav region of Fojvodina might persuade Budapest to make plans for territorial adjustments".*[55]

Therefore, the United States, the former USSR and the United Kingdom, amongst others, recognised the international character of the conflict stemming from refugee flows, energy shortfalls and spillages of fighting into neighbouring states. Deciding whether or not the conflict was internal or international is important for several reasons, because for one, the rules of international law are technically applicable only to states. In this case, there is an extensive body of international law available that the international tribunal may apply, while conversely, individual criminal responsibility for grave breaches of humanitarian law or for war crimes does not extend to internal armed conflict. In an internal conflict, the parties thereto have a general duty to take measures necessary for the suppression of violations of the applicable law, altough there exists no specific duty to punish the individuals responsible.[56]

The international response in general to the question of internality/internationality, has been to point to the fact that the various former

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54 Bodley 1999: 443.
55 Tocker 1994: 546.
56 Tocker 1994: 546; Bodley 1999: 443.

Yugoslav republics agreed to the tribunal's jurisdiction at the *Dayton Accords* and therefore to limit examination of the issue.[57]

3.2 The Security Council and the ICTY

The Security Council, as a political body, was not found to be competent to sit in judgment of alleged perpetrators of war crimes and other atrocities and it was consequently necessary to establish a separate judicial body to apply the principles of individual criminal responsibility for crimes under international law. However, and this has been grounds for criticism of the ICTY, it cannot technically be said that it is completely independent in the sense that it relies on the Security Council for its mandate and continued existence as a subsidiary organ of the United Nations.

It may therefore be argued:

> "*that the Security Council has extended its own powers - perhaps as supranational - by creating and controlling the International Tribunal to carry out a mandate it could not do itself".*[58]

3.3 Political criticism

The criticism against the ICTY can be divided into political and legal criticism. Under the first is listed the fact that the Balkan trials, like the Nuremberg trials, may be challenged as historic trials.[59] The charge has already been made that the United Nation's efforts to establish the ICTR were nothing more than a victor's tribunal and an organ of the western-dominated Security Council rather than one elected by the representatives of the General Assembly. In addition, it has been suggested that:

> " *the trials are being conducted at the behest of the Council merely in an attempt to compensate for more than four decades of institutional paralysis. Holding the several countries of the former Yugoslavia, all of which are second-world countries and none a major power, responsible*

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57 Bodley 1999: 448.
58 Bodley 1999: 452.
59 Chaney1995: 82 and further.

for violations which have been committed with apparent impunity by major powers, suggests that Serbia, Bosnia, Croatia and Montenegro are being put on trial only because they have neither the military nor economic wherewithal to persuade the Council to do otherwise. Moreover, that China, one of the leading violators of human rights, should sit in judgment over another power which is being accused of crimes against humanity, may be perceived as tantamount to Russia's presence on the IMT".[60]

3.4 Legal criticism

Three possible points of contention may remain despite the fact that the ICTY is able to invoke conventional human rights law that has been rooted in international jurisprudence for nearly a century, and despite the fact that the Security Council has stated that it was determined that the ICTY apply only that law which is beyond any doubt part of the customary law.[61]

The first point of contention relates to the classification of the conflict in the Balkans as an international conflict rather than an internal one. The second point of contention may be, as was also claimed by the critics of Nuremberg, that the rules of law that the ICTY will rely on, still contain no penal element, without which they are unenforceable. Thirdly, that the ICTY cannot be said to have jurisdiction over the alleged crimes it prosecutes because these alleged acts were committed before the inception of the tribunal.[62] Other criticism of the ICTY relates to the question of individual criminal responsibility but as Chaney convincingly argues,[63] the principle of individual criminal responsibility is surely now, and hugely as a Nuremberg legacy, established as international law.

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60 Chaney 1995: 82.

61 Chaney 1995: 85.

62 Chaney 1995: 86.The author responds as follows to this charge: "*However, until the International Court of Justice is given jurisdiction over criminal matters or a permanent international criminal court is established, the international community must rely upon ad hoc efforts which, by their very nature, must be formed to enforce international law. To deny an ad hoc tribunal jurisdiction over acts which necessitated, but preceded, its formation, would merely accord prospective violators a window of opportunity to act with impunity*". See also Tockley 1994: 554.

63 1995: 87.

4. Lessons learned and the impact of the ICTY

Addressing the issue of the ICTY's contribution to the restoration of peace security and reconciliation in the former Yugoslavia, and lessons learned from the ICTY experience so far, Coliver[64] identifies the following:

4.1 The need to indict and arrest leaders

A clear lesson, as a consequence of the ICTY, is the need to indict and arrest the people with criminal responsibility at the highest political and military level; the arrests have resulted in an increased respect for the Tribunal and a further result has been that it has subdued other wartime leaders who now fear indictment.

4.2 Public outreach and transparency

Public outreach is needed to enable those affected by the crimes to understand what happened in their countries and to counter perceptions of possible bias and illegitimacy of the court. This could be fanned by the media, controlled by or in support of those persons who are targeted by investigations. Public outreach is also needed in order to establish realistic expectations by the public.[65]

Latore is of opinion that:

> "*the creation of the International Criminal Tribunal for the former Yugoslavia at The Hague and the International Criminal Tribunal for Rwanda at Arusha (the Tribunals) reflected the desire of the international community to use international tribunals to prosecute those responsible for violating the laws of war. The Tribunals were undermined, however, by the fact that they had difficulty arresting those indicted. This ineffectiveness resulted in decreased public confidence in the Tribunals, and prevented them from serving as a deterrent to other offenders*".[66]

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64 2000: 19-31.
65 Coliver 2000: 28-29.
66 2002: 163.

Public outreach therefore includes a reference to the transparency of the process and has a domestic as well as an international dimension. The transparency with which the ICTY's proceedings were conducted, has been described as exemplary, but the ICTY:

> "*...could have done more to promote public understanding of the court and its work, both in the former Yugoslavia and around the world*".[67]

Too often proceedings were ignored or worse, misunderstood. Again applying this experience to the ICC, the ICC should foster transparency from its start by explaining its purpose and functions to citizens all over the world.[68]

4.3 Initial strategy

Lessons may be learned from the initial strategy of the ICTY. The ICTY initially focused on the low level offenders rather than the chief architects and planners of the atrocities perpetrated.[69] This initial focus was criticised but proved to be the correct strategy. A series of smaller, less-publicised trials allowed the ICTY to develop its practice and jurisprudence that allowed prosecutors to slowly build compelling cases against the chief perpetrators. By the time the Tribunal was ready to prosecute Milosevic, the Tribunal had established its practice and jurisprudence well. The credibility of the ICTY was initially undermined by the fact that it was unable to secure the presence of a significant number of defendants.[70]

Goldstone and Bass echoed this view as follows:

> *"One of the most obvious signs of the initial weakness of the world's response to the wars in the former Yugoslavia was the amount of time it took to create The Hague Tribunal. As early as 1991, when the Serb-dominated Yugoslav National Army besieged Vukovar and Dubrovnik in Croatia, it was clear that these wars would be waged in a criminal fashion. Warren Zimmermann, the last US ambassador to Yugoslavia, later wrote that such sieges were 'the first major war crimes in Yugoslavia*

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67 Schvey 2003: 83.
68 Schvey 2003: 84.
69 Schvey 2003: 83.
70 Schvey 2003: 83.

since World War II'. Among human rights activists, at least, the massacre of perhaps two hundred Croats from a Vukovar hospital became a symbol of such brutality.
But the world response was little and late. US and Western European leaders concentrated on avoiding military intervention and only looked to institutions of international justice as a halfway measure".[71]

4.4 Other efforts to promote justice, security and reconciliation

One needs to be realistic about the limits of a Tribunal. It is unrealistic to hope to prosecute all those who come within its jurisdiction. To counter this strategy would be to prosecute for representative crimes and to explain this strategy to affected populations.[72] Responsible procedures should be put in place between a Tribunal and responsible authorities to share information concerning the criminal culpability of police, members of the armed forces, and public officials.[73]

4.5 Development of International law

4.5.1 Humanitarian law as determinant

A noteworthy development was the groundbreaking determination by the Security Council that the commission of atrocities in the former Yugoslavia, particularly Bosnia-Herzegovina, "*constitutes a threat to international peace and that the creation of the ad-hoc tribunal would contribute to the restoration of peace*". This meant that violations of humanitarian law were singled out as a major factor in the determination of what constituted a threat to [world] peace that creates an important precedent in international law.[74] The fact that the tribunal was established under Chapter VII of the United Nations Charter as enforcement measure instead of the alternative route in terms of which an international court could be established by treaty between nations, which would be subject to consent, may foreshadow more effective international

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71 Bass 2000: 52.
72 Colivier 2000: 29. See also Akhavan 1996:501 and further for the legislative history of the Rwanda Tribunal.
73 Colivier 2000: 30.
74 Meron 1994: 79.

responses to violations of humanitarian law. It is respectfully submitted that this additionally by implication, foreshadows a more active and responsive role to be exerted by the United Nations in relation to human rights abuses in its designed role as the representative body of nations.

4.5.2 Affirmation of humanitarian law

The second significant implication of the ICTY is gained from the statute of the tribunal. It contributes in a significant way to affirming major components of international humanitarian law as customary law. To this extent, it is justifiably argued, the Geneva Conventions, which constitute "*the core of the customary law applicable in international conflict*", are now affirmed as such in the Charter of the ICTY.[75] In a sense then, one can describe the statute of the ICTY as serving as a declaration of customary international law. Flowing from this, the impact of the establishment of the *ad hoc* tribunals has also been that it gave rise to resurgence in the interest in humanitarian law.[76] Governments are beginning to take humanitarian law seriously, and three of the permanent members of the Security Council, the United States, France and the United Kingdom, have passed national legislation recognising their international obligation to comply with the statutes under which the tribunals operate.[77]

4.5.3 Due process protection

A further significant development with the establishment of the ICTY is that the due process protection in the statute exceeds those in the Charters of the Nuremberg and Tokyo Tribunals. This work has before alluded to the criticism against the Nuremberg and Tokyo Tribunals on this aspect, and undoubtedly the drafters of the ICTY statute took a lesson from history. Meron[78] describes articles 20 and 21 of the ICTY's statute as exemplary, recognising that "*they*

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75 Meron 1994: 79.
76 Goldstone 1996: 500.
77 Goldstone 1996: 500. See also Meron 1995: 577.
78 1994: 83.

are based in the extensive catalogue in article 14 of the International Covenant on Civil and Political Rights".[79]

Referring to the first international war crimes trial since World War II, handed down on the 7 May 1997 by the trial chamber of the ICTY against Dusko Tadic[80], and judging it through the lens of US due process requirements, Scharf is conservatively optimistic:

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79 Meron 1994: 83.

80 *Prosecutor v Dusko Tadic* (a/k/a 'Dule'),Trial Chamber Case Number IT-94-1-T: The Opinion and Judgment was handed down by Trial Chamber II of the ICTY on 7 May 1997.The summary of the case that follows here is taken from the Opinion and Judgment accessed through the official website of the ICTY on www.un.org/itcy/. The page numbers quoted are the printed page numbers of the Opinion and Judgment, which do not correspond with the page numbers that appear on the website. The case was of particular significance as it *"was the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal...".* Tadic was a citizen of the former Yugoslavia and of Serb descent and was a resident of the Republic of Bosnia and Herzegovina at the time that the crimes were allegedly committed. The accused was arrested in February 1994 in Germany, where he was then living on suspicion of having committed offences at the Omarska camp in the former Yugoslavia which crimes Tadic allegedly committed in June 1992 and which included torture and aiding and abetting the commission of genocide. These crimes constituted crimes under German law. Proceedings against Tadic in the ICTY commenced on 12 October 1994 when the then prosecutor, South African judge Richard Goldstone filed an application for deferral by the German courts to the competence of the ICTY. The initial stages of the proceedings were characterised by various applications and motions by both the prosecution and the defence. The actual trial only commenced on 7 May 1996. The presentation of the prosecution case in chief continued for 47 working days during which 76 witnesses gave evidence and 346 prosecution exhibits were admitted. The defence case opened on 10 September 1996 and continued for 8 weeks until 30 October 1996. The indictment against Tadic is set out on pages 15-19 of the Opinion and Judgment and includes various extremely serious and horrific charges. During the course of its judgment, the Tribunal pronounced on a wide range of international criminal and related aspects such as the applicable scope of Common Article 3 of the Geneva conventions, the applicability of Article 3 of the ICTY Statute in relation to protection to victims in conflicts not of an international nature, the customary status in international humanitarian law of the prohibition against crimes against humanity, individual criminal responsibility under article 7 of the ICTY Statute, persecution as a crime against humanity. See also: http://www.unorg/icty/pressreal/tad-sumj000126.htm : On 7 May 1997, the Trial Chamber II found Tadic guilty on 9 counts, guilty in part on two counts and not guilty on 20 counts. The Trial Chamber imposed penalties that ranged from 6 to 20 years' imprisonment for each of the counts on which Tadic was convicted and ordered that the sentences run concurrently. The Trial Chamber recommended that unless exceptional circumstances prevailed, the sentence not be reduced or otherwise commuted to less than 10 years. Both Tadic and the Prosecutor appealed against separate aspects of the Judgment, and Tadic in addition appealed against the sentence judgment. The Appeal Chamber reversed the judgment in certain respects and found Tadic guilty on a number of additional counts. The substance of the appeal against sentence was

> "*… the Yugoslavia Tribunal's initial legal practice as reflected in the Tadic case has not been wholly above reproach…..Yet, given the overwhelming weight of the evidence against Tadic, a U.S. court reviewing the case would almost certainly conclude that these deficiencies, while troubling as a matter of principle, constituted harmless error under the circumstances*". [81]

It is submitted that judgments like the above are important in order to establish international perception that justice for international crime may be achieved through international criminal tribunals.

4.5.4 Sexual crimes

The recognition of rape as a crime against humanity, and in doing so, going beyond the Nuremberg Charter, is in the view of Meron,[82] a significant development. The tribunals have also greatly contributed towards a focus which has virtually been ignored in international prosecutions, namely that of prosecution for crimes involving sexual violence. Although crimes involving sexual violence have occurred in conflicts since time immemorial, and have inevitably been seen in the past as an unavoidable consequence of war, prosecution for them is a relatively new phenomenon in international criminal law. So, for example, the Nuremberg Judgment contains not a single reference to rape.[83]

4.5.5 Crimes against humanity in armed as well as non-armed conflict

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that Tadic serve 20 years imprisonment and that the Appeals Chamber preserved the Trial Chamber's recommendation of a minimum of 10-year sentence.

81 1997-1998: 167 and further.

82 1994-1994:84.

83 McDonald 2000: 10. The author continues: "*The prosecutions of other war crimes subsequent to World War II, however, at least made some mention of the sexual violence during the war. The International Military Tribunal for the Far East, which sat at Tokyo, found several high-ranking officials guilty of violations of the laws and customs of war for their responsibility for widespread rapes and sexual assaults, although its Charter did not explicitly criminalize rape. These assaults included the notorious Rape of Nanking, during which Japanese soldiers raped approximately 20 000 women and children and later killed most of them. Yet, the tribunal completely ignored the enforced prostitution of 'comfort women' kept by Japanese soldiers to rape at will*".

A last aspect deals with the *nexus* between crimes against humanity and war.[84] It is indicated that although disappointingly, the letter of the statute confers jurisdiction on the tribunal only for crimes against humanity committed in armed conflict, comments on the interpretation of the statute seems to suggest that the jurisdiction will cover crimes against humanity whether committed in armed conflict or not.

Meron concludes with the following general remark:

> "*The reaction of the international community to the appalling abuses in the former Yugoslavia has brought about certain advances - some of them of considerable importance in international criminal and humanitarian law. One may hope that these institutional and normative developments will enhance prospects for firm responses to future atrocities*". [85]

4.6 Impetus for an International Criminal Court

Schvey describes the creation of the ICTY as groundbreaking for the creation of the ICC. [86] He echoes much of what was previously written by Meron. A particularly positive contribution by the ICTY is the fact that it proceeded on the basis of clearly established law:

> "*The ICTY has been able to attain this legitimacy because it has, for the most part, based its decisions on relatively well established international law stemming from the Nuremberg and Tokyo Tribunals or from the various international human rights and humanitarian law instruments created in the post-war period. While the ICTY has extended existing precedent, it has also relied on past precedents when, for example, applying concepts of command responsibility, denying immunity for high elected officials, and defining contours of 'crimes against humanity'. This fact allowed the ICTY to step out of the shadows of Nuremberg, whose jurisprudence has been questioned as result-oriented victor's justice*".[87]

The legitimacy of the ICTY has been bolstered by a wide-spread sense that the trials of the ICTY have been fundamentally fair. This is regarded as very significant, given the charges of partiality and undue process that have been

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84 Meron 1994: 84.
85 1994: 84.
86 2003:39-85. See also Akhavan 2001: 27.
87 Schvey 2003: 81. See also Booth 2003: 159 and further.

levelled at the Nuremberg tribunal. No doubt this was fairly obviously also facilitated by the fact that the ICTY was a creature of the Security Council of the United Nations, as opposed to Nuremberg and Tokyo which were responses by the victorious allies. In terms of the ICTY statute, defendants were provided with a wide range of rights and were prohibited for capital punishment to be utilised.[88]

4.7 Blow against impunity

In establishing the tribunals, the Security Council dealt a meaningful blow to impunity.[89] The mere establishment of the tribunals signaled to would-be criminals that the international community is no longer prepared to allow serious war crimes to be committed.[90]

4.8 Jurisprudence of the international tribunal and development of international criminal law

Despite the criticism against the ICTY, this tribunal served to establish and record development of international criminal law in a far-reaching manner.[91]

The uncertainty hitherto in international law regarding the issue of when a war is characterised as internal or international in its nature has been reduced by

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88 Schvey 2003: 82.

89 Goldstone1996: 500. See also Akhavan 2001: 27. The author remarks as follows: "*Beyond the former Yugoslavia and Rwanda, the broader impact of the ICTY and the ICTR on transforming a culture of impunity should not be overlooked. These institutions have 'mainstreamed' accountability in international relationships and thus instilled long-term inhibitions against international crimes in the global community*".

90 Akhavan 2001: 30. The author observes as follows: "*The examples of the former Yugoslavia, Rwanda, Sierra Leone, and other transitional situations demonstrate how hard it is becoming even for realpolitik observers and diehard cynics to deny the preventive effects of prosecuting murderous rulers'. Accountability arguably reflects a new realism".*

91 Goldstone 1996: 499. The author lists a number of achievements by the tribunals: First, the norms of international humanitarian law have been substantially advanced through the work of the tribunals. The decisions handed down by the judges of both the appeal and trial chambers have begun to create a new international jurisprudence that, if allowed to develop further, will undoubtedly influence national systems of law positively. The problematic gaps in humanitarian law, in particular the artificial distinction made between international and internal wars, have been reduced considerably.

jurisprudence by the tribunals; the prior deficient approach to mass rape which has been significantly transformed by the recognition that this vile conduct not only constitutes a war crime, but a crime against humanity.[92]

Another example of the effect of jurisprudence of international tribunals on the development of international criminal law is the case of *Prosecutor v Furundzija,*[93] where the court analysed the state of the international norm against torture and found it to be peremptory in nature to the extent that it has acquired the status of a *jus congens* norm.[94] The court, having come to this conclusion, proceeded to express itself as follows on efforts to legitimate the practice of torture:

> "*It would be senseless to argue, on the one hand, that on account of the jus congens value of the prohibition of torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body… What is even more important is that the perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle".*[95]

Secondly, the ICTY in the same case, in an *obiter dictum,* and from which the impact of the jurisprudence of international criminal courts is appreciated, suggested that the violation of a *jus congens* norm, such as the prohibition against torture, had direct legal consequences for the legal character of all official domestic actions relating to the violation.[96] The court declared:

> "*The fact that torture is prohibited by a peremptory norm of international law has effects at the inter-State and individual levels. At the inter-State*

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92 Goldstone 1996: 500.
93 Case No. IT-95-17/1-T, 10 December 1998
94 Wilson 1999: 956.
95 Wilson 1999: 957.
96 De Wet 2004: 97.

level, it serves to internationally delegitimise [sic] any legislative, administrative or judicial act authorizing torture".[97]

It is conceded that this is a broad view of the additional legal effects of peremptory norms but could even include the abolition of intra-state measures that hinder the enforcement of a *jus congens* norm in relation to unlawful treaties.[98]

5. The International Criminal Tribunal for Rwanda

5.1 Background

In 1994, a campaign of genocide in Rwanda led to 500 000 to one million deaths in Rwanda in three months.[99] This was brought about by the ethnic, social and economic rivalry that has existed between the Hutus and Tutsis in central Africa since pre-colonial times.[100] Since 1959, when the first

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97 As quoted by De Wet 2004: 98. See also Askin 2000: 55 and further. The author observes as follows: "*The Furundzija case, while an excerpted and redacted version of a larger indictment containing a broader scope of crimes, was essentially about the multiple rapes of one woman by a single physical perpetrator during one day of the Yugoslav conflict. The accused was not the alleged physical perpetrator, an important point to emphasize: he was present during at least part of the rape and he could have prevented the rape but failed to do so'. The author continues to list the following as aspects in which the jurisprudence flowing from the ICTY and the ICTR has enriched and developed gender law, in that the following were recognized by the tribunals: (1) that sexual violence may be committed with genocidal intent, (2) widespread or systematic rape crimes may constitute a crime against humanity, (3) a victim may be tortured by means of rape, (4) the rape of one person constitutes a serious violation of international humanitarian law, (5) not only the physical perpetrator but also anyone who orders, aids, abets, or otherwise facilitates a rape crime may be held accountable, (6) forcible nudity constitutes sexual violence and is a serious crime, (7) forcible or coercive oral, anal, or vaginal penetration constitutes rape, (8) men may be victims of sexual violence, (9) rape crimes may be committed as a form of discrimination, (9) women may be subjected to persecution on the basis of their sex, (10) the definition and elements of rape must be sufficiently wide to cover all factual realities, (11) any form of captivity vitiates consent, and (12) failing to adequately investigate, document and prosecute these crimes is contrary to the interests of justice*".

98 De Wet 2004: 98.

99 Carroll 2000: 164. See also Shaw 1997:189 and further.

100 Carroll 2000: 166. The author indicates that in 1994, the Rwandan population was comprised of 84 percent Hutu, fourteen percent Tutsi and two percent other ethnic groups such as the Twa. In the few years before Rwandan independence, the Hutu majority rebelled against the minority Tutsi power structure. Hutus may have been resentful of the favoritism Europeans showed the Tutsis during colonial times. Thus from the early 1960s when the Hutus gained power, to the 1990s, ethnic violence

massacres occurred in Rwanda, no one had been punished and thus, a culture of impunity developed in the country in which citizens do not feel obligated to a rule of law and do not fear retribution for their actions.[101]

In November 1994, the Security Council, acting on a request from Rwanda, voted to create a second so-called *ad hoc* criminal tribunal.[102] In a sense, the establishment of the ICTR was an expression of the reactive nature of the international human rights system: first the worst atrocities have to occur as in the case of Nazi Germany and in the former Yugoslavia before intervention occurs by the international community.[103] The International Criminal Tribunal for Rwanda was created on 8 November 1994 by the United Nations Security Council, of which it is a subsidiary body.[104]

5.2 Establishment

The international community decided to create an international criminal tribunal as opposed to relying on the Rwandan national justice system for a number of reasons: the latter was in ruins after the 1994 conflict; the Commission of Experts established by the UN Secretary-General believed that an international tribunal was better suited than a domestic court to achieve justice and accountability. This was so because the Commission

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erupted periodically. Massacres occurred in 1959, 1963, 1966 and 1973, but no one was ever held accountable or prosecuted for these massacres. Many Tutsis fled Rwanda and Tutsi exile groups continually tried to invade Rwanda. In October 1990 the Rwandan Patriotic Front, which was made up of Tutsis in exile, attacked Rwanda. In 1992, groups that were affiliated with the Rwandan army of the ruling regime established two militias. These, trained and supported by the Rwandan army, periodically attacked Rwandan Tutsis and eventually played an instrumental role in the 1994 atrocities. Peace accords, known as the Arusha Accords were concluded, and the United Nations Security Council established the Assistance Mission in Rwanda, but did not establish peace. A plane crash on 6 April 1994 and which amongst other carried President Habyarimana and the president of Burundi crashed outside Kigali. Supporters of the president immediately claimed that the Rwandan Patriotic Front was responsible and this incident sparked the atrocities that followed.

101 Carroll 2000: 171.

102 Schabas 2001: 11.

103 Akhavan 1996: 501. The author indicates that at least one year before the massacres of April 1994, which according to some estimates took the lives of as many as five thousand to one million people, United Nations human rights experts and non-governmental organisations had forewarned of an impeding calamity, to no avail.

104 Carroll 2000: 174.

feared that the new Rwandan government and its court system may not be capable of bringing criminals to justice in a objective, impartial and fair manner.[105]

The ICTR consists of three organs: the Chambers, the Office of the Prosecutor and a Registry.[106] The ICTR was charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and in the neighbouring countries during the year of 1994. Its Statute closely resembles that of the International Criminal Tribunal for the former Yugoslavia, although, from the war crimes provision, it is reflected in the Statute creating the ICTR, that the Rwandan genocide took place within the context of a purely internal armed conflict.[107] The United Nations Security Council, in the resolution that created the Tribunal, expressed its grave concern, based on the reports about the Rwandan situation it had received, at the genocide and the other systematic, widespread and flagrant violations of international humanitarian law that had been committed in Rwanda.[108] The Tribunal is stationed in Arusha, Tanzania. It has jurisdiction over the following crimes: genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions of 12 August 1949 for the protection of war victims, and committed in the territory of Rwanda and neighbouring states, over Rwandan citizens responsible for such violations committed during the period between 1 January and 31 December 1994.[109] Like the ICTY, the ICTR exercises jurisdiction over natural persons.[110]

The ICTY Prosecutor also serves as the ICTR Prosecutor.[111] The provisions in the ICTR Statute, and regarding aspects relating to the organisation of the

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105 Carroll 2000: 172.

106 Art 10 Statute of the International Criminal Tribunal for Rwanda.

107 Schabas 2001: 11. The procedure to be applied by the ICTR was modelled on that in force at the ICTY. The procedure itself is of a fairly accusatorial nature, basically of the kind that finds its fullest expression in the common-law countries.

108 Schabas 2001: 11.

109 Kittichaisaree 2001: 24.

110 Kittichaisaree 2001: 24.

111 Kittichaisaree 2001: 25. See also Akhavan 1996: 503.

Tribunal, investigation and preparation of indictment, review of indictment, rights of the accused, penalties appellate proceedings, and cooperation and judicial assistance, show corresponding provisions in the ICTY Statute.[112]

As a body that was created by the Security Council, the Tribunal has primacy over national courts. As such, it may require states to cooperate fully in its action by the following measures: identifying and seeking suspects, producing evidence, forwarding documents, and arresting and detaining persons against whom it has initiated proceedings. It may also request a national court to defer cases to it at any time of the proceedings. These compelling powers and the primacy attributes are essential features or characteristics of an international court. It is regarded as unfortunate that cooperation is of a one-way nature in the sense that neither the Statute of the Tribunal, nor the Rules of Procedure and Evidence indicate how the Tribunal should respond to a request for legal assistance from the Rwandan Public Prosecutor's office or courts despite the fact that by the nature of the crimes committed, it could happen that cases tried by the one court may be linked to cases tried by the other.

The legislative and institutional adaptations needed for holding the trials were dealt with by the government and parliament of Rwanda, which started at an international conference organised by the Government of Rwanda in 1995. The Rwandan government opted for a specific constitutional law in order to institute proceedings and repress the genocide and crimes against humanity committed between 1 October 1990 and 31 December 1994.[113]

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112 Kittichaisaree 2001: 25.

113 http:www.ictr.org/web/eng/siteengOnsf/iwpList412 5/26/2004: 4: "*Organic Law of 30 August 1996 on the organization of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990, Law No.8/96, Official Gazette of the Republic of Rwanda, 30 August 1996*". Art 2 of this law classifies perpetrators of crimes in four separate categories, which makes it simpler to indicate the degree of individual responsibility involved and possible to limit recourse to capital punishment and imprisonment by applying a 'graduated scale of penalties'. *Category 1* includes the organisers and planners of the genocide and crimes against humanity, persons who abused positions of authority within the administration, the army, political parties, religious groupings or militias to commit or encourage crimes, notorious killers who distinguished themselves by their ferocity or excessive cruelty and perpetrators of sexual torture. *Category 2* makes provision and includes perpetrators of or accomplices to intentional homicides or serious assaults against individuals that led to death. *Category 3* provides for persons guilty of other serious

5.3 Obstacles

The establishment and continued existence of the ICTR and ICTY were initially faced with serious challenges, which challenges continue to present major obstacles.[114] Despite these obstacles, there have however been major achievements, which cannot be ignored for purposes of the development of international criminal law and justice.

5.3.1 Geographic dispersion

In the case of the ICTR, the Tribunal is geographically dispersed: the seat of the Tribunal and the Detention Unit are in Tanzania.[115] There is an office of the Prosecutor however, which is located in the Rwandan capital, Kigali, where the Prosecutor's staff conduct their enquiries and institute criminal proceedings. The Prosecutor and the appeal judges common to the two international tribunals are based at the seat of the ICTY in The Hague, Netherlands. This geographical dispersion of the Tribunal encumbers the activities of the ICTR and obviously complicates communication and coordination between the different offices and organs.

5.3.2 Relationship with the Rwandan government

Though the ICTR was instituted as a result of a request by the Rwandan government that government subsequently voted against resolution 955 in the Security Council of which it was, at the time, a non-permanent member.[116] The Rwandan government's main objection was that the temporal jurisdiction

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assaults against individuals, and category 4 provides for persons who have committed offences against property.

114 Dougherty 2004: 311.

115 Carroll 2000: 176. The author states that although the Secretary-General believed that the ICTR would guarantee a neutral and fair judicial process, he believed that seating the Tribunal outside Rwanda was necessary to ensure the appearance of complete impartiality and objectivity. He additionally reasoned that there might be security risks in bringing former leaders back to Rwanda for genocide trials. Thirdly, on a practical level, Tanzania had a location ready for the tribunal whereas it would have taken too long to build a location in Rwanda.

116 Carroll 2000: 175.

given to the Tribunal, that is to prosecute only alleged violations that were committed between 1 January and 31 December 1994, was too limited and would not cover the lengthy period during which preparations were made for the genocide, and secondly, that with only two Trial Chambers, it was prevented from functioning properly in view of the large number of prosecutions to be brought.[117] The Rwandan government had proposed that account be taken of the period from the beginning of the armed conflict on October 1, 1990 until July 17, 1994, when it terminated with the victory of the Rwandan Patriotic Front.[118] The Rwandan government furthermore disagreed with the penalties in the ICTR Statute. The Rwandan national laws allow the death penalty in the case of genocide, whereas the ICTR Statute provides for imprisonment only. By 1998, after the ICTR demonstrated its ability to gain custody of several high-level offenders and to begin with its trials, the relationship between the ICTR and the Rwanda government improved. The relationship was not always smooth: in November 1999 and after the appeals chamber of the ICTR ordered the release of Jean-Bosco Barayagwiza, a director in the Foreign Ministry and the head of the radio station responsible for hate propaganda because of his prolonged detention without trial, Rwanda severed diplomatic relations with the ICTR. In February 2000 relationships were normalized when the appeals chamber decided to revise its decision to release Barayagwisa.[119] This illustrates however the diplomatically sensitive circumstances in which the tribunal operates.

5.3.3 Financial constraints

The *ad hoc* tribunals are extremely expensive, the extent of which was not entirely foreseen by the creators of the Tribunals.[120] By 2000, the costs of the two Tribunals accounted for over 10% of the UN's regular budget.[121] Both the

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117 Dougherty 2004: 313: Both the Trial Chambers of the ICTR and the ICTYs statutes were amended by the Security Council and a third trial chamber was added to each Tribunal. The number of trial judges was also increased from 11 to 16.

118 Akhavan 1996: 505.

119 Carroll 2000: 177, 180-181.

120 Dougherty 2004: 312.

121 Dougherty 2004: 312: "*By the end of 2003, the ICTY received nearly $695 million, and the ICTR nearly $544 million, and these costs are set to continue well into the*

Tribunals' expense and their sheer size surprised their architects. This particularly arose as a result of the fact that both Tribunals' jurisdiction with regard to personal jurisdiction was cast very wide, allowing both Tribunals to prosecute any person responsible.[122]

5.3.4 Slow delivery of justice, and due process

There have been charges levelled against the Tribunals that they are slow and inefficient.[123] They both encountered problems in getting off the ground. In the case of the ICTY, and having no indicted persons in custody, its first three years were spent on administrative matters. The ICTY lacked a prosecutor for its first 18 months. It took the ICTR more or less two and a half years to start its first trial. As more of those indicted were brought to trial, the Trial Chambers could not keep up.[124] Serious issues regarding due process resulted from this situation, as some persons who were indicted spent years in detention before their trials started.[125] Since 1995 the ICTR has only managed to complete cases against eleven persons, with another nine

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future; in 2003 an exasperated Security Council passed Resolution 1503 calling on both courts to take all possible measures to complete all trial activities by the end of 2008". See also Akhavan 1996: 508-509. See also Scharf 2000: 934 for a detailed account of the immensity of the financial costs of the tribunals.

122 Dougherty 2004: 313. It is thus not surprising, given the hundreds of thousands of victims in the former Yugoslavia and Rwanda, the tribunals indicted the following numbers of persons: The ICTY, over 120 persons, and the ICTR, 76 persons. In addition to these indictments, further indictments might be forthcoming.

123 Dougherty 2004: 313. See also Carroll 2000: 181.The author indicates that the charge for the slow delivery of justice could be ascribed to (1) inadequate technical resources and staff, (2) initial allegations of corruption and mismanagement, (3) the ICTR largely has to operate at the whim of other countries to cooperate in terms of producing suspects for detention and trial. Despite the fact that many countries did cooperate, cooperation was not always fast. (4) The ICTR's judges create the procedural rules that govern future proceedings as they go along. Caroll points out that this is a gargantuan task that is open to criticism by those who are disadvantaged by any change in the continuously evolving rules. This situation should improve as the Tribunal gradually establishes a body of case law and rules from which to proceed. (5) Hundreds of motions filed by both prosecution and defence have led to delays.

124 Dougherty 2004:313. See also Akhavan 1996: 506. One of the reasons that the Rwandese Government voted against resolution 955 was based on the objection that the composition and structure of the Tribunal was "*inappropriate and ineffective*".

125 Dougherty 2004: 313. Particularly notable in the case of the ICTR, was the case of Theodore Bagasora, who was arrested in March 1996, and whose trial only started in April 2002.

persons at the appeals stage.[126] In the case of the ICTY, the picture is no better: in ten years the ICTY has completed cases against 30 indicted persons with a further 21 cases at the appeals stage, or awaiting sentencing. The mismanagement and staff problems at the ICTR were so great in extent, that this triggered a United Nations investigation in 1996. In the case of the ICTY, it suffered from its inability to obtain custody of indicted persons, and the feeling was that it was left to prosecute the small fish while major criminals were at large. In similar vein, the Rwandan government complained that the ICTR failed to arrest a large number of known "*genocidaires".*[127]

It has therefore become clear to the international community that if support for prosecutions of mass atrocities is to be maintained, another model needs to be found such as was recently the case in Sierra Leone.[128]

5.3.5 Perceived legitimacy

Another issue to the question of delivery of justice pertains to the legitimacy or perceived legitimacy of international criminal tribunals and specifically, the ICTR. As has been indicated above, and in particular in the case of Rwanda, a primary object of the ICTR in that country would be to aim to achieve a discontinuation of the culture of impunity. The ICTR's initial slow pace of delivering justice cast serious questions on its integrity and therefore also its legitimacy.[129]

It is further recognised that one of the reasons that the ICTR was created was to compensate for the inability of the Rwandan courts to try those responsible for serious human rights violations fairly and without delay. Ironically, however, the ICTR has suffered some of the same problems as the Rwandan

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126 Dougherty 2004: 313. Thus, after nine years of operation, nearly 30% of persons indicted are still awaiting trial.
127 Dougherty 2004: 313-314.
128 Dougherty 2004: 314. See also Charney 1999: 452.
129 Carroll 2000: 184.

courts. Due process rights of accused persons were violated in that the ICTR held them for inappropriate periods of time before charging them.[130]

5.3.6 Tensions between international politics and justice

Judging the development of international criminal justice in recent times, particularly measured against the strengths, weaknesses and opportunities with which the two *ad hoc* tribunals are faced, it becomes obvious that prosecutions of international crime highlights tensions between international politics on the one hand, and the enforcement of the law's natural-justice goals on the other hand.[131] Charney points out that the international community heretofore has made only limited use of international courts to adjudicate international human rights law, not to speak of their limited use for criminal prosecutions.[132]

5.4 Achievements

5.4.1 Peace and stability

Apart from the general development of international criminal law through the establishment of the ICTR and the ICTY, one must also measure the achievements of the *ad hoc* criminal tribunals in the light of the measure of success in promoting peace and stability in the regions for which they were established. A number of witnesses have been able to travel to and give evidence at these tribunals, which has been facilitated in the case of the ICTR, by its *Witness and Victims Support Section*. Some twenty witnesses thought to be particularly at risk, have been relocated. The section was also

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130 Carroll 2000: 193.

131 Charney 1999: 452 and 453.

132 1999: 453. He points out that the European Court of Human Rights is a notable positive example of an active regional human rights court, but although it functions in the context of Western developed states that strongly support court enforcement, basic human rights and humanitarian law. Moreover, it has no criminal jurisdiction. The only other functioning international human rights court is the Inter-American Court of Human Rights. This court also lacks criminal jurisdiction. The author further states: "*The African Charter on Human and People's Rights (Banjul Charter) has no associated human rights court and the regime has not been especially effective*".

successful in maintaining the anonymity of witnesses during and after their testimony, which encouraged other witnesses to travel to Arusha and to participate willingly in the search for justice and reconciliation in Rwanda. It is pointed out that the number of witnesses that were able to testify is not the only yardstick to measure whether justice was achieved: it is also a measure to ensure that justice is done through trial to the accused as well as the victims. Unfair trials of those persons accused before the ICTR, who are mainly Hutu (who comprise 80 percent of the Rwandan population), would not be successful in bringing peace and reconciliation in Rwanda, but would instead sow seeds of revenge. It has been concluded that the ICTR as neutral organ has played a very important role in the reconciliation process in Rwanda. Often the victims of crimes may need only an apology and particularly knowledge of the truth and not necessarily monetary compensation in order to experience that justice has been done.[133]

The ICTR has established the precedent that killing innocent civilian people is not a political issue nor political offence. Thus it has become clear, and this message is continually spread through the judgments of the ICTR, that perpetrators of crime cannot hide from the hands of the international community.[134]

5.4.2 International case law precedent

The decisions of the *ad hoc* Tribunals are forging a substantial body of case law which can be used in future by international criminal tribunals and by national courts all over the world. As such, it will provide a sound body of precedent case law for the International Criminal Court.[135] An example of how the *ad hoc* tribunals have the inherent capacity to create precedent in

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133 Mafwenga 2000: 11-17.

134 Mafwenga 2000: 11-17. This is so because the ICTR was the first Tribunal to track down, arrest and try a former Prime Minister of a country. The message has reached politicians all over the world, which in this sense makes the decisions of the ICTR a deterrent to future would be perpetrators of crime. In this context it is therefore not only Rwanda that benefits, but also the whole world.

135 Mettraux 2002: 316.

international law and how it consequently contributes towards the general development of international criminal law is the case of *The Prosecutor v Joseph Kanyabashi.*[136] In this case the counsel for the defence raised a number of objections. The first was that the principle of state sovereignty was violated by the fact the Tribunal was not established by a treaty but through the General Assembly of the United Nations.[137] It submitted that the Tribunal should and in fact could only have been established by an international treaty, upon recommendation of the General Assembly, which would have permitted the member states of the United Nations to express their approval or disapproval of the establishment of an *ad hoc* tribunal.[138] In the view of the defence council, the Tribunal was therefore not lawfully established. In response to this objection, the prosecutor rejected the notion on the grounds that since there was a need for an effective and, notably, an expeditious implementation of the decision of the United Nations to establish the Tribunal, the treaty approach would have been ineffective because of the considerable time it takes for the establishment of an instrument by treaty and for its entry into force.[139]

In order to adjudicate this objection, the Trial Chamber found that two issues had to be addressed: the first, whether the accused as an individual had the necessary *locus standi* to raise a plea of infringement of the sovereignty of states, particularly Rwanda, and secondly, whether the sovereignty of the Republic of Rwanda and other member states were in fact violated in the present case.[140] The Trial Chamber ruled that the accused indeed had such a right. It relied on the ruling of the Appeals Chamber held in the *Tadic* case, that:

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136 Case No ICTR-96-15-T.

137 *Prosecutor v Joseph Kanyabashi* 727:B.1.

138 *Prosecutor v Joseph Kanyabashi* 727: 9. The defence council argued that by leaving the establishment of the Tribunal to the Security Council through a resolution under Chapter VII of the UN Charter, the United Nations not only encroached upon the sovereignty of the Republic of Rwanda and other Member States, but also frustrated the endeavours of its General Assembly to establish a permanent criminal court.

139 *Prosecutor v Joseph Kanyabashi* 727: 10.

140 *Prosecutor v Joseph Kanyabashi* 727: 11.

> "*...to bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State Sovereignty*".

In addition, so the Chamber held, it was the accused as an individual and not the state that had been subjected to the jurisdiction of the Tribunal. As to the second issue, the Trial Chamber noted that membership of the United Nations entails certain limitations upon the sovereignty of member states. This is particularly so by virtue of the fact that all member states, pursuant to article 25 of the UN Charter, have agreed to accept and carry out the decisions of the Security Council in accordance with the Charter.[141] In further motivation of deciding the second issue against the accused, the Trial Chamber relied on the fact that it was the government of Rwanda itself, that called for the establishment of the Tribunal, which request was motivated by a view expressed by the Rwandan government, that by prosecuting those responsible for acts of genocide and crimes against humanity, it would promote the restoration of peace and reconciliation in Rwanda.[142] The second main issue, which was addressed by the defence for the accused, was that the Security Council lacked competence to establish an *ad hoc* tribunal under Chapter VII of the UN Charter. Council for the defence advanced that the establishment of the Tribunal was ill-founded on grounds of the following five reasons.[143]

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141 *Prosecutor v Joseph Kanyabashi* 726: 13. The Chamber notes the following as an example of limitations upon the sovereignty of states, where the use of force against a state is sanctioned by the Security Council in accordance with article 412 of the UN Charter.

142 *Prosecutor v Joseph Kanyabashi* 726: 14. "*The Ambassador of Rwanda, during the discussion and the adoption of Resolution 955 in the Security Council on 8 November 1994 declared that: 'The tribunal will help national reconciliation and the construction of a new society based on social justice and respect for the fundamental rights of the human person, all of which will be possible only if those responsible for the Rwandese tragedy are brought to justice*".

143 *Prosecutor v Joseph Kanyabashi* 726: 17. The reasons set forth were: "*(1) that the conflict in Rwanda did not pose any threat to international peace and security, (2) that there was no international conflict to warrant any action by the Security Council, (3) that the Security Council thus could not act within Chapter VII of the UN Charter, (4) that the establishment of ad hoc tribunal was never a measure contemplated by Article 41 of the UN Charter, and, (5) that the Security Council has no authority to deal with the protection of Human Rights*".

(a) That the conflict in Rwanda did not pose any threat to international peace and security: The Trial Chamber rejected this contention mainly on the grounds that the decision as to whether a particular situation in the world posed a threat to international peace and security, was exclusively that of the Security Council, which has a wide scope of discretion regarding when and where a threat exists to international peace and security. The Chamber nevertheless took judicial notice of the fact that the conflict in Rwanda created a massive wave of refugees, many whom were armed, spilling over into neighbouring countries, which in itself spelled out a considerable risk of serious destabilisation of the local areas in the host countries where the refugees had settled. (b) That there was no international conflict to warrant any action by the Security Council. The Trial Chamber responded to this argument stating that if the Security Council had decided that the conflict in Rwanda did in fact pose a threat to international peace and security, this conflict would thereby fall within the ambit of the Security Council's powers to restore and maintain international peace and security pursuant upon the provisions in Chapter VII of the UN Charter.[144] Further, that the Security Council's authority to take action exists independently of whether or not the conflict was deemed to be international of character:

> "*The decisive pre-requisite for the Security Council's prerogative under Article 39 and 41 of the UN Charter is not whether there exists an international conflict, but whether the conflict at hand entails a threat to international peace and security. Internal conflicts, too, may well have international implications which can justify Security Council action*".[145]

(c) The Security Council could not act within Chapter VII of the UN Charter: Defence counsel argued that the Security Council was not competent to act in the case of the conflict in Rwanda, because international peace and security had already been re-established by the time the Security Council had decided to establish the Tribunal. The Trial Chamber again responded that the question of whether the Security Council was entitled to take the decision it did, was a question to be determined by the Security Council itself. In

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144 *Prosecutor v Joseph Kanyabashi* 724: 20 and 23. See also Bailey 1982: 44 generally on the primacy of the Security Council.

145 *Prosecutor v Joseph Kanyabashi* 724: 24.

addition, the Trial Chamber noted that despite the fact that hostilities might have ceased, this did not necessarily mean that international peace and security had been restored.[146] It further noted that in its view, it could not be argued that peace and security had been re-established without justice having been done:

> "*…the achievement of international peace and security required that swift international action be taken by the Security Council to bring justice to those responsible for the atrocities in the conflict*".[147]

(d) The establishment of an *ad hoc* tribunal was never a measure contemplated by article 41 of the UN Charter: The *crux* of this argument is that article 41 of Chapter VII of the United Nations contains a list of actions that the Security Council may take in order to restore international peace and security and that establishing an international *ad hoc* criminal tribunal, is not one of those measures. The Trial Chamber responded to this argument by finding, and relying on the view of the Appeals Chamber in the *Tadic* case, that the list contained in article 41 is not an exhaustive list of measures the Security Council might take, but rather, constitutes examples of measures it might take in order to restore international peace and security.[148]

(e) The Security Council has no authority to deal with the protection of human rights. The gist of this argument by the defence was that there existed specialist international instruments for the protection of human rights, and this was not within the powers of the Security Council. The Trial Chamber responded to this argument by holding that the existence of certain specialised international institutions for the protection of human rights does not preclude the Security Council from taking action in cases of violations of human rights, and that in fact the protection of human rights was the responsibility of all United Nations organs, including that of the Security Council.[149]

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146 *Prosecutor v Joseph Kanyabashi* 724: 24-26.
147 *Prosecutor v Joseph Kanyabashi* 724: 26.
148 *Prosecutor v Joseph Kanyabashi* 724: 27.
149 *Prosecutor v Joseph Kanyabashi* 724: 28-29.

Another objection by the defence relating to the argument that the establishment of an *ad hoc* tribunal was never a measure contemplated by article 41 of the UN Charter related to an objection to the primacy of the Tribunal's jurisdiction over national courts and against the violation of the principle of *jus de non evocando.*[150]

Article 8 of the Statute of the International Criminal Tribunal for Rwanda stipulates as follows:[151]

> "*Article 8: Concurrent Jurisdiction:*
> 1. *The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighboring[sic] States, between 1 January 1994 and 31 December 1994.*
> 2. *The International Tribunal for Rwanda shall have primacy over national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda*".

Article 9 of the Statute of the International Criminal Tribunal for Rwanda, stipulates as follows:

> "*Article 9: Non Bis in Idem:*
> *(1) No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.*
> *(2) A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:*
> *(a) The act for which he or she was tried was characterized as an ordinary crime; or,*
> *(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.*
> *(3) In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for*

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150 *Prosecutor v Joseph Kanyabashi* 723: 3.

151 http://www.itcr.org/ENGLISH/basicdocs/statute.html 5/19/2001 4-5.

> *Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served*".[152]

The principle of *jus de non evocando* originally derived from the constitutional law in civil jurisdictions and it establishes that persons accused of certain crimes should retain their right to be tried before the regular domestic criminal Courts, rather than by politically founded *ad hoc* tribunals which, in times of emergency, may not provide impartial justice.[153] The Trial Chamber responded by indicating that in its view, the Tribunal was far from being an institution designed for the purpose:

> "*…of removing for political reasons, certain criminal offenders from fair and impartial justice and [to] have them prosecuted for political crimes before prejudiced arbitrators*".[154]

As far as the primacy of the Tribunal over domestic courts is concerned, the Trial Chamber responded that primacy is exclusively derived from the fact that the Tribunal is established under Chapter VII of the UN Charter, which in turn enables the Tribunal to issue directly binding international legal orders and requests to states, irrespective of whether they consent or not.[155]

The last of the defence counsel's objections which is examined here, relates to the objection to the jurisdiction of the Tribunal over individuals directly under international law. This defence was that allowing the Tribunal jurisdiction over individuals is inconsistent with the United Nations Charter, for the reason that the Security Council has no authority over individuals, and that states only, can present threats to international peace and security. The Trial Chamber recognised that the question of individual criminal responsibility has

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152 http://www.itcr.org/ENGLISH/basicdocs/statute.html 5/19/2001: 5.

153 *Prosecutor v Joseph Kanyabashi* 723: 31. The Appeals Chamber in the *Tadic* case, stated the principle as follows: "*As a matter of fact and of law the principle advocated by the Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial*".

154 *Prosecutor v Joseph Kanyabashi* 723: 31.

155 *Prosecutor v Joseph Kanyabashi* 723: 32.

been a controversial issue within and between various legal systems for decades.[156]

However, by establishing the ICTY and the ICTR, the Security Council very explicitly extended international legal obligations and criminal responsibilities directly to individuals for violations of international humanitarian law. In doing so, the Security Council provided an important innovation of international law. Further that there is nothing in the defence's motion to suggest that this extension of the applicability of international law against individuals was not justified and also necessary, in the circumstances, referring to the seriousness, the magnitude and the gravity of the crimes committed.[157]

Differences (in which may lie development) between the Yugoslav and Rwandan Tribunals firstly indicate a difference in the scope of their respective subject matter jurisdictions.[158] Akhavan shows that:

> "*…the provisions on genocide in both statutes are a verbatim reproduction of Articles II and III of the Genocide Convention*".[159]

Unlike the Yugoslav Statute however, the Rwanda Statute in defining crimes against humanity in article 3, does not require a *nexus* with armed conflict, although it requires an additional link between the proscribed inhumane acts and discriminatory grounds.[160] It is submitted that in the context that one would ideally want to have as wide as possible a range of acts covered as crimes against humanity, the Rwandan model presents that option, despite the requirement of the acts having been committed on discriminatory grounds. This, it is respectfully submitted, represents an improvement and as such a development on the Yugoslav option. The most significant difference between the two statutes, and to which was alluded to under the section on the ICTY, relates to article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II. Akhavan, points out that article 4 of the Rwandan

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156 *Prosecutor v Joseph Kanyabashi* 722: 33, 35.
157 *Prosecutor v Joseph Kanyabashi* 722: 35.
158 Akhavan 1996: 503.
159 1996: 503.
160 Akhavan 1996: 505.

Statute now includes these provisions as opposed to the Yugoslav Statute, which did not despite those interpretative comments after enactment indicate that it would be included (in the Tribunal's interpretation of the Statute).[161] This in itself represents progress in that an uncertainty or potential uncertainty was eliminated when the ICTR was created. Another example of the precedent - creating capacity of the *ad hoc* tribunals is the so-called *media case*. During December 2003, in the case of *Prosecutor v Nahimana, Barayagwisa, and Ngeze*[162] (the Media case), the ICTR produced international criminal law's first re-examination of the link between the mass media and mass slaughter when it convicted three media executives for the role of their newspaper and radio station in Rwanda's 1994 genocide. Trial Chamber I of the ICTR found the defendants guilty of genocide, direct and public incitement to genocide, conspiracy to commit genocide, and two crimes against humanity (persecution and extermination). With this judgment, the Tribunal established a number of principles that will assist in refining the contours of speech rights under international law. Most significant, the Tribunal noted that while:

> *"...the nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself, "*[163]

this fact :

> "*…does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication".*[164]

In determining a communication's purpose, whether it was intended to promote an offence or that it merely intended to educate persuasively, relevant factors include its accuracy, its tone and the context, both actual and perceived, of its transmission. Each case requires a contextual inquiry as to the likely impact of the communication and relevant here is the scope of the

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161 1996: 503.
162 Case No. ICTR-99-52-T (Int'l Crim. Trib. For Rwanda Trial Chamber I Dec.3,2003).
163 As noted by Anonymous 2004: 2769.
164 As noted by Anonymous 2004: 2769.

impact and the importance of protecting political expression. The judgment also noted that speech

> "*...aligned with state power rather than in opposition to it', deserves less protection, 'to ensure that minorities without equal means of defence are not endangered*".[165]

Perhaps the most significant aspect of the judgment is that the Tribunal affirmed that direct and public incitement to genocide (unlike the crime of genocide itself) does not require proof of actual causation, though the Tribunal considered the factual occurrence of genocide as significant evidence of genocidal intent.[166]

6. Conclusion

6.1 Institution building by the United Nations

Akhavan comments on recent institution building by the United Nations as follows:

> " *In empirical terms, unconscionable atrocities have been the most effective catalyst for standard setting and institution building in the international human rights system. Indeed, the introduction of human rights into the corpus of international law was the result of the unprecedented barbarity of the Second World War. The doctrine of crimes against humanity under the Nuremberg Charter, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Universal Declaration of Human Rights all owe their existence to the universal moral revulsion against the Holocaust and other excesses of Nazi Germany. In the post-Cold War era, 'ethnic cleansing' in the former Yugoslavia and genocide in Rwanda have assumed similar roles, giving rise to an unprecedented experiment in institution building by the United Nations*". [167]

It is submitted that the institution building by the United Nations has contributed towards the general evolution and development of international

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165 As quoted in Anonymous 2004: 2772.
166 Anonymous 2004: 2772.
167 1996: 501. See also Akhavan 2001: 27.

criminal law and must be judged in a positive way.[168] Having said this, it is to be noted that the world body, as represented by the United Nations, needs to react faster to human rights abuses all over the world and need not act selectively as to where to become involved in world conflict situations. This is a recurring theme throughout current literature on international law. [169]

The establishment of the ICTY and the ICTR is an expression of the modern *"reactive nature of the international human rights system".* Akhavan justifiably laments that in the case of Rwanda, particularly,

> "*...there was ample opportunity but little willingness, to take preventative action or to intervene against what is perhaps the worst genocide since the Second World War II*". [170]

There are indications that at least one year before the massacres of April 1994, which according to estimates, took the lives of five hundred thousand to a million people in three months, United Nations human rights experts and non-governmental organisations warned of the looming calamity. This was to no avail.[171]

Perhaps the single most significant and valuable contribution that the establishment of the *ad hoc* tribunals brought about is the further development of international criminal, human rights and humanitarian law. In forging an international criminal justice order, the contribution by the *ad hoc* tribunals is the development that the United Nations has justification to interfere in matters that are technically within the domestic jurisdiction of a state, where there are violations of human rights, to the extent that such matters are now viewed as a concern of the international community.[172]

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168 This is in stark contrast to many years preceding the establishment of the *ad hoc* tribunals. See for example: Chip 1981: 15 and further.

169 Akhavan 1996: 501.

170 1996: 501.

171 1996: 501.

172 This view is shared by Tocker 1994: 546 who states: "*Thus, based on past incidences of Council intervention, it now appears that the Council is authorized to intervene in an internal conflict in which a government violates the human rights of its own inhabitants*".

6.2 States need to exercise universal jurisdiction over "core" crimes

The 1998 *Akayesu* decision of the ICTR is the first conviction for the crime of genocide by an international criminal tribunal. The Nuremberg Tribunals never prosecuted for the crime of genocide despite the evidence of its widespread practice by the Nazis.[173] There is furthermore:

> "*…every reason to believe that many others committed genocide since World War II of which examples are Khmer Rouge in Cambodia and Saddam Hussein in Iraq*".[174]

Yet, no prosecutions were ever instituted for these crimes despite the fact that the exercise of universal jurisdiction is available to states in order to prosecute persons for genocide and other core crimes. It is well established in international law. Charney is of the opinion that:

> "*One reason for the reluctance to exercise universal jurisdiction for these highly political crimes is that it may subject the prosecuting state to pressure by other states that wish to avoid exposure of their complicity*".***[175]***

He further opines that it is hoped that the International Criminal Court could perhaps directly or indirectly relieve some of this risk from the state with custody of the suspect and therefore overcome obstacles to these prosecutions. He continues:

> "*Support for this result can be found in the fact that there have been two clusters of such domestic court prosecutions. The first cluster includes the prosecution of Nazis and Nazi supporters arising out of World War II that furthered the goals of Nuremberg and the political consensus supporting that Tribunal. The second includes several prosecutions for the crimes that are also within the jurisdiction of the ICTY and the ICTR, thus building upon the lead taken by these Tribunals. Rwandan national courts are also prosecuting these crimes. The mere existence of these international tribunals may have provided indirect political protection for the prosecuting states. Such protection may also be a by-product of the ICC. Furthermore, the ICC may ease the burden on a state holding a suspect that wishes neither to undertake domestic proceedings nor refer the case to the international court, as it may initiate the prosecution itself*

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173 Charney 1999: 455.
174 Charney 1999: 455.
175 1999: 456.

> *(perhaps through a non-public communication from a state) or in response to a referral by the UN Security Council*".[176]

Roht-Arriaza in an article titled *"Universal Jurisdiction: Steps Forward, Steps Back"* traces the attempts of particularly Spanish and Belgium courts to exercise universal jurisdiction in various cases and indicates how, as a result of mainly political pressure, these states showed signs of "*judicial expansion*" which later gave way to *"judicial contraction*". Contractions of the laws of these states seem to have happened because:

> "*…both judges and legislators seem to be reacting to a sense that universal jurisdiction without specified limits is too unbounded, too subject to confusion, when more than one jurisdiction can prosecute the same course of conduct".*[177]

The author continues:

> "*Faced with the theoretical possibility of multiple prosecutions for the same course of action, in an effort to create an orderly process of prioritisation, Spain and Belgium, through different means, have in effect superimposed a nationality tie (or at least something close to it) on something they are still calling universal jurisdiction. But presumably the reason universal jurisdiction exists at all is because the crimes involved are of concern to all states. By their very definition and nature, they transcend the realm of territorial sovereignty. If so, why should any additional tie be a jurisdictional prerequisite?*".[178]

The above setbacks in the exercise of universal jurisdiction by the states under discussion were the result of political pressure, especially from the United States. Roht-Arriaza concludes that a lesson that needs to be taken from Spain and Belgium's attempts to exercise universal jurisdiction is that advocates need to be more strategic in choosing both the number and type of cases they present under extraterritorial jurisdiction.[179] Nevertheless, states increasingly need to exercise universal jurisdiction to prosecute persons for core crimes when the opportunity therefore arises, in order to create a just and consistent international justice order. This will be the subject of the next chapter.

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176 Charney 1999: 456.
177 2004: 376 and further.
178 2004: 388.
179 Roht-Arriaza 2004: 375, 388.

Chapter 7

Attempts by states to exercise universal jurisdiction: the Pinochet and *Congo v Belgium* cases

1. Introduction

The previous chapter ended with the conclusion that states need to exercise universal jurisdiction and need to prosecute core crimes when the opportunity arises in order to ensure a just and consistent international legal order. The *Eichmann* case was the first case in which a person accused of crimes against humanity was tried in a state with which the accused had no formal links.[1] The attempted prosecution of Augusto Pinochet, which this chapter will examine and evaluate, witnesses that there are further positive signs that states are increasingly doing so.[2] The chapter makes reference to the

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1 Cassese 2003: 293. This is so, according to Cassese, because it could be argued that most of the surviving victims and relatives of the victims were in Israel. It is ironic, so Cassese points out, that no state concerned protested against that trial, that is protested or challenged the principle enunciated in 1960 by the Supreme Court of Israel whereby *'the peculiarly universal character of these crimes [against humanity] vests in every state the authority to try and punish anyone who participated in their commission'.*

2 See Mendez 2000: 65 and further on the "*new relationships*" in international law between international human rights law, international humanitarian law and international criminal law and procedure. Commenting on the *Pinochet* case, the author remarks: "*For decades 'universal jurisdiction' was largely a theoretical possibility. Jurists proclaimed that certain violations of human rights were so severe and so shocking to the conscience of humanity that they could and should be punished by any and all civilized nations of the world. Dutifully, government representatives professed to uphold the notion of universal jurisdiction. In reality, however, domestic parliaments rarely enacted legislation to make universal jurisdiction effective, and domestic courts dismissed most such criminal claims, except in regard to the prosecution of former Nazi war criminals. The arrest warrant issued by Spanish judge Baltazar Garzon, and its serious treatment by British authorities changed all that*". See also Cassese 2003: 298 who concludes that in sum, national courts are still loath to bring to justice persons that are accused of international crimes. This in part is attributable to the fear of meddling in the domestic affairs of other states. Few national judges, according to Cassese, share the sense that it is imperative to vindicate and judicially enforce respect for fundamental values wherever they may have been breached. The tension between these two views of international law, namely the need to protect universal international values and on the

International Court of Justice's judgment in the *Congo v Belgium* case and examines the impact of both cases on the development of international law. The chapter concludes that international law is uncertain on the prosecution under universal jurisdiction of heads of state. This needs to be urgently addressed by the international community as is reflected in passing remarks on Zimbabwean president, Robert Mugabe.

2. Background to the Pinochet case

Before the Pinochet case is examined, it appears opportune to briefly mention the law of international extradition.
Blakesly, describes extradition as:

> "*…the judicial rendition, by one sovereign state to another, of fugitives charged with having committed an extraditable offence and sought for trial or already convicted and sought for punishment*". [3]

Public international law, international human rights law, and international criminal law are complementary to one another. Developments in one of these related fields of law, necessarily influences the other fields. The case of General Augusto Pinochet illustrates this trilateral relationship and the interaction between these branches of the law, primarily with reference to immunity and extradition.[4]

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other side the maintenance of strict state sovereignty was illustrated in the *Pinochet* judgments.

[3] 1996: 148.

[4] Kittichaisaree 2001: 56. The background to this case is briefly set out here: In September 1973, General Augusto Pinochet staged a *coup d'etat* in Chile, South America, in order to overthrow President Allende's socialist government in that country. In a combined operation, known as Operation Condor, the military governments in Chile, Argentina, Bolivia, Paraguay, Uruguay and perhaps that of Brazil, allegedly coordinated anti-leftist, anti-communist, and anti-Marxist campaigns which involved international terrorism, kidnapping across borders, exchange of prisoners, torture and murder. Spanish citizens, two Uruguayan congressmen, students and political activists were among the victims. It was believed that Chile was the centre of the operation. In 1988, Pinochet held a referendum in Chile on whether he should continue in office for a further eight years. He lost the referendum, but a substantial percentage of the Chilean electorate (forty-three percent) voted in his favour. In 1990, Pinochet relinquished his power to a democratically elected president in exchange for a secret amnesty. He had legal immunity as commander-in–chief of the army until he retired from this post on 11 March 1998. On 12 March 1998, he was sworn in as a senator of Chile for life. This position gave him immunity and which he

The Pinochet case is important to the development of the above-mentioned branches of the law primarily for the reason that Pinochet was one of the most notorious violators of human rights. Firstly, his actions as Chilean dictator injured the interests of citizens of various nations. On 11 November 1998, Switzerland demanded his extradition to face charges relating to the disappearance of a dual Swiss-Chilean citizen, and on 12 November 1998, France followed suit in order for him to stand trial in France for the disappearance of several French nationals in Chile during his rule. In the United Kingdom, Belgium, Sweden and in Italy, Chilean exiles filed charges against Pinochet for crimes against humanity, including widespread murder, kidnapping, and torture. In Germany also, German nationals, who were Chilean exiles, have brought charges against Pinochet for murder, torture and kidnapping.[5]

The case of Pinochet is further important because national governments rarely punish former leaders who violate human rights.[6] The process by Spain to extradite Pinochet was largely one that focused on the application of domestic criminal law, combined with international law and aimed at bringing a former dictator to justice. This brings to the fore the difficulty of overcoming

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arranged for himself in the 1980 Chilean Constitution, which restored limited democracy in Chile. Since March 1998, alleged victims of his dictatorship have initiated criminal proceedings against Pinochet. Only a handful of other Chilean military officers have been brought to justice. Chile has an amnesty law issued by a military decree in 1978, which prohibits prosecution of crimes committed by the military rulers before the amnesty. This Chilean amnesty has however never been put to the vote in Chile. In October 1998 Pinochet went to London, and while there he had to receive medical treatment. On 16 October 1998, at the age of 82, he was arrested in London on a warrant issued by the Central Court of Criminal Proceedings in Madrid, Spain. The allegations were that he had murdered Spanish citizens in Chile. The arrest was undertaken after the Office of Legal Adviser of the UK Foreign and Commonwealth Office had advised the police that Pinochet's diplomatic passport did not give him diplomatic immunity. On 22 October 1998, the Spanish court, accusing him of crimes of torture, hostage taking, and murder, issued a second warrant. On 3 November 1998, Spain requested his extradition, accusing him of involvement in the deaths and disappearances of 3178 people in Chile and abroad during his rule, as well as torturing and kidnapping. See also De Than and Shorts 2003:54, and http://web23.epnet.com/DeliveryPrintSave.asp 6/17/2004:1, Dixon and McCorquodale 2003 148 and Wilson 1999:930 and further. See further Mendez 2000: 72 and further.

5 Mendez 2000: 67; Kittichaisaree 2001: 57.

6 Kittichaisaree 2001: 58.

the limits of the traditional territorial and political sovereignty of nations.[7] The pertinent questions presenting themselves in the Pinochet matter were: firstly, what is the scope of the immunity enjoyed by a former head of state for acts that were committed while he was still head of the state, and secondly, if he was entitled to immunity only in respect of official acts which were performed in the exercise of his functions as head of state, what constituted these official acts?[8]

Following his arrest on 18 November 1998, Pinochet sought judicial review and *habeas corpus* in the High Court of England. The High Court suppressed both the warrants for Pinochet's arrest on the grounds that a former head of state enjoyed immunity from prosecution. Under Britain's Extradition Statute, an individual who is alleged by a foreign state to have committed an extraditable offence can be arrested and transported to that state if that state and Britain have signed an extradition treaty. Extraditable offences include those committed within the requesting state's territory or those extraterritorial crimes that represent violations of the laws of the foreign state. Furthermore, an individual can be extradited for an extraterritorial offence if the state requesting the extradition has jurisdiction over its own nationals for that crime or if the extraterritorial offence committed by a non-national would also be an

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7 Wilson 1999: 931. The author gives a short history of the Spanish criminal investigations on Chile and Argentina. The idea for the prosecution in Spain originally came about as a result of cooperation between human rights activists and the Spanish victims of the Pinochet and Argentine military regimes. Lawyers from the outset pointed out that they did not stand a chance of success because Spanish law does not allow trial *in absentia.* However, the process would focus world attention to the woes suffered by the millions of victims. Spain has a special national court, the *Audienca Nacional,* sitting only in Madrid, that has jurisdiction over international crimes such as counterfeiting, commercial fraud, terrorism, drug trafficking and specified crimes, which occur outside the Spanish national territory. Originally responsible for the filing of both actions was the Association of Progressive Prosecutors of Spain. The prosecutors were not acting as agents of the state, but as private complainants with particular expertise to judge the merits of the cases. This set the process in motion and by way of what is known in Spanish law as the *action popular,* the lawyers for the victims took over the action. Any Spanish citizen may bring popular actions in Spanish law regardless whether he/she has suffered any injury or other standing if the action is in the public's interest.

8 Kittichaisaree 2001:58.

extraterritorial offence in Great Britain, through the principle that is known as "*double criminality*".[9]

The argument for Pinochet's extradition also rested upon the question of whether the alleged crimes were committed against Spanish nationals. For crimes that were committed against non-Spanish nationals, the extradition would only be possible if the alleged crimes represented extraterritorial offences under British law. England's High Court reasoned that the alleged torture and hostage-taking formed part of Pinochet's functions as head of state. They were actions performed with ostensible government authority. It had not been alleged that Pinochet had personally tortured and/ or kidnapped the victims. He had used state power to achieve the result. Despite ruling in favour of Pinochet, the English High Court allowed the Crown Prosecution Services, acting on behalf of the Spanish government, to appeal the decision.[10]

3. The majority judgment in the first House of Lords judgment

England's Crown Prosecution Service appealed with its "*leapfrog*" method to the House of Lords. By now, Spain had formally requested extradition from the UK.[11]

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9 *Augusto Pinochet Ugarte* (1999) 38 I.L.M. 68 (Q.B. Div'l Ct. 1998). See also De Than and Shorts 2003:54, Byers: 2000: 423 and further, Bianchi: 1999 238 and further; Labuschagne 2001: 186-190 . See also Rothenberg 2002: 938. This began a complex legal process involving three key court decisions, including two separate hearings by the nation's highest court, the Lords of Appeal in Ordinary, or Law Lords and the House of Lords.

10 Rothenberg 2002: 938, 940; De Than and Shorts 2003: 56. See also Kittichaisaree 2001:58

11 De Than and Shorts 2003: 56: "*The House of Lords exceptionally allowed non-governmental organisations, including Amnesty International and Human Rights Watch to make submissions as amici curiae'.* See also Rothenberg 2002: 940: the author points out that the case immediately became a highly contentious subject of national and international debate. Public figures, including Margaret Thatcher, expressed outrage at the political implications of prosecuting a former head of state that was widely viewed as an ally of Britain. At the same time however, human rights advocates around the world as well as the governments of various European nations supported the "*historic legal action*". See also Bianci 1999: 240 and further.

The central issue in the case was not whether Pinochet could benefit from head of state immunity for criminal actions but whether a head of state accused of gross violations of human rights would by virtue of his position, always be immune from any type of prosecution. The first House of Lords to hear the appeal, found that whilst a current head of state does enjoy immunity from criminal proceedings under international law, and that a former head of state also enjoys some immunity, the latter is less extensive than the former, and that immunity cannot apply to charges of hostage-taking and torture.The court found that actions that are illegal under international law could not be defended under immunity of former heads of state. To Lord Steyn, hostage-taking, genocide and torture were established crimes in international law long before the actions occurred that were now levelled against Pinochet.[12] Thus it was unlikely that the actions resulting in the charges against Pinochet could be referred to as "*acts performed in the exercise of the functions of a head of state*".[13] Lord Nicholls shared this view as follows:

> "*International law recognizes, of course, that the functions of a Head of State might include activities which are wrongful, even illegal, by the law of his own State or by the law of other States. However, international law has made it plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. That applies as much to Heads of State, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law….*"[14]

4. The dissenting judgment in the first House of Lords judgment

This decision was brought out by a majority of three to two. Dissenting Lord Lloyd's view was that crimes aree committed by almost all of those who lead revolutions and that immunity should be upheld for all such persons. Secondly, by hearing an extradition case, an English court would be giving its opinion upon the validity of a Chilean amnesty and would therefore be

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12 http://www.derechos.net/doc/hl.html 4/21/06:1-53.See also De Than and Shorts 2003: 56;

13 De Than and Shorts 2003:56. Rothenberg 2002: 941. See also Van der Vyver 1999: 120 and further; Bianci 1999: 241 and further; Kittichaisaree 2001: 58

14 http://www.derechos.net/doc/hl.html 4/12/06 at 44.See also De Than and Shorts 2003: 56. See also Van der Vyver 1999: 120 and further.

interfering in that state's sovereignty.[15] The other dissenting judge, Lord Slynn, held that immunity did apply to any case brought before an English court, but that the allegations against Pinochet should be tried either by a Chilean or an international court.[16]

As a result of the ruling by the House of Lords, the Home Secretary authorised extradition, but then the House of Lords set aside its first decision because one of the judges, Lord Hoffman, had failed to disclose that he was a director of *Amnesty International*, and that could infer either bias or a possible conflict of interest.[17]

5. The second House of Lords judgment

In the second House of Lords judgment, on 24 March 1999,[18] the appeal was partly upheld. The House curtailed a very large number of charges for which Pinochet could be extradited to stand trial in Spain. The court did so largely on the grounds of lack of jurisdiction *ratione temporis* over the charges to be excluded and in respect for the principle of legality. It held that extradition could proceed for the torture offence but only in relation to those alleged acts of torture committed after the UK signed the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[19] Thus, all the crimes for which Pinochet's extradition was sought from Spain, except that of

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15 http://www.derechos.net/doc/hl.html 4/21/06 at 22-40.

16 http://www.derechos.net/doc/hl.html 4/21/06 at 2-22.See also De Than and Shorts 2003:57, Van der Vyver 1999: 120 and further and Kittichaisaree 2001:59.

17 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.2), 2 W.L.R. 272 (H.L.1999) See also de Than and Shorts: 2003:57; Kittichaisaree 2001: 60, Rothenberg 2002: 943. Amnesty International was a party to the case.

18 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 2 W.L.R.827 (H.L. 1999).See further Byers: 2000: 433 and further.

19 De Than and Shorts 2003: 57. The issue here was that of double criminality which is a fundamental necessity for extradition .It meant that all the other charges could not be pursued because they were not crimes under the English law at the time they were allegedly committed. See also Kittichaisaree 2001: 60, and Dixon and McCorquodale 2003: 150. Lord Browne Wilkinson pointed out that this convention, the Torture Convention in short, was agreed upon not in order to create an international crime which had not previously existed but to provide an international system under which the criminal in terms of international law, the person accused of torture, could find no safe haven. Therefore in bare essence, the purpose was to ensure that the torturer does not escape the consequences of his acts by going to another country.

torture, were not crimes under English law at the time the alleged offences were committed. Torture was an extraditable offence under the Criminal Justice Act of 1988, which implemented the Convention referred to in this paragraph above.[20]

The two key issues for the decision of the second House of Lords were: which of the offences were ones where extradition was possible and whether Pinochet's claim to immunity as head of state. The problem the House encountered with the second question was that the *State Immunity Act 1978* grants a head of state absolute immunity from all actions or prosecutions, but as far as former heads of state are concerned, it is silent.[21] To the second issue the majority of the House of Lords held:

> "*…the immunity of a former Head of State persists only with respect to acts performed in the exercise of the functions of the Head of State, that is official acts, whether at home or abroad. The determination of an official act must be made in accordance with international law. International crimes in the highest sense, such as torture, can never be deemed official acts of State*".[22]

The *ius cogens* nature of the international crime of torture will justify states to take universal jurisdiction over the crime, wherever permitted. The concept of universal jurisdiction allows a state to prosecute alleged perpetrators for crimes that are generally understood to be illegal everywhere in the world and are regarded as such to be contrary to the prescriptive norms of the

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20 Kittichaisaree 2001:60. See also Bianci: 1999 243 and further.

21 De Than and Shorts 2003: 57.

22 As quoted by De Than and Shorts 2003:58. Should immunity to a serving head of state, which seems to be currently held as absolute, not for the same reason be qualified? Regarding torture as an international crime, see Dixon and McCorquodale 2003:148-149 where as per Lord Browne-Wilkinson, in the early development of international law, state torture was one of the elements of a war crime. Torture and various other crimes against humanity were linked to a war or to hostilities of some kind. However, in the course of time the linkage to war fell away and torture was divorced from war or hostilities and became an international crime on its own. Consequently it now seems recognised that torture has the character of *ius cogens* or a peremptory norm that is one of the rules of international law which has a particular status.

international society.[23] Thus universal jurisdiction recognises the idea that certain crimes:

> "...*are so reprehensible that any state, if it captures the offender, may prosecute and punish that person on behalf of the world community regardless of the nationality of the offender or victim or where the crime was committed*".[24]

There was however a notably large range of views and several important disagreements between the judges.[25]

Pinochet was allowed to return to Chile in March 2000 after the UK Home Secretary had determined that he was unfit to stand trial. The Supreme Court in Chile removed his immunity in August 2000, but imposed a temporary stay

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[23] Dixon and McCorquodale 2003: 149. See also the comments of De Wet 2004: 115 and further. The author points out the separate opinion of Lord Millet. Lord Millet held that the statutory criminalisation of acts of torture was supplemented by the common law of which customary international law formed a part. In his reasoning, if the latter determined that a particular act constituted an international crime over which all states had jurisdiction, the English court would have the competence to try extra-territorial offences. Lord Millet further submitted that already in 1973 widespread and systematic acts of torture constituted an international crime to which universal jurisdiction was attached under customary international law as a result of which the English courts had the jurisdiction to try for such crimes where they were committed extraterritorially and even before the enactment of the English Torture Act.

[24] Rothenberg 2002: 933 the author justifiably points out the significance of the Spanish Court's affirmation of the principle of universal jurisdiction for certain crimes, including genocide, terrorism, or *"any other [crime] which, according to international treaties or conventions must be prosecuted in Spain"*. The evocation of the principle of universal jurisdiction and its subsequent support by the Spanish judiciary opens up the possibility that victims from around the world could pursue cases in Spain, or any other nation with a similar legal commitment to universal jurisdiction. This would imply that if universal jurisdiction were to become widely accepted, the perpetrators of gross violations of fundamental human rights might increasingly find themselves facing prosecution in domestic courts throughout the world.

[25] De Than and Shorts 2003: 57. See also Bianci 1999: 243. The author states that: "*The second judgment of the House of Lords profoundly differs from the previous one on the treatment given to two issues: the qualification of extradition crimes and the role that some of the Law Lords attributed to the Torture Convention for the purpose of denying immunity to General Pinochet. On the one hand, the intertemporal law question of which critical date is relevant for the double criminality principle was solved by interpreting the applicable provisions of the Extradition Act to the effect of requiring that the alleged conduct constituted an offence in both the requesting and the requested state at the date of the actual conduct. While Lord Bingham for the Divisional Court and Lord Lloyd in the first ruling of the House of Lords, had held that the critical date was the date of the request of extradition, the large majority of the Law Lords sitting in the second Appellate Committee agreed that the critical date was that of the actual conduct*". This had the effect of narrowing down the number of offences for which Pinochet could be extradited.

of proceedings so that no trials ever took place. Various countries still wish him to stand trial, including some courts in Chile.[26]

Although the Pinochet case has had considerable impact on the development of international criminal law, which will be examined below, the case of *Democratic Republic of the Congo v Belgium,* casts doubt over it.[27]

6. The *Congo v Belgium* case

A warrant for arrest was issued by Belgium against the Congo's minister for Foreign Affairs, for crimes against humanity.[28] The background to the case was that on 11 April 2000 an investigating judge of the Brussels *tribunal de premiere instance* issued an international arrest warrant in absentia against Mr Abdulaye Yerodia Ndombasi, the then serving minister of foreign affairs of the Democratic Republic of the Congo (DRC). The charges related to offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and crimes against humanity.

The allegations were based on acts allegedly committed by Yerodia in 1998 when he was not yet a minister and included various speeches which incited racial hatred which, according to the allegations, resulted in the incitement of the population of the Democratic Republic of the Congo to attack and kill Tutsi residents in Kinshasa. A number of victims fled to Belgium and lodged complaints. Following their complaints a criminal investigation was started in 1998 which subsequently led to the issue of the arrest warrant in April 2000.[29] Through Interpol, the warrant was circulated internationally. The warrant was not enforced when Yerodia visited Belgium in June 2000 and Belgium did not request the extradition of Yerodia, as long as he was in office. The request for an Interpol Red Notice was only made in 2001 after Yerodia was no longer a

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26 Kittichaisaree 2001: 60; De Than and Shorts 2003: 58.

27 De Than and Shorts 2003:59. See also Cassese 2002: 853 and further.

28 De Than and Shorts 2003:59. See also Cassese 2002: 853 and further and Erasmus and Kemp 2002: 68 and further.

29 Erasmus and Kemp 2002: 68. See also Du Plessis and Bosch 2003: 246 and further.

minister.[30] The crimes with which Yerodia was charged were punishable in terms of a controversial piece of legislation of Belgium, styled "*Concerning the Punishment of Serious Violations of International Humanitarian Law*".[31]

6.1 The DRC's argument

The Democratic Republic of the Congo, prompted by the arrest warrant issued against Yerodia, brought proceedings before the International Court of Justice, initially on two grounds, but in their final submissions only on the question of immunity. It alleged that the mere issue of the warrant of arrest violated a customary international rule which ensured that incumbent foreign ministers were absolutely inviolable and therefore immune, from criminal prosecution. According to their submission, the DRC argued that absolute immunity enjoyed by foreign state representatives was to cover acts that were committed both before and during their period of office, irrespective of whether they were classified as official or non-official acts.[32]

6.2 Belgium's argument

Counsel for Belgium argued that immunity applied only to acts carried out in the course of official functions and that in any case, immunity could never extend to state officials when war crimes and crimes against humanity were committed.[33]The question that underlay the dispute was again clearly a crucial issue currently facing the international community.[34] The exercise of universal jurisdiction by a particular state may inevitably lead to a dispute with another state when the alleged criminal is a national of the latter and especially so in

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30 Erasmus and Kemp 2002: 68.

31 Du Plessis and Bosch 2003: 246. The authors indicate that between 1993 and 1999, the Belgian government promulgated this legislation and that it was "*progressive*" in two ways: firstly it conferred upon Belgium courts the jurisdiction to try serious violations of international humanitarian law wherever they may have been committed and secondly it precluded state officials from invoking the doctrine of immunity which they may otherwise have enjoyed under international law.

32 Du Plessis and Bosch 2003: 247. See also Erasmus and Kemp: 2002: 69.

33 Du Plessis and Bosch 2003: 248.

34 Cassese 2002: 854.

the case where he/she enjoys immunity or is a government official.[35] The dilemma is that on the one hand, there is the need to safeguard major prerogatives of sovereign states and on the other hand, the demands of emerging universal values and norms result inevitably in an inroad on principles of state sovereignty.[36] Bringing this issue into the field of international criminal justice simply means that on the one side, states still cling to the notion that when it comes to the exercise of criminal jurisdiction, it is the prerogative of the territorial or the national state to prosecute and punish criminal offences, whilst on the other hand, there is a tendency in international criminal law for states to claim extraterritorial criminal jurisdiction over international crimes to substitute for states that are unable or unwilling to prosecute.[37]

6.3 The ICJ's ruling

The Court ruled that a foreign minister enjoys immunity from foreign criminal jurisdiction and inviolability,

> "*…whether the minister is on foreign territory on an official mission or in private capacity, whether the acts are performed prior to assuming office or while in office, and whether the acts are performed in an official or private capacity*".[38]

Thus the warrant of arrest was found to be unlawful by the majority of the International Court of Justice, simply on the grounds that current state officials are immune from criminal trial abroad regardless of the severity of the charges. The International Court of Justice thus refused to extend the precedent of Pinochet to serving officials.[39] The rationale in this decision is that the purpose of state immunity as applied to foreign ministers is to ensure that they effectively perform their duties on behalf of their respective states

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35 Mbaku and Mangu 2005: 84.

36 Cassese 2002: 854. See also Du Plessis and Bosch 2003: 246.

37 Cassese 2002:853. The author argues that this is precisely why international criminal courts and tribunals are set up: to substitute for states unable or unwilling to prosecute and to try alleged perpetrators of international crimes.

38 Cassese 2002: 854.

39 De Than and Shorts 2003:59.

and that the threat of potential arrest while they were abroad, would negatively influence these functions and istherefore not permitted under customary international law.[40]

The argument is that this is so regardless of whether the official was of current or former status, and furthermore, regardless of whether his alleged offence was committed as an official or in private capacity. This argument ran contrary to some of the reasoning in the Pinochet case. According to the *Congo* decision, the only circumstances in which state officials would lose their immunity against prosecution are: (1) when they were to be charged in their own countries: (2) where their national state waived immunity expressly; (3) for acts they committed in their private capacity before or after serving as an official; and (4) trial by a properly-constituted international tribunal such as the International Criminal Court.[41] The Court found that none of these circumstances were present in the particular case.[42]

Cassese hails the judgment as "*an important contribution to a clarification of the law of (what one ought to correctly term) personal immunities (including inviolability) of foreign ministers*". The decision is also lauded in an area where state practice and case law is lacking. The Court namely inferred from the rationale behind the rules of personal immunities of senior state officials that such immunities must prevent any prejudice to the effective performance of their duties. Thus the Court gave priority to the need for foreign relations to be conducted unimpaired.[43]

In a concurring minority decision, the International Court of Justice led by Judge Higgins, came to their conclusion by quite different reasoning, citing various sources of customary international law, instances of state practice,

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40 De Than and Shorts 2003: 59. See also Cassese 2002: 853 and further.

41 De Than and Shorts 2003: 59.

42 Cassese 2002: 854.

43 Cassese 2002: 855. In contrast to this positive development, Cassese expresses misgivings on (i) the Court's failure to rule on whether states are authorised by international law to exercise extraterritorial criminal jurisdiction, and (ii) the failure of the court to clearly distinguish between functional and personal immunities.

and including but by no means limited to, the Pinochet case. The minority agreed that serving state officials could not be served with arrest warrants relating to prosecution overseas. They may not have immunity if they were overseas on private visits. Furthermore, should it appear that a state was keeping a minister in office artificially in order to maintain his immunity from suit, that immunity would be void. Finally, and of great significance, is that a former minister or former holder of other state office might not have immunity for serious international crimes committed while in office, regardless of whether the crimes were committed as part of official business or in private capacity.[44]

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[44] De Than and Short: 2003: 59, 60. See also Spinedi 2002: 896 and further. The author quotes the following *obiter dictum* from the Congo case: "*…after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister of Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity*". From this obiter dictum the author proceeds to draw the following conclusion: "*The Court thereby implicitly affirmed that, in relation to acts committed not "in a private capacity" but "in an official capacity", a former Minister for Foreign Affairs of a state cannot be subjected to the criminal jurisdiction of another state even after leaving office. It seems impossible to doubt that this is what the Court meant*". A literal interpretation of this *dictum* does not warrant such a conclusion. It is respectfully submitted that what this *obiter dictum* seems to say is the following: (1) a former Minister of Foreign Affairs will no longer enjoy all the immunities accorded by international law in other states, (2) provided that a state has jurisdiction in international law, (3) a court of one state may try a former Minister of Foreign Affairs of another state, (4) in respect of acts committed prior or subsequent to his/ her period of office (implying that these acts were 'official acts') as well as (5) in respect of acts committed during that period in private capacity. From this may be respectfully concluded that: (1) Foreign Affairs ministers always have immunity for official as well as private acts, whilst in office for acts before or during their office but (2) no such immunity exists for either category irrespective of the period in which the acts were committed.

7. The impact of the *Pinochet* and *Congo v Belgium* cases

7.1 The *Congo* judgment

The *Congo* decision has been both lauded as shedding light on an obscure area of international law and criticised on several aspects.[45] Firstly due to a lack of state practice before this case, it highlighted the question of whether the foreign affairs minister shared the same immunities as heads of state.[46] The Court namely ruled that an incumbent foreign affairs minister enjoys immunity *ratione personae* from foreign jurisdiction under all circumstances regardless of whether the person is abroad or at home, and regardless of whether the act in question was committed in an official or in a private capacity. The Court's decision on this point implies that a foreign affairs minister is important enough to accord him/her the same immunities as those enjoyed by a head of state.

The Court's finding by implication however, that a former minister of foreign affairs is immune against core crime prosecutions, in other words that immunity *ratione materiae* exist for such a person, is criticised as wrong.[47] This is so because to grant immunity *ratione materiae* in the case of core crimes, would inevitably mean that it is granted to every state official, as even the lowest-ranking state officials are protected by immunity *ratione materiae,* since there is no separate category of immunity of former ministers of foreign

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45 Cassese 2002: 853. Cassese criticises the decision for (i) failing to pronounce upon the admissibility of universal criminal jurisdiction, (ii) failing to distinguish between so-called functional immunities pertaining to foreign ministers and, more generally to all state agents with respect to acts performed in their official capacity and personal immunities, (iii) failing to refer to the customary rule lifting functional immunities in the case of international crimes, as well as for (iv) the court's conclusion that foreign ministers (and other state officials) may only be prosecuted for international crimes perpetrated while in office if such acts are committed in their private capacity.This, Cassese concludes, is hardly consistent with the current 'pattern of international criminality and surely does not meet the demands of international criminal justice.'

46 Wirth 2002: 889. See also Cassese 2002: 853.

47 Wirth 2002: 890.See also Spinedi 2002: 895 and further on state responsibility versus individual responsibility. The author argues that treating war crimes or crimes against humanity perpetrated by a state official as acts committed 'in private capacity' would mean that such acts could not be attributed to the state at an international level, a consequence of which is that the state would not be responsible for those acts under international law.

affairs in international law.[48]There is only one way according to Wirth,[49] and with which is respectfully agreed, to harmonise the views of the International Court of Justice with the prevailing state practice, and that is to understand the term "*official act*" in such a way that "*official act*", by its definition, excludes the commission of core crimes. It is submitted that this represents a balanced view and expresses the majority international view on this aspect. If available sources of international law are surveyed, there is indeed a strong tendency to deny state immunity to state officials who have committed core crimes.[50] Wirth submits that the best "*concretization of the existing state practice*" would be a rule along the lines of the Pinochet decision, which is that immunity *ratione personae* would grant effective protection to the person concerned, even against prosecution for core crimes. However, because immunity *ratione personae* is available only to incumbent holders of office, it ceases to protect this person as soon as his or her term of office ends. After termination of the person's term of office, these persons are protected only by immunity *ratione materiae,* which should be interpreted as providing no protection against core crimes. A rule fashioned in the way that Wirth thus proposes, would create balance between protection of a state's ability to function and the protection of human rights.[51] It would ensure that the highest state representatives could discharge their functions in an unfettered way, but at the same time, serve to forewarn that, once out of office, they must face responsibility for even their official conduct.

As far as lower ranking state officials are concerned, no protection would be afforded, even when in office, against the prosecution of core crimes, for the reason that lower ranking officials are not protected by immunity *ratione personae* but only by immunity *rationae materiae.*[52]

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48 Wirth 2002: 890.This would mean according to Wirth, that even the lowest-ranking state officials are protected by immunity *ratione materiae.* Consequently the vast majority of the perpetrators who are usually responsible for the commission of 'crimes of state', such as genocide, crimes against humanity and war crimes would be immune.

49 2002: 890.

50 Wirth 2002: 892.

51 Wirth 2002: 892.

52 Wirth 2002: 892.

Mbaka and Mangu, commenting on the *Congo v Belgium* case, suggest that the jurisprudence of the International Court of Justice indicates that sovereign immunity still weighs heavier than universal jurisdiction where a crime against humanity has been committed; that the doctrine of head of state, state and diplomatic immunities is not in a rapid process of being phased out in international law, and that national sovereignty of states has not been discarded in favour of the human rights notions of individual freedom and human dignity. A long struggle, according to the authors, lies ahead for the victims of serious human rights violations against perpetrators who will use state and sovereign immunity as a shield.[53]

7.2 The *Pinochet* judgment

Despite the fact that uniformity of approach in relation to jurisdiction and state immunity would be a welcome development in international law, which is in a state of vagueness and uncertainty of principle[54], several points can be made about the Pinochet case which hail a positive development of international criminal law and a general step in the right direction for the protection and development of international human rights.

7.3.1 Growing trend by states to exercise universal jurisdiction

Whilst it is true that there was criticism against especially the second decision by the House of Lords, it cannot be denied that universal jurisdiction over crimes against international law is a growing trend and cannot be reversed.[55] Professor Ariel Dorfman puts it thus:

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53 2005:96.

54 De Than and Shorts 2003:60.

55 Kittichaisaree 2001:60. See also Akhavan 2001: 27: Several states have prosecuted Yugoslav or Rwandese perpetrators, even when no international indictments had been issued.

"*The Pinochet case will remain a fundamental step in the search for a better humanity, a better mind for a different sort of mankind and womankind, the arduous construction of a universal consciousness*". [56]

7.3.2 Further movement towards ending impunity

The Pinochet case has instigated and propelled further movement towards the end of impunity both at national and international levels.[57]

7.3.3 Impact of national courts

The impact that decisions of national courts have on the content and role of international courts should not be underestimated.[58] Even if the Pinochet rulings do not establish as a matter of international law, the primacy of human rights law over principles of sovereign immunity, there exists no doubt that the judgments will be used as a source of principles when the issues raised in that case present themselves for decision in similar cases.[59]

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[56] 2000:50.See also Cassese 2003: 7 on the *Eichmann* case where the Israeli response to the submission by Eichmann that the Israeli courts had no jurisdiction over him was: "*Not only do all crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel was therefore entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent of its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed"*.

[57] Kittichaisaree 2001: 60. The author states that in February 2000, following the Pinochet 'precedent' in Britain, the Dakar Regional Court in Senegal indicted Hissene Habre, former Head of State of Chad, who had been living in exile in Senegal since 1990. This person was charged with torture and murder of his own subjects during his rule from 1982 to 1990. This was the first time that a former African head of State had been charged with human rights violations by a court of another state. In the same month, Lieutenant Colonel Tharcisse Muvunyi, a former Rwandan army commander, was arrested in London on a warrant issued by the ICTR. This came just after the arrest in Belgium of the former Rwandan Chief of Staff of the Rwandan Military Police.p.61: the list goes on. See also Dorfman: 2000:50. The author makes the following observation in very lucid and convincing terms: "*There are in the world today thousands of vile men who destroyed the lives of their fellow citizens, who raped and tortured their bodies, and who will not, solely because of the Pinochet extradition trial, be able to travel abroad, as they so cheerfully did in the past*".

[58] Dixon and McCorquodale 2003: 48. See also Bianci 1999: 249 and further. The author is of opinion that the interpretation of domestic statutes in the light of contemporary standards of international law may in principle remedy domestic legislation ambiguities and correctly implement the principles and rules of international law.

[59] Dixon and McCorquodale 2003: 48.

7.3.4 International criminal law

A related impact that cases like the Pinochet case have had is that international criminal law applied in domestic law of states develops. States are forced to look at a situation in terms of domestic and international criminal law and really to ensure that domestic criminal law keeps abreast with development in international criminal law and *visa versa*. Spain provides a good example: as originally filed, the complaints filed in Spain only named Spanish citizens as victims. This was therefore grounded in the criminal jurisdictional principle of passive personality that is jurisdiction because of the nationality of the victim. While Spanish law on criminal jurisdiction allows for passive personality jurisdiction, the complaints in both Chilean and Argentine cases subsequently added non-Spanish citizens, thus forcing the issue into the area of universal jurisdiction. As a result, one of the most significant single findings of the appellate review of the *Audienca* was that Spanish courts are vested with international jurisdiction under Spanish criminal law.[60]

7.3.5 Domestic court interventions

Rothenberg points out that while the British legal cases involved British law, they rested upon an acceptance of the "*fundamental legitimacy of the Spanish extradition order and legal cases against former members of the Argentine and Chilean military regimes*".[61] The fact that the British government allowed that this matter be settled through the intervention of the British courts, instead of avoiding the matter through a possible diplomatic resolution, is highly significant. The author points out that this action by the British government expresses a basic respect for Spanish law and its legal processes, which signifies, together with the work of the Spanish judge Garzon particularly, the international community's growing willingness to take concerted transactional legal action against human rights violators.[62]

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60 Wilson 1999:951.
61 Rothenberg 2002: 944.
62 Rothenberg 2002: 945. See also Sands 2003: 68 and further.

8. Conclusion

Sands in posing the question as to whether international law has been transformed by the Pinochet and Congo cases, concludes as follows:

> "*The Pinochet and Yerodia cases were different. The distinction between a former president or minister and a serving president or minister is an important one. But the underlying issues are essentially the same. The judgements of the House of Lords (a national court) in Pinochet and of the International Court in Yerodia reflect, in my opinion, a struggle between two competing visions of international law. For the majority in the Lords international law is treated as a set of rules the primary purpose of which is to give effect to a set of broadly shared values, including a commitment to rooting out impunity for the gravest international crimes. The other vision, which reflected in the judgement of the ICJ, sees the rules of international law as being intended principally to facilitate relations between states, which remain the principal international actors. For the majority in the House of Lords balance is to be achieved by limiting the role of immunities, and establishing, in effect, a presumption against immunity*".[63]

The author is of the opinion that for the International Court of Justice, there is a presumption in favour of immunity, including before the national courts, unless that immunity has been removed by an express act.[64] The International Court of Justice's response therefore to the claim as witnessed in the Congo case directly, and indirectly the Pinochet case,

> "*…suggests a more limited role for national courts, certainly insofar as higher officials (presidents, foreign ministers, etc.) are concerned, while they are in office and possibly even after they have left office, depending on how the notion of 'private acts' is interpreted and applied*".[65]

The author concludes that what the International Court of Justice in essence signalled by its judgment in the *Congo* case, was that it was in order for the low key offenders to be prosecuted in the national courts, but that the more senior officials were to be left for prosecution in international courts. Lastly, according to Sands,

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63 2003:51. See also Cassese 2005: 21 and further.
64 Sands 2003: 51.
65 2003: 52.

> "*…broad presumptions in favour of immunities as reflected in the International Court of Justice's recent decision can only lead to a diminished role for national courts, a watered-down system of international criminal justice, and greater impunity*".[66]

There need to be definitive prescriptions in international law regarding the immunity of serving heads of state for serious violations of international humanitarian law as is so poignantly pointed out by Tatchell, if credibility is to be maintained for the process of an emerging international criminal justice order.[67] The author indicates that in an application for the arrest and extradition of the Zimbabwean president, Robert Mugabe, to stand trial on charges of torture, which application was heard at the Bow Street Magistrate's Court on 14 January 2004 before Judge Workman, the application was rejected on the ground that serving heads of state enjoy absolute immunity from charges under both British and international law.[68] The judge's ruling is based on the *Congo decision* of the International Court of Justice.[69]

The double standards over immunity for heads of state have been illustrated in the Iraq war, with two attempts, on 20 March and 7 April 2003, to assassinate the then Iraqi president, Saddam Hussein. The lawfulness of both of these attempts was asserted by the United Kingdom government. The question is then posed how a head of state may be lawfully assassinated but not lawfully prosecuted for crimes against humanity.[70] The applicant is quoted in this matter before the application was heard as stating:

> *"If the court judgment goes against me, it will make a mockery of international human rights law. What is the point of having human rights conventions if the main abusers, heads of state,-are exempt".*

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66 Sands 2003:53.

67 Tatchell 2004: 27.

68 Tatchell 2004: 27 Under the UK's Criminal Justice Act 1988, section 134, which incorporates the 1984 UN Convention Against Torture into UK law, anyone who commits, authorises, colludes, acquiesces or condones acts of torture anywhere in the world can be prosecuted in Britain. Serving heads of state according to the ruling are however protected by the doctrine of state immunity.

69 Tatchell 2004: 27.

70 Tatchell 2004: 27.

The question is justified and reflects the current state of uncertainty in international criminal law but may on the other hand just indicate that:

> "…*the world is reaching that point long strived for by proponents of human rights where law, in the form of criminal culpability, will triumph over politics*".[71]

On a general note, this chapter to a certain degree reflects the current trends in the international community's reaction to widespread atrocities. In this regard, Cassese notes that certain trends stand out: first, that it would seem that placing responsibility for atrocities is yielding from state responsibility to individual responsibility,[72] and secondly, that mechanisms are sought for enforcing compliance with international law, there is an increasing tendency to target individuals, sometimes in addition to states and in certain cases to use tools of international criminal justice to do so.[73]

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71 Penrose 2000: 204.

72 Cassese 2003: 447 proceeds as follows: "*No doubt in interstate relations the legal rules and machinery for invoking and enforcing State responsibility, that is, for reacting to wrongful acts of States, still possess considerable significance and are used by States, particularly in the area of commercial or territorial disputes and in other similar matters. Nevertheless, one can discern a tendency to shift attention from the interstate to the inter-individual level and to react to gross breaches and atrocities more by attempting to prosecute and punish individuals rather by invoking the responsibility of the State for which they may have acted as State agents*".

73 Cassese 2003: 447.The author illustrates this by citing as example UN Security Council resolutions that request states to freeze the financial assets of Usama Bin Laden and individuals and entities that are associated with him. These enforcement actions include interim measures typical of criminal justice namely the freezing of private assets belonging to that individual. Another example in African context that Cassese uses is drawn from the practice of the European Union when it recently decided to impose sanctions not only against the government of Zimbabwe but also against those who bear a wide responsibility for the violations of human rights in Zimbabwe, including the head of that state, Mugabe, and a number of state officials. By legally binding acts of the European Council, it has requested its members to freeze the private assets of those state officials.

Chapter 8
International Criminal Tribunals: the establishment of the International Criminal Court

"*To condemn crimes for which there is no court is to mock justice and encourage criminality*".
Dr Benjamin Ferencz[1]

1. Introduction

This chapter proposes the need for an International Criminal Court, examines the expectations for such a court and different models that such a court may fulfil. It proceeds to record the historical progress towards establishing the Court and then reflects on the significance of its establishment, particularly with regards to the modern view or approach to international criminal law. It then deals with certain aspects of the Rome Statute and indicates what development or not there has been in international criminal law as reflected by the Statute. Finally the chapter concludes that the establishment of the International Criminal Court may imply a further or extended use of universal jurisdiction in international criminal law and secondly that the exercise of domestic jurisdiction is conditional upon complying with international norms, particularly human rights and humanitarian law norms.

2. Background

In 1991, Bassiouni wrote that many of the crimes for which an international criminal court would have jurisdiction "*are the logical extension of international protection of human rights*"[2]*.* He observed that without enforcement, these rights are violated with impunity.[3] Once an international criminal court is

1 Santosus 1994: 25. See also Ferencz 1992: 375 and further.
2 1991: 34.
3 1991: 34. See also Mendez 2000: 65 and further.

established, a process of prosecution is institutionalised and can operate impartially and fairly. He further observed that the establishment of a permanent international criminal court would be the best policy for the advancement of the international rule of law and "*for the prevention and control of international and transnational criminality*".[4] Bassiouni pointed out that international criminal law has developed by treaties, which merely defined international crimes and placed a duty upon states, through agreement in terms of a particular treaty, to prosecute such crimes under the municipal or domestic law of that state. This required domestication of such crimes, failing which a state, as party to a treaty, was bound to extradite the accused person to another state that was willing to prosecute. The author characterised this control scheme for prosecution as an "*indirect control scheme*" as opposed to a control scheme for prosecution that would be vested in a supranational structure, such as an International Criminal Court.[5]

These weaknesses and obstacles represent weaknesses and challenges inherent in international criminal law itself.[6] They may eventually serve as valuable yardsticks against which to measure the success of the ICC and by implication, how close the international community is to a credible international criminal justice order.

2.1 Expectations of an international criminal court

Before the establishment of the International Criminal Court is dealt with, one should establish, even to a very general extent, what it is that is expected of

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4 Bassiouni 1991: 34.See also Wedgewood 1999: 93. The author observes as follows on the establishment of the International Criminal Court: "*Though only an army can interrupt genocide, the forms of justice are a means to strengthen the norms against indiscriminate violence, integral to the honour of the profession of arms. The awe and finality of trial can help teach respect for humanitarian standards, showing that the safeguard of civilians and non-combatants is a demand of the law, and not a matter of arbitrage*".

5 Bassiouni 1980: 23.

6 Bassiouni 1980: 23.

such a court. In this way one may hopefully have realistic expectations of its future role.[7]

2.1.1 Different models:

Marquardt, citing J.Y. Dautricourt, divides crimes into three categories, each category fitting into its own type of model.[8] First there are crimes against the domestic or municipal order of a state, termed national crimes. Then there are crimes against international public order, or trans-national crimes, and lastly, crimes against the universe or world order, which are impossible to commit by private means alone. Each of these classes of crimes corresponds to a potential role for an international criminal court: for international crimes, there is what the author styles the "*Nuremberg model*", for trans-national crimes, the "*adjunct*" and for national crimes, the "*sovereign of last resort"* model.

(a) The Nuremberg model

According to the author, this model of an international court serves to punish and deter the most heinous violations of international crimes.[9] By definition, and logically, its intervention is accomplished against the wishes of a national government. Such violations are also the least likely to reach trial before an international court.

(b) An international court as adjunct

According to this vision of an international court, the court serves to supplement and support the national jurisdiction of a state's courts. Here one

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7 Rubin 2002: 65 and further. The author discusses the legal response to terror and doubts whether an international criminal court is a suitable forum in which to prosecute for such crimes.

8 1995: 96 and further. See also Booth 2003: 177 with the following objectives or roles of an international criminal court: (1) an International Court as a public demonstration of justice, (2) an International Criminal Court that upholds the rule of law so thatt order is created, and (3) an International Criminal Court as a recorder of truth and a historical account.

9 1995: 96.

thinks of such trans-national crimes as drug trafficking and international terrorism. The author points out that although the existing web of extradition and mutual assistance treaties address these problems to a certain extent, an international court can fill the gaps in the current system.[10] In this regard, the creation of a neutral forum, i.e. an international criminal court, may facilitate the trial of criminals who have taken refuge in states unwilling to extradite them to the complaining state.[11]

Marquardt concludes:

> "*In short, under the adjunct model of an international criminal court, the court would not override national legal systems, but rather enhance them. Such a court would improve states' ability to respond to those transnational crimes that fall between the cracks of existing systems of national jurisdiction or create difficult tensions and conflicts among national systems*". ***12***

(c) An international court as sovereign of last resort

This is the least developed view of an international court, "*but clearly implicit in some of its proposed functions".*[13] In this role, an international criminal court could serve as an enforcer of international norms by its mere existence and implicit deterrent value to the world, and may additionally act as a safety net in the event that a national criminal jurisdiction collapses.[14]

The three models of the role of an international criminal court set out above are however not mutually exclusive, and in fact they are reasonably distinct,[15]

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10 Marquardt 1995: 97.

11 Marquardt 1995:97. The author points out that states often have qualms about extradition which is usually based on a number of factors, such as doubts that the accused will receive an unbiased trial if extradited for political crimes, uneasiness about appearing give in to the pressure from the requesting state and so forth. The creation of a neutral forum with independent authority under international law could thus make it easier for the state with the custody of an alleged transnational offender to hand over for trial.

12 1995 :99.

13 1995: 99.

14 Marquardt 1995: 99.

15 Marquardt 1995: 100.

but correctly so, the author points out, and they should be born in mind by both sceptics and proponents of an international criminal court.

2.1.2 To encourage domestic processes

Professor Steven Ratner, writing on the "*limits of global judicialization*", envisages an effective international criminal court as one that encourages individual criminal accountability by providing a back-up mechanism in case states do not prosecute human rights abuses. The goal is to:

> "*...encourage domestic processes and, in the end, to create a deterrent to the underlying human rights abuses. The ICC is, in effect, a way of signalling to domestic courts that they should prosecute - which is a way of signalling to those who might commit human rights abuses that they ought to be afraid of the possibility of prosecution*".[16]

2.1.3 Practical reasons for a permanent international criminal court

There are also practical reasons for the creation of a permanent international criminal court. Since the conclusion of the Nuremberg trials, the world has continued to witness genocide, war crimes and torture. And often those responsible for these atrocities like Pol Pot, Saddam Hussein (until recently, of course), and Idi Amin have gone unpunished because no court was willing to try them.[17]Secondly, as has been shown so far, the processes to set up *ad hoc* tribunals as in the case of the ICTY and the ICTR are time consuming and politically exhausting.[18] This prompted US Ambassador Scheffer, who also led the US delegation to the Rome Conference that established the ICC, to state before a Senate Committee in the United States:

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16 Ratner 2003: 447.

17 Seguin 2000: 86.

18 Senguin 2000: 86. See also Roberts 2001: 36 and further. This author, contrary to most commentators and writers, takes a rather dim view of the establishment of the ICC and notes inter alia: "*Nations that embrace this court should do so only after careful review and after acknowledging that they are, in effect, agreeing to cede their sovereignty over to their own court systems and notions of justice to a supra-national tribunal*". See also Wedgewood 1999: 94.

"*Our experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda has convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost-efficient in its operation*".[19]

2.2 The historical progress towards the establishment of the International Criminal Court

The idea of creating an international criminal court is not a new one.[20] The issue was raised after World War I and was discussed by two unofficial bodies in the interwar period. At the 34th Conference of the International Law Society held in Vienna in 1926, there were discussions on, amongst other things, proposals for the establishment of a permanent international criminal court and the crimes that would be included in its jurisdiction.

At the 39th Conference of the International Law Association, held in Paris in 1936, a declaration was issued which aimed at invoking the speedy jurisdiction of the Permanent Court of International Justice in the case of any violation of the 1928 "*General Treaty for the Renunciation of War as Instrument of National Policy*" (the Paris Peace Pact or Kellogg-Briand Pact). Support for the creation of an international criminal court came in 1937 with the *Convention for the Prevention and Punishment of Terrorism*, which was signed on 16 November 1937.[21] There were also early efforts by the United Nations to foster the establishment of an international criminal court. In December 1948, as the result of the then recently enacted Genocide Convention, the General Assembly requested that the International Law Commission study the feasibility of the establishment of an international

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19 Senguin 2000: 86.

20 Cassese 2003: 327. The author divides the attempts to create an International Criminal Court into 5 distinct phases: (1) abortive early attempts (1919-1945), (2) criminal prosecutions by the IMT in the aftermath of World War II, (3) elaboration by the ILC of the Statute of a permanent court, (4) the post cold war "*new world order*" with the establishment of the ICTY and the ICTR, and (5) the drafting of the ICC Statute. See also Santosus 1994: 29.

21 Bassiouni 1980: 25: It provided for the establishment of an international criminal court to try acts of terrorism. Twenty-four states signed the Convention on terrorism and thirteen states signed the Convention for the creation of an international criminal court to try acts of terrorism. The Convention never came into being because too few states ratified it.

criminal court to try persons charged with genocide and other crimes over which jurisdiction would be conferred by international conventions.[22] A draft statute for the creation of such a court was agreed upon by the members of the Commission in 1951. A report to the General Assembly followed in 1952.

After the above events took place, the General Assembly adopted a resolution whereby a Commission on International Criminal Jurisdiction was established to explore the consequences of establishing such a court, the various methods by which this might be done and the relationship between the court and the United Nations. As a result a revised draft statute was completed in 1953, which was submitted to the General Assembly in 1954.[23]

The drafting of concrete instruments did little at the time to ease the differences of opinion over the proposed court. The beginning of the cold war complicated matters further and while not the only obstacle, the Soviet bloc countries opposed the creation of a court. The start of the Korean War hardened their position and contributed to their fear that such an institution would be used against them.[24]

Marquardt comments as follows on this period and the reactions of the Eastern block:

> "*To the extent the Eastern bloc objections were a principled attempt to insulate domestic political decisions from international judicial review under the banner of state sovereignty; they represented a retreat from the Nuremberg principles enunciated above. However, the more probable motivation was more a question of power than of principle. The Soviets were unwilling to accept such review except by organs in which they had veto power or an option not to accept jurisdiction*". [25]

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22 Bassiouni 1980: 25, 26. See also Politi and Nesi 2002: 19.

23 Bassiouni 1980: 26.

24 Marquardt 1995: 85. According to the author, these states consistently raised a number of objections to the court: these were that it would violate national sovereignty (including the right of victim states to try crimes committed on their territory), interfere with the domestic affairs of member states in violation of Article 2(7) of the UN Charter, and that it would infringe upon the roles of both the International Court of Justice (the only judicial body mentioned in the Charter) and the Security Council (entrusted with such central peace and security matters as identifying and responding to wars of aggression).

25 1995: 85-86.

Pursuant upon Resolution 1187 (XII) of 1957, the General Assembly postponed the discussion of an international criminal court until a definition of aggression could be agreed upon by the then various world factions. Resultantly, in 1967, the *Special Committee on the Question of Defining Aggression* was established by the General Assembly and finally in 1974, the Committee reported that it had completed the much-vexing definition of aggression. It was now assumed that as a result of the last stumbling block in the way of the creation of an international court having been removed, the 1953 Draft Statute could be reintroduced before the General Assembly.[26] This was not to happen. Further development of international criminal law was in terms of its "*indirect control scheme*".

The end of the cold war eliminated the bipolar political stability, which, during the cold war, had maintained international social stability for over 40 years. The dissolution of this political system resulted in dramatic political and social changes, which have caused a large-scale breakdown of state order. This breakdown in state order, according to Peter resulted in extensive human rights violations notably in Yugoslavia and Rwanda, and additionally, the world has experienced a dramatic increase in international crime, including drug trafficking and terrorism. [27]

Aspirations to establish a permanent international court were revived in the 1980s with a proposal before the United Nations General Assembly by the Latin American States, led by Trinidad and Tobago.[28] The latter envisaged a permanent court as their last resort to prosecute international drug-

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26 Bassiouni 1980: 26. See also Politi and Nesi 2002: 19.

27 1997:178.

28 Kittichaisaree 2002:27. See also Marquardt 1995: 88 who remarked: "*The very existence of international crimes logically suggests the need for a permanent ICC. The mere presence of terrorism and drug trafficking alone is compelling enough reason to create a mechanism to try the alleged perpetrators of such crimes. The individuals who commit these crimes of an international character endanger world peace and should not be permitted to go unpunished and undeterred. Persons accused of international crimes should be tried by an independent tribunal free of any question of political bias that inevitably confront domestic courts attempting to deal with the same crime*".

traffickers.[29] The matter was referred to the International Law Commission [30] by the General Assembly. In 1993, the ILC was asked to draft a statute for such a court.[31]

In 1994 Santosus wrote:

> "*Today, global peace and security have been threatened with an increased frequency. Yet, an international mechanism to adequately adjudicate these conditions does not exist. It is becoming increasingly more evident that an international criminal tribunal, based on binding international law, is an absolute necessity for world harmony*".[32]

The 1994 draft statute: The United Nations General Assembly decided in 1994 to pursue work towards the establishment of an international criminal court, using the draft statute by the International Law Commission as a basis upon which to start its work.[33] The draft statute of the International Law Commission envisaged an International Criminal Court to be:

> "*(1) a permanent court in the sense that it will be available to act as required, but one that will not have a large infrastructure or permanent staff; in particular, it is intended that the judges will perform other roles (e.g. as national judges) unless called on;*
> *(2) a court created by treaty under the control of the states parties, but in close relationship with the United Nations;*
> *(3) a court of defined jurisdiction over grave crimes of an international character under the existing international law and treaties;*
> *(4) a court the basis of whose jurisdiction is-with the significant expectation of genocide-dependent on the acceptance of states; and*
> *(5) a court whose operation is integrated with the existing system of international criminal assistance and which is not intended to displace that system in cases where it is functioning. As the*

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29 Kittichaisaree 2002: 27. See also Politi and Nesi 2002: 20. The request noted that the 1988 UN Narcotics Convention declared drug trafficking an international criminal activity, that international drug trafficking "*threatens to engulf small states and afflicts even the superpowers"* and that an international criminal jurisdiction was necessary 'for prosecuting and punishing offenders who command the means to evade the jurisdiction of the domestic courts. Terrorism was also again mentioned as reason to establish a permanent international court. See also Marquardt 1995: 90.

30 Referred to as the ILC.

31 Kittichaisaree 2002: 27. See also Karadsheh: 1996: 253 for a discussion of a draft statute for an International Criminal Court prepared by international scholar M. Cherif Bassiouni.

32 1994: 28.

33 Schabas 2001: 13. See also Kittichaisaree 2002: 27: The ICTY Statute largely influenced this draft.

> *preamble states, the Court 'is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole…[and] to be complementary to national criminal justice systems in cases where [their] trial procedures may not be available or may be ineffective*".[34]

The 1994 Draft Statute conferred jurisdiction to the proposed court in respect of (a) the crime of genocide; (b) the crime of aggression; (c) serious violations of the laws and customs applicable in armed conflict and (d) crimes against humanity. The content of these crimes is to be found in general international law. Previously, the 1993 draft provided for three categories of crimes: (1) crimes under general international law, (2) crimes under a list of treaties in force (the Genocide Convention, the four Geneva Conventions of 1949 and the first Protocol of 1977, and the various terrorism conventions directed at hijacking, hostage-taking, etc.), and (3) a further category of crimes under national law giving effect to what were described as "*suppression conventions*".[35]

Aggression: As far as the crime of aggression is concerned, the Commission did not find it necessary to take a position on whether this crime is limited to the act of waging a war of aggression. However, prosecution for the crime of aggression was subject to an important limitation: a complaint could not be brought before the court unless the Security Council had first determined that a particular state had in fact committed such an act of aggression.[36]

Admissibility: As far as issues of admissibility are concerned, the 1994 draft statute provided that the court could, on application by the accused or at the request of an interested state, at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of the Statute, that a case before it is inadmissible on the ground that the crime in question: (a) has been duly investigated by the state with jurisdiction over it, and the decision of that state not to proceed to a prosecution is apparently

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34 Crawford 1995:410.

35 Crawford 1995: 410.

36 Crawford 1995: 410, 411. As will be shown later, this very issue presently is a most contentious one and is one of the reasons why the United States of America is opposed to the International Criminal Court.

well-founded; (b) is under investigation by a state which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or (c) is not of such gravity to justify further action by the Court.[37]

Legality: As far as the principle of legality is concerned, article 39 of the draft Statute provided that an accused could not be held guilty in respect of a crime unless the act or commission in question constituted a crime under international law and in the case of prosecution with respect to a crime referred to in article 20(e) unless the treaty in question was applicable to the conduct of the accused at the time the act or omission occurred.[38]

Specific needs for a permanent International Criminal Court: It is generally accepted that the following contributed to further calls for the development of mechanisms of international criminal justice: (1) the almost total impunity for war crimes and grave violations of human rights, be it in the former Yugoslavia or in states of less public interest like Columbia or Peru, Togo or Liberia, (2) an unexpected political push at the end of the cold war, and (3), the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda. In addition to these factors and interrelated with them, is the fact that the United Nations, especially at the conclusion of the cold war, assumed an active role in world affairs as opposed to during the cold war, when consensus could rarely be achieved as the likelihood of a veto which was ever present in the Security Council'.[39]

However, this very activism of the Security Council is often met with scepticism as many commentators and also governments are concerned by the rather *ad hoc* character of the Security Council's actions in establishing the tribunals for the former Yugoslavia and Rwanda.[40]

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37 Crawford 1995: 413-414.
38 Crawford 1995: 414.
39 Crawford 1995: 415.
40 Crawford 1995: 415.

A permanent court was also preferred to *ad hoc* tribunals for several reasons: to avoid charges of victor's justice; to establish a professional core of staff trained in criminal investigation and prosecution that could react in a speedy way to any new crisis before evidence could be destroyed, who would also be trained in criminal investigation and who would have well trained staff to address the psychological problems and problems of personal safety that are encountered by victims and witnesses of mass atrocities.

Latore is of the opinion:

> "*…that the international community created the ICC because the continuing practice of establishing temporary ad hoc tribunals was viewed as an ineffective method of assuring universal justice. Judging from the problems of the Tribunals for Yugoslavia and Rwanda, it became clear that a permanent, effective court with arrest power was needed in order to provide notice of the law and to deter international crimes*".[41]

The Ad Hoc committee: For this purpose an Ad Hoc Committee was convened which met twice in 1995.[42]

Complementarity as jurisdictional alternative: In meetings of the *Ad Hoc* Committee, a new concept, which was referred to as "*complementarity*" of jurisdiction, was introduced, as opposed to the ILC's envisaged draft of a court with "*primacy*" of jurisdiction.[43] Whereas the latter concept meant that if the court's prosecutor wished to proceed with a case, domestic courts could not pre-empt this by offering to do the prosecution themselves, the former meant that the international criminal court could only exercise jurisdiction if domestic courts were unwilling or unable to prosecute.[44]

Definition of crimes: The Ad Hoc Committee, in another departure from the ILC's draft, insisted that the crimes within the court's jurisdiction not only be enumerated, but also defined in detail. The Statute setting up the international criminal court would also include detailed definitions of crimes as well as

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41 2002: 164.
42 Schabas 2001: 13.
43 Schabas 2001: 13.
44 Schabas 2001: 13.See also Morris 2000:177 and further.

elaborate provisions dealing with general principles of law and other substantive matters. The aspiration of the Ad Hoc Committee was that the new court should conform to principles and rules that would ensure the highest standards of justice, and that these would not be left to judicial discretion, but that they would be incorporated in the statute itself.[45]

The Preparatory Committee: At the 1995 session of the General Assembly, it decided to convene a "*Preparatory Committee*", inviting participation by member states, non-governmental organisations and international organisations of all kinds. The committee, which became known as the "*PrepCom*", in 1996 held two three week sessions, presenting the General Assembly with a voluminous list of amendments to the draft of the International Law Commission.[46] The "*Zutphen draft*" was reworked at the final session of the Preparatory Committee, and then submitted for consideration by the Diplomatic Conference.[47]

The Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court: Pursuant upon General Assembly resolutions adopted in 1996 and 1997, the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened on 15 June 1998 in Rome.[48]

Course of the Rome Conference: Various caucuses and aligned groups emerged at the Conference, the largest group being the so-called "*like*

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45 Schabas 2001: 13-14. See also Kirch and Holmes 1999:3: "*The draft statute that ultimately emerged from the PrepCom was riddled with fourteen hundred square brackets, i.e., points of disagreement, surrounding partial and complete provisions, with a number of alternative texts*".

46 Schabas 2001: 14: It met again in 1997, this time holding three sessions. There were also informal intersessional meetings, most notably the one held in Zutphen, in the Netherlands, in January 1998, which produced the so-called Zutphen draft. This consolidated all the proposals in a more coherent text. See also Kittichaisaree: 2002: 28.See also Ambos 1996: 519-544.

47 Schabas 2001: 14.

48 Schabas 2001: 15: more than 160 states sent delegates to the Conference. In addition a large number of delegates of international organisations and non-governmental organisations attended. See also Politi and Nesi 2002: 27 on the role of NGOs.

minded", including more than 60 states, and also such groups as the Southern African Development Community and the caucus of the Arab and Islamic States, each with different focuses and approaches.[49] Many differences existed over jurisdictional issues, such as how the jurisdiction of the court could be triggered; whether states should automatically accept the court's jurisdiction over crimes as soon as ratification took place, or whether they should be protected by another form of case-by-case consent of the court's jurisdiction. [50]

The conference began with a few days of formal speeches from political figures, United Nations officials and personalities from the ranks of persons involved in international criminal prosecution such as the presidents of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, and their Prosecutor. After this the conference divided into a number of work groups with the responsibility for matters such as general principles, procedure and penalties. Managing the negotiating process was the responsibility of the *Bureau of the Committee of the Whole*.[51]

In the early discussions of the statute, many issues were sensitive and complex. Delegations in the early discussions at the conference, were prepared to consider the inclusion of a broad range of crimes, if the court's jurisdiction was limited, for example by requiring state consent on a case-by-

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[49] Schabas 2001: 16. See also Kirsch and Holmes 1999: 4: According to the authors, the most organised was the "*like-minded group, which generally favoured a strong and independent court. A second group consisted of the permanent members of the Security Council. Their solidarity was particularly on two issues: a strong role for the Council vis a vis the court, and the exclusion of nuclear weapons from the weapons prohibited by the statute. It also wanted the jurisdiction of the court and its exercise to be carefully circumscribed. They paid particular attention to its jurisdiction over armed conflicts, but their main area of concern (international vs. internal conflicts) varied according to their national perspective*". Directly opposed to the P5 as the latter group had become known, were those states that were extremely suspicious of the Security Council. This group had insisted on the inclusion of nuclear weapons prohibited by the statute. Similar to the P5 group, this group also favoured a court whose powers were relatively restricted. Most developing countries advocated the inclusion of aggression among the core crimes covered by the statute, many also favouring the prohibition of nuclear weapons. Some wanted terrorism or regional drug trafficking to be covered as well, while others considered such crimes as belonging to a state's domestic jurisdiction.

[50] Kirsch and Holmes 1999: 4.

[51] Schabas 2001: 16; Kirsch and Holmes: 1999:2.

case basis or by permitting states to decide that they could opt out of certain crimes. Opposed to the inclusion of a wide range of crimes, but a court with limited jurisdiction, there was the possibility of a court with automatic jurisdiction, exercising jurisdiction close to a universal kind of jurisdiction. This caused some delegations to argue for a limited range of crimes, narrower definitions and higher thresholds.[52]

Lost opportunity? If regard is to be had for the extent of present international crime, to wit terrorism, drug-trafficking, serious economic crime, trade in humans, the list goes on, it is a pity that this list was not extended to include a wider range of crimes within the ICC's jurisdiction.[53] Did the world lose a golden opportunity at Rome? The initial resolution that called for the establishment of the court wanted the court, not for what is referred to as the international core crimes such as genocide, crimes against humanity and serious war crimes, but rather for drug-trafficking and terrorism. The initial resolution was sponsored by Trinidad and Tobago and a coalition of Caribbean countries because they felt they could not deal themselves with the issues of drug-trafficking and terrorism because terrorists had more money than they had and were corrupting their police and killing their judges. These countries basically wanted assistance on international law enforcement. Countries that opposed an extension of the list of crimes to fall under the ICC's jurisdiction at the time, did perhaps not fully contemplate the extent of terrorist networks such as Al Qaeda. The Final Act of the Rome Conference, adopted at the same time as the Statute, however includes a resolution on treaty crimes, which recommends that the Review Conference, which is to be

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52 Kirch and Holmes 1999: 5.

53 In this regard it is interesting to read an article by Zappala 2001: 595 and further in which he discusses the Ghaddafi case before the French Cour de Cassation in which case that court held that at this stage of development of international customary law, the crime that Ghadaffi was charged for, namely terrorism, does not fall within the exceptions to the principle of immunity from jurisdiction of foreign heads of state in office. As the author indicates (on 601), an interpretation of this ruling by the French court, there are crimes that constitute an exception to the jurisdictional immunity of heads of state. See also Boister 2003: 953 and further who agitates for the differentiation of international criminal law *strictu sensu* referring to core international crimes and *trans-national criminal law* that would refer to the hitherto referred to "*treaty crimes*".

held seven years after the entry into force of the Statute, consider means to enable the inclusion of the crimes of terrorism as well as drug crimes.[54]

After a tedious process the provisions of the statute were being adopted one by one after consensus had been reached. As time passed at the Rome Conference there were however the key issues which had to be settled, of which the most important were the role of the Security Council, the list of core crimes over which the court would have jurisdiction and of course, the scope of the court's jurisdiction over persons who were not nationals of States Parties.[55]

Issues relating to crimes were, as previously mentioned, that many delegations wanted more crimes covered by the statute than the three core crimes of genocide, crimes against humanity and war crimes. Notably amongst these crimes were aggression and the so-called treaty crimes, illicit trafficking in drugs and terrorism.[56]

Further controversy in terms of related to crimes related to war crimes that were committed during internal armed conflicts.[57] A few delegations insisted that the statute should not apply to internal armed conflict, while there was widespread consensus amongst other delegations that it should.[58]

As far as the list of weapons whose use would constitute a war crime was concerned, there were divergent views and positions held by delegates.[59] There was some support for including nuclear weapons and land mines in the list of prohibited weapons, but also strong resistance on the grounds that the

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54 Schabas: 2001: 28.

55 Schabas 2001: 17. See also Kirch and Holmes 1999:4.

56 Kirch and Holmes 1999: 6.

57 Kirch and Holmes 1999: 7.

58 Kirch and Holmes 1999: 7. Some delegations wanted the court's jurisdiction as wide as possible whilst other states argued that allowing the court to prosecute crimes committed in internal conflicts would be contrary to international humanitarian law. Although the authors do not state this, one may safely assume that opposition to the court prosecuting crimes committed in internal armed conflict was an attempt not to allow the court any form of interference in the domestic affairs of any particular state.

59 Kirch and Holmes 1999: 7.

threat or use of such weapons was not prohibited under existing international law.[60] These was extremely controversial especially since biological weapons, called by many the “nuclear weapons of the poor”, were prohibited. However, apparently the inclusion of nuclear weapons would have permanently deprived the court of essential support and would have rendered it powerless.

Jurisdictional issues were the aspect of the negotiation process that was the most complex and sensitive. One of the difficult aspects here was determining whether entitlement to refer matters to the court should be vested in states parties, the Security Council and / or the prosecutor of the court. Referral by states parties received overwhelming support from delegates; giving power *proprio motu* to an independent prosecutor received considerable support; but giving the right to the Security Council to refer cases to the court, and even more, to force the court to defer cases for political reasons, was strongly opposed by many delegations. This issue remained a problem right till the end of the conference.[61] On the final day of the Conference, the president of the Conference’s Committee of the Whole presented a draft relating to the difficult issues. Hopes by most delegates that the final draft would be accepted by consensus were disappointed when the United States exercised its right to demand that a vote be taken. The result was 120 states in favour, 21 abstentions and 7 states against.[62]

Adoption of the Rome Statute: Apart from the Statute of the International Criminal Court, the Conference on 17 July 1998 also adopted a Final Act, which provided for the establishment of a Preparatory Commission which was assigned the following tasks: most important was the drafting of the Rules of Procedure and Evidence and the drafting of the elements of the Crimes. Other tasks included the drafting of an agreement with the United Nations on the

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60 Kirch and Holmes 1999: 7: It was understood that the statute was not to create new substantive law, but only to include crimes already prohibited under international law.

61 Kirch and Holmes 1999: 8.

62 Schabas 2001: 18. See also Politi and Nesi 2002: 35. See further Dormann: 2003: xii. On 30June 2000, the Preparatory Commission for the ICC adopted by consensus the draft Elements of Crimes, elaborating upon the definitions of genocide, crimes against humanity and war crimes that are contained in the ICC Statute.

relationship between that organ and the court, and preparing a host state agreement with the Netherlands, where the court would be seated.

The Rome Statute required sixty ratifications before it could come into force. States were also invited to sign the Statute, which would be an initial indication of their intention to ratify. It was justifiably foreseen that there could be some time span between signature and ratification because most states would have to undertake significant legislative changes in order to comply with the obligations imposed by the Statute and that it is to be expected that they would want to resolve these issues before ratification, especially the incumbent duty to cooperate with the court in terms of investigation, arrest and transfer of suspects.[63]

Further issues that needed to be addressed by most states of intention to ratify would include issues such as extradition of nationals which is currently prohibited, in the case of some states, and which is incompatible with the Rome Statute. In addition, and because the Statute is predicated on the complementarity principle, by which states themselves are presumed to be responsible for prosecuting suspects found on their own territory, it necessitates that many states should bring their substantive criminal law into line, enacting the offences of genocide, crimes against humanity and war crimes, as defined in the Statute, ensuring that their courts can exercise universal jurisdiction over these crimes.[64]

By the end of November 2003, 92 states had ratified the treaty. The International Criminal Court came into force on 1 July 2002, its 18 judges were elected in February 2003, and they took their oaths in March 2003.

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63 Schabas 2001: 18-19.
64 Schabas 2001: 19.

2.3 The significance of the establishment of the International Criminal Court

The establishment of a permanent International Court has been hailed as the greatest event since the establishment of the United Nations.[65] In essence it is part- realisation of the United Nations Charter which in its Text provides:

> *"WE THE PEOPLES OF THE UNITED NATIONS DETERMINED*
> *to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and*
> *to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small, and*
> *to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and*
> *to promote social progress and better standards of life in larger freedom,…"*[66]

The great significance of the adoption of the Rome Statute is thus the fact that it suggests the existence of a social system built on universal respect for the idea of human rights. This system recognises that to allow impunity to those responsible for the most serious war crimes and crimes against humanity diminishes and in fact threatens all those that live under it.[67]

In terms of development of international criminal law and justice, and the significance of the adoption of the Rome Statute, Du Plessis points out that the international legal order was originally conceived as if it were a kind of private law between equal sovereign states.[68] It was thus seen as simply the contractual relations between states parties. As a result of this conception, the idea of an international criminal law, which by nature had to involve a public law dimension with an underlying system of shared social ethics, seemed at first, totally inappropriate if regard is paid to the fact that the international regime has no central sovereign, and is further pluralistic in its views on common morals. Therefore, an international social system, and its shared

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65 Schabas 2001: 20.
66 As quoted in Brownlie 1992:3.
67 Du Plessis 2002: 304. See also Wedgewood 1999: 93.
68 2002: 304.

international public morality, are evidence of the strengthening of human rights and humanitarian law of war, markedly so in the second half of the twentieth century.[69]

3. Crimes

Article 5 of the Rome Statute stipulates that the jurisdiction of the Court regarding crimes within its jurisdiction:

> "*…shall be limited to the most serious crimes of concern to the international community as a whol', in respect of the crime of genocide; crimes against humanity; war crimes,*[70] *and the crime of aggression*".[71]

As far as aggression is concerned article 5(2) stipulates that the court shall exercise jurisdiction over this crime once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the court will exercise jurisdiction with respect to this crime and that such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.[72]

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69 Du Plessis 2003: 304. See also Akhavan who notes as significant the fact that the process leading to the adoption of the ICC statute constituted an important exercise in the 'acculturation' that engaged "*…thousands of diplomats, advisers, academics, and activists who represented states, international organisations, and NGO's. This process has resulted in greater exposure to and familiarity with the basic principles and procedures of international criminal law, strengthening the idea of accountability in a system of foreign states*".

70 See in this regard Brown: 1999: 865. The definition of war crimes in the Rome Statute combines in one five-page article crimes defined under the Hague Conventions of 1899 and 1904, the four Geneva Conventions of 1949, and the two Additional Protocols to the 1949 Geneva Conventions.

71 O'Shea 1999: 254. The author indicates that the Statute follows the drafting style of the Yugoslav and Rwanda Statutes in listing genocide and crimes against humanity separately. The author further indicates that the Nuremberg Charter made no reference to genocide but incorporated extermination as a crime against humanity together with persecutions on political, racial or religious grounds in execution of or in connection with extermination. See also Senguin 2000: 88 and Boller 2003: 284 and further. Limiting the ICC's jurisdiction to the most serious international crimes only may be viewed as an attempt by the international community to thereby obtain as much consent to its jurisdiction as possible. See in this regard Ambos 1996: 523.

72 Trahan 2002: 440. The author indicates that the ICC will therefore have the jurisdiction to prosecute aggression, but will be unable to do so since the crime has not been defined. The difficulty in defining the crime relates in part, according to the author, to determining when the ICC would have jurisdiction to hear a case concerning aggression. This is so because the UN Charter charges the Security

The crimes over which the ICC has jurisdiction, are described in the Preamble to the Statute as:

> "*...unimaginable atrocities that deeply shock the conscience of the humanity*".

It therefore becomes abundantly clear that the intention of the drafters was that these crimes were to apply only in respect of the most serious crimes, and crimes regarded as international in their nature. The concept of "*international crimes*" has been in existence for centuries.[73] The crimes over which the ICC has jurisdiction are international of nature, not so much because international cooperation is needed for them to be repressed, although this is also true, but because of their particularly heinous nature which elevates them to a level where they become the serious concern of the international community.[74] Humanity as a whole is the victim of these

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Council with determining when a state has committed aggression. Therefore the difficult question arises: should the ICC be able to prosecute an individual for aggression before the Security Council determines that the individual's state committed aggression? In addition, what happens when the Security Council fails to make any determination at all?

73 Schabas 2001: 21. The author states that these crimes were generally considered to be offences whose repression compelled some international dimension and mentions as examples, piracy, which was committed on the high seas and which necessitated special jurisdictional rules as well as cooperation between different states, slave trade, trafficking in women and children, traffic in narcotic drugs, hijacking, terrorism and money laundering. These crimes are generally referred to as "*treaty crimes*".

74 Schabas 2001: 21. See also Bassiouni 1980: 14 and further, who divides crimes in international perspective as: (1) International proscriptions not directed at states which developed as an evolutionary progression of treaty obligations, such as slavery, slave trade and traffic in women and children, narcotics, hijacking and so on (2) International proscriptions not directed against states which did not develop in an evolutionary progression of treaty obligations such as the international conventions for the suppression of the circulation of and traffic in obscene publications, the International Convention for the suppression of counterfeiting currency and so on, (3) International proscriptions directed against states which all have origins in customary international law and have developed through an evolutionary process of conventions. They may be described as the criminalisation of violations of human rights which are so serious as to shock the conscience of mankind or, to threaten the peace and security of the world, such as the Genocide Convention, the 1972 International Convention for the Prevention and Suppression of the crime of Apartheid, and so on. Whether a particular crime is such that it can be styled as an international crime repugnant to the world in general is not always without contention. See for example Zemach: 2003: 89 who writes on the Settlement provision in the Rome Statute: Article 8(2)(b)(viii) of the Rome Statute proscribing the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies as a war crime, something which the author argues

crimes.[75] Although the four crimes within the Court's jurisdiction were the crimes for which were prosecuted at Nuremberg, there has since Nuremberg been considerable development. Schabas describes the development in scope and application of crimes covered by the ICC Statute in relation to the crimes prosecuted at Nuremberg, as follows:

> "*At Nuremberg the crimes prosecuted for were called crimes against peace, war crimes and crimes against humanity. The crime, which then was called crimes against peace, is now called 'aggression'. Furthermore, the term 'genocide' did exist at the time of the Nuremberg trials, but the Nazi criminals were charged for their atrocities against Jews, with 'crimes against humanity*".[76]

The concepts of crimes against humanity and war crimes underwent considerable development and enlargement in scope of application in that crimes against humanity can now be committed in times of peace as well as during armed conflict. War crimes now exist in international as well as in internal armed conflict.[77]

In order to provide for the further evolvement of customary law in the future, and for possible fear that the Rome Statute cannot keep pace with such evolvement, article 10 was inserted:

> "*Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute*".

There seems to be agreement that the crimes proscribed in the Rome Treaty are meant for prosecution of not all perpetrators of the four core crimes, but rather only for the most serious crimes and the most serious offenders. These would inevitably generally be leaders, organisers and instigators of these crimes, and lower ranking offenders are unlikely to be prosecuted if only

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violates basic principles of fairness in criminal law and which requires that the reach of international criminal law be confined to punishing violations of fundamental self-evident moral norms.

75 Schabas 2001: 22.

76 2001: 22.

77 Wedgewood 1999: 94.

because of monetary constraints.[78]Article 17(1) (d) of the Statute further states that the court "*shall determine that a case is inadmissible where...(d)The case is not of sufficient gravity to justify further action by the Court*".[79]

Article 53(2) (c) determines that the Prosecutor upon investigation shall forego prosecution:

> " *…if a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age and infirmity of the alleged perpetrator*".[80]

Additionally, all the definitions of the crimes within the jurisdiction of the Court have some kind of built-in threshold in order to limit the discretion of the prosecutor.[81] In the case of genocide, this is achieved by a kind of very strict requirement of *dolus specialis* or special intent, which forms part of the definition of the crime.[82] Article 6 defines a list of acts constituting the crime of genocide and stipulates that these acts have to be committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[83] Thus many who participate in genocide may fall outside this definition, for

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78 Schabas 2001: 24.

79 Shelton 2000: 290. See also O'Shea 1999: 251: The author opines that the importance of this basic premise is that prosecution is limited to the most serious crimes and lies in the desirability of securing the largest number of ratifications as early as possible. Further, that it also assists in ensuring that the court is not inundated with work and that it is perceived as a forum for deciding the worst excesses of inhumanity - it reinforces the deterrent effect of the Court in relation to the gravest crimes.

80 Shelton 2000: 306.

81 Schabas 2001: 24.

82 Schabas 2001: 24.

83 Shelton 2000:283 See also Kittichaisaree 2002:83: The author points out that in terms of the elements of the crime of genocide, it has now been made clear that genocide can be committed by an act or an omission. Further, that the built-in qualitative and quantitative test ease the burden of proof of the prosecution with respect to the requirement that the act or omission must be committed with the intent to destroy a protected group as such in whole or in part. This burden the prosecutor could discharge by evaluating the potential or actual impact of such act or omission in the context of what would happen or has happened to the group concerned. See also Triffterer 2001: 399-488 who comments: '*All crimes of genocide have a common structure. There must be an actus reus, a corresponding mens rea and, in addition, a second subjective element, the ''intent to destroy, in whole or in part, a [...] group as such'.*

although they may be actively involved, they may lack knowledge of the context of the crime and thus lack the required intent in terms of the definition of genocide.[84]

In the case of crimes against humanity, article 7 specifies certain acts constituting the crime as well, *"when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".*[85] Both genocide and crimes against humanity therefore have a quantitative dimension; they are not isolated crimes, and will in practice only be prosecuted when planned or committed on a large scale.[86]

War crimes, in contrast to genocide and crimes against humanity, do not by definition have this quantitative nature. Thus, a single murder of a prisoner of war for example could qualify as a war crime, but is unlikely to be prosecuted as either genocide or a crime against humanity in the absence of at least some broader context.[87] The Rome Statute thus attempts to narrow the scope of war crimes in article 8(1) by stating:

> "*The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes*".[88]

The Article was accepted in its present form because many states objected to any form of limitation of the definition, thus the insertion of the words "*in particular*".[89]

The Rome Statute does not propose any formal kind of hierarchy among the four categories of crime, but there are suggestions that within customary international law, case law of the international tribunals, and within the Rome

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84 Schabas 2001:24.
85 Shelton 2000:283.
86 Schabas 2000:24.
87 Schabas 2000:25.
88 Shelton 2000: 284.
89 Schabas 2001: 25.

Statute itself, that even among these most serious crimes, some are more serious than others.[90]

As far as the crime of aggression is concerned, the Rome Conference agreed that this crime should form part of the subject matter of the court's jurisdiction, but it proved impossible to agree either upon a definition or appropriate mechanism for judicial determination of whether or not the crime had actually occurred.[91] Therefore, the definition of aggression and the conditions of its prosecution, as well as an annex enumerating prohibited weapons and methods of warfare require a formal amendment in accordance with articles 121 and 123 of the Rome Statute.[92] Although a definition of aggression was adopted by the General Assembly in the early 1970s, it was not designed as an instrument of criminal prosecution, but will no doubt be a useful basis for a definition.[93] At the Rome Conference the United States delegate in his opening address indicated to the Conference that the crime of aggression should not be subject to the jurisdiction of the Court in so far as it is not clearly criminalised under international law.[94] This is despite the fact, as O'Shea

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90 Schabas 2001: 25. The author concludes that this might be that war crimes are less important than both the crime of genocide and crimes against humanity because Article 124 of the Statute allows states 'to opt out' temporarily of the jurisdiction for war crimes at the time of ratification of the Rome Treaty. Additionally, two of the defences that are codified in the Statute, that of superior orders and defence of property, are only admissible in the case of war crimes, which implies that justification may exist for war crimes whereas it can never exist for genocide and crimes against humanity. On superior orders as a defence, see also Kittichaisaree 2002:268.

91 Schabas 2001: 26. See also O'Shea 1999: 253: According to the author, to the extent that the court will not have jurisdiction over aggression until it has been defined, this represents a step backwards as the International Military Tribunal at Nuremberg did have jurisdiction over the crime of aggression and the Principles of the Charter were confirmed by the General Assembly.

92 Schabas 2001: 26. See also Trahan 2002: 446.

93 Schabas 2001: 27: The author indicates that the reference in article 5(2) of the Rome Statute to the fact that the ultimate definition '*shall be consistent with the relevant provisions of the Charter of the United Nations*' was a carefully constructed phrase that was understood as a reference to the role that the Council may or should play. Further, that the underlying issue here is the fact that article 39 of the Charter of the United Nations declares that determining situations of aggression is the prerogative of the Security Council. Thus, if the Security Council is the arbiter of situations of aggression, the question is whether the court can only prosecute aggression once the Council has pronounced it to be aggression. Such a view according to the author would be an incredible encroachment upon the independence of the court and would imply at least that no permanent member of the Security Council would ever be subject to prosecution for aggression.

94 O' Shea 1999: 253.

indicates, that during the Nuremberg Trials, the Tribunal stated that in its judgment:

> "*to initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole*".[95]

Nesbit indicates that proper definition of aggression by the international community for incorporation into the ICC Statute would benefit the international law and particularly, the rule of law. No doubt this is one of the challenges facing the international community and the ICC. [96]

The list of crimes is less extensive than that suggested by the International Law Commission Draft Statute, which envisaged jurisdiction over listed treaty crimes relative to terrorism, drug offences and offences against internationally protected persons.[97]

It has been suggested that the main reason for the reluctance of states in this regard may be attributed to the fact that powerful states prefer the treaty-based obligation to try or extradite.[98]

Spieker, writing on the ICC and non-international armed conflict, highlights a tendency to apply the regime of international humanitarian law in non-international armed conflicts. The tendency, so he points out, has:

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95 1999: 253.

96 http://home.att.net/-terrykidd/PAGES/Aggression.htm 5/11/2004:8.

97 O'Shea 1999: 252. The author indicates that the relevant treaties concerned here include the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, the Montreal Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation of 1971, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents of 1973, the International Convention Against the Taking of Hostages of 1979, the Rome Convention for the Suppression of Unlawful Acts against Safety of Maritime Navigation of 1988, the Protocol for the Suppression of Unlawful Acts Against Safety of Fixed Platforms Located on the Continental Shelf of 1988, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the Convention on the Safety of United Nations and Associated Personnel of 1994 and the International Convention for the Suppression of Terrorist Bombings of 1998.

98 O'Shea 1999:252.

> "*…not only emerged from modern international treaties on the prohibition of antipersonnel landmines and the protection of cultural property. It has been reinforced and further developed with regard to the criminal responsibility of individuals for violations of humanitarian law. The regulation in Article 7 on crimes against humanity and in particular in Article 8(2)(c) and (e) on war crimes amounts to real progress in the applicability of international humanitarian law in non-international armed conflict*".[99]

Spieker further points out it is a process in development and far from completed. The distinction between the two types of armed conflict, international and non-international, is embodied in the ICC Statute but the discrepancy between the regimes is substantial in both theory and practice, he continues. Spieker bases his view on the fact that article 8, concerning the jurisdiction of the ICC on war crimes,

> "*…not only differentiates formally, but also differs substantially regarding these types of conflict. Serious violations of Common Article 3 of the Geneva Conventions (Article 8(2)(c)) as well as other serious violations of the laws and customs applicable in non-international armed conflicts (Art 8(2)(c)) do not provide for a comprehensive criminal responsibility of individual perpetrators in non-international conflicts*".[100]

This Spieker reveals is so because firstly, acts which violate the human dignity and which are covered by Common Article 3 of the Geneva Convention, but are not defined in article 8(2)(c) of the ICC Statute, are not endorsed with the sanction of individual liability.[101] Secondly, the:

> "*…list of other serious violations neither comprises a general clause entailing individual criminal responsibility for inhuman treatment of persons not taking part in hostilities nor provides for criminal sanction on specific acts as collective punishments, slavery and slave trade, acts of terrorism and spreading terror*".[102]

Thirdly,

> "*…intentional direction of attacks against civilian objects, attacking undefended civilian towns, villages, dwellings or buildings, killing or*

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99 2000: 395-425.
100 2000: 425.
101 2000: 424.
102 2000: 424.

wounding a combatant hors de combat and perfidious acts are not sanctioned by the criminal responsibility of the perpetrator".[103]

Apart from the Statute of the International Criminal Court, the conference adopted a final act which provided for the establishment of a preparatory commission which was assigned various tasks, including the drafting of the elements of the crimes proscribed in the Rome Statute.[104] This was completed and on 9h September 2002 and the Elements of the Crimes was adopted and came into force on the same date. The structure of the elements of the crimes of genocide, crimes against humanity and war crimes follows the structure and corresponding provisions of articles 6, 7 and 8 of the Rome Statute.[105]

4. Jurisdiction and admissibility

A delicate issue in the creation of the International Criminal Court was the determination of the Court's personal and territorial jurisdiction.[106] Whereas the Nuremberg Charter and the charters for the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda provided useful models, they were created for crimes to be prosecuted for a specific period within a specific area of jurisdiction. The basic difference then between the precedents and that of the ICC was that the latter was created with the consent of those who will themselves be subject to its jurisdiction. It is accepted that states exercise jurisdiction in the field of criminal law on five grounds: territory, protection, nationality of the offender (active personality), nationality of the victim (passive personality), and universality.[107] The latter

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103 2000: 424.

104 Schabas 2001:18.

105 www.icc-cpi.int/home.html 2/11/2006: Article 6 (page.112) Genocide, Article 7(page.116) Crimes against humanity, Article 8(2)(a) and (b)(page 125) War crimes.

106 Schabas 2001: 54.

107 Schabas 2001: 59: the author points out that of these bases of jurisdiction territory is the most common. He points out that an early criminal law treaty, the Treaty of International Penal Law, which was signed at Montevideo on 23 January 1889, stated that crimes are tried and punished by the laws of the nation on whose territory they were perpetrated whatever the nationality of the perpetrator or the victim. Jurisdiction based on nationality of the victim or the offender as well as the right of a state to protect its interests is rarer than jurisdiction based on territory. Jurisdiction based on

basis of jurisdiction applies to a limited number of crimes for which any state, even if a personal or territorial link is absent, is entitled to try the offender. This is so because international law regards criminal jurisdiction as a prerogative of sovereign states. As a result, the traditional limits on national criminal jurisdiction are largely coextensive with the limits of national sovereignty. In customary international law, crimes subject to the exercise of universal jurisdiction were piracy, slave trade and the trafficking in women and children.[108]

In more recent times, by way of multilateral treaties between states, universal jurisdiction in respect of crimes such as hijacking and other threats to air travel, piracy, attacks upon diplomats, nuclear safety, terrorism, apartheid and torture have been recognised. Apart from the latter, the application of universal jurisdiction is widely recognised as well for genocide, crimes against humanity and war crimes.[109]

Article 11, titled, "*Jurisdiction ratione temporis"* of the Rome Statute stipulates that the Court only has jurisdiction in respect of crimes that were committed after the entry into force of the Statute.[110] Sub-article 2 stipulates that if a state becomes a party to the Statute after its entry into force, the Court may exercise its jurisdiction only in respect of crimes that were committed after the entry into force of the Statute in terms of that state unless the particular state makes a declaration under article 12(3) that it accepts the Court's jurisdiction with respect to the crime in question.[111]

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the nationality of the offender is well established while jurisdiction based on the nationality of the victim is less so. There is a sixth jurisdictional ground, namely that of the so-called 'effect-jurisdiction' to which is referred to below.

108 Schabas 2001: 60; Kontrovich 2004: 188.

109 Schabas 2001: 60.

110 Article 11(1) Rome Statute of the International Criminal Court (1998).

111 Article 11(2) Rome Statute of the International Criminal Court (1998) See also Boller 2003: 286. This typically, so Boller points out, means the ICC will not have jurisdiction over crimes committed on the territory of non-state parties by non-state nationals unless the state of the accused submits to the ICC jurisdiction.

Article 12 of the Statute sets the "*preconditions to the exercise of jurisdiction"* by the ICC.[112] It states that the court may exercise its jurisdiction if one or more of the following states are parties to the Statute or have accepted the Court's jurisdiction as has been provided for in article 12(3): (1) the state on which territory the conduct in question occurred, or if the crime was committed on board of a vessel or aircraft, the state of registration of that vessel or aircraft; and (2) the state of which the person accused of the crime is a national.[113] Schabas points out that many national jurisdictions extend the concept of territorial jurisdiction to include crimes that create effects upon the territory of a state.[114] Such an extension of the territorial base for jurisdiction would imply that, for example, a state could exercise jurisdiction where the conspirators overturning the legitimate government were to commit their conspiring in another state.[115] The ICC Statute is silent on "*effects jurisdiction*" and Schabas points out that there are compelling arguments in favour of a strict interpretation of article 12, excluding such a concept. [116] The International Criminal Court may exercise its jurisdiction with respect to the crimes postulated in the Statute and in accordance with the Statute in one of three instances:[117]

(1) in a situation where one or more of the crimes have been referred to the prosecutor by a states party in accordance with article 14 of the Statute,

(2) in a situation where one or more of the crimes have been referred to the Prosecutor by the Security Council of the United Nations acting under Chapter VII of the Charter of the United Nations, and

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112 Article 12 Rome Statute of the International Criminal Court (1998). See further Boller: 2003 285.

113 Article 12 Rome Statute of the International Criminal Court (1998). See also Schabas 2001: 63. The author indicates that territory for the purpose of criminal law jurisdiction needs to be defined. Logically, so the author submits, territory should extend to the air above the State, and to its territorial waters. However the actual scope of these "*grey areas"* as Schabas labels them, needs to be established. See further Boller: 2003: 285.

114 2001: 63.

115 2001: 63.

116 2001: 63.

117 Article 13 Rome Statute of the International Criminal Court (1998).

(3) when the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15 of the Statute.

When a state party requests the prosecutor to investigate a situation in which one or more crimes within the Court's jurisdiction seem to have been committed, this referral shall as far as possible, specify the relevant circumstances and also be accompanied by such documentation as is available to the state which is referring the situation.[118]

The prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the Court's jurisdiction.[119] The prosecutor is given the task of analysing the seriousness of the information received, and for this purpose may seek additional information from states, organs of the United Nations, inter-governmental or non-governmental organisations, or other reliable sources that are deemed appropriate by the prosecutor, and finally, may receive written or oral testimony at the seat of the Court.[120] Should the prosecutor conclude on investigation that there is *"a reasonable basis"* to proceed with an investigation, the Pre-Trial Chamber of the Court shall be requested for authorisation to proceed with the investigation and the Chamber will also be provided with the supporting material that has been gathered.[121] Victims of the alleged crimes are given the opportunity to make representations to the Pre-Trial Chamber, which has to be made in terms of the Rules of Procedure and Evidence.[122] Should the Pre-Trial Chamber decide that upon investigation that there is a reasonable basis to proceed with an investigation and that the case appears to fall within its jurisdiction, it will then authorise the commencement of the investigation.[123] The refusal of the Pre-Trial Chamber to authorise an investigation shall not preclude a subsequent request to the Chamber by the prosecutor based on new facts or

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118 Article 14 Rome Statute of the International Criminal Court (1998).
119 Article 15(1) Rome Statute of the International Criminal Court (1998).
120 Article 15(2) Rome Statute of the International Criminal Court (1998).
121 Article 15(3) Rome Statute of the International Criminal Court (1998).
122 Article 15(3) Rome Statute of the International Criminal Court (1998).
123 Article 15(4) Rome Statute of the International Criminal Court (1998).

evidence regarding the same situation.[124] The fact that the prosecutor on own initial investigation decides not to proceed with the investigation of a situation shall not mean that he/she will be precluded from considering further information regarding the same situation that may be submitted.[125]

The Rome Statute obliges the Court to determine that a case before the Court is inadmissible in the following instances:

> "*(1) The case is being investigated or prosecuted by a state, which has jurisdiction over the crime, 'unless the state is unwilling or unable genuinely to carry out the investigation or the prosecution*".[126]

Sub-article (2) determines the considerations that the Court will employ in order to determine "*unwillingness*" in a particular case as:

> *"(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 unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, …,*
> *(c) the proceedings were not or are being conducted in a way which, in the circumstances, is inconsistent with intent to bring the person concerned to justice*".

Unwillingness also has a bearing on the principle of *ne bis in idem* as defined in the ICC Statute.[127] Sub-article (3) determines the considerations that the

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124 Article 15(5) Rome Statute of the International Criminal Court (1998).
125 Article 15(6) Rome Statute of the International Criminal Court (1998).
126 Article 17 Rome Statute of the International Criminal Court (1998).
127 Van der Vyver 1999: 8. Article 20 of the ICC Statute provides that no person shall be tried before the Court with respect to conduct that formed the basis of crimes for which the person has been convicted or acquitted by the Court. In addition, no person shall be tried by another court for a crime under the jurisdiction of the ICC for which that person has already been acquitted or convicted by the ICC. Lastly, article 20(3) stipulates that no person who has been tried by another court for conduct proscribed by articles 6,7 and 8 shall be tried by the ICC unless the proceedings in the other court were (a) for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC's jurisdiction or (b) were otherwise not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring that person to justice.

Court will apply to determine "*inability*" in a particular case as being that the Court will consider whether:

> *"…due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".*[128]

The question of a particular state's "*inability*" to prosecute raises interesting aspects regarding state sovereignty, because inevitably in terms of the Statute, it affords the ICC the competence to cast a value judgment of the criminal justice system of national states.[129] Although the 1996 Prep Com's report on this aspect expressed concerns on the potential inroad a stipulation of this nature would have on absolute state sovereignty, this aspect was raised but never stressed to great extents at the Rome Conference.[130] Van der Vyver refers to various writings on the subject from which the conclusion may be drawn that, increasingly, the notion of absolute state sovereignty to the extent that a state may conduct itself independently from the affairs of other nations, is outdated and unrealistic.[131] The notion of an inevitable inroad on absolute state sovereignty is further borne out by the Draft Declaration on the Rights and Duties of States adopted by the ILC in 1949, which provides that:

> *"Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law".*[132]

5. Applicable law

Article 21 of the ICC Statute establishes the hierarchy of the rules of interpretation of the ICC Statute as follows:[133]

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128 Article 17(3) Rome Statute of the International Criminal Court. (1998)
129 Van der Vyver 1999: 8.
130 Van der Vyver 1999: 9.
131 1999:9 and further.
132 Van der Vyver 1999: 9.
133 Article 21 of the Rome Statute of the International Criminal Court (1998).

"*(1) The Court shall apply:*

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

(2) Court may apply principles and rules of law as interpreted in its previous decisions.

(3) The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".

Article 9(1) of the Statute of Rome stipulates that the Elements of Crimes shall assist the ICC in the interpretation and the application of articles 6, 7 and 8 of the Statute, which deal with the crimes proscribed in the Statute.[134] During the drafting process, there were two attitudes towards the insertion and wording of article 9(1). On the one hand, some delegations, led by the United States, wanted the Elements of Crimes to bind the ICC judges, arguing that that would ensure certainty and clarity of the law in terms of the ICC Statute, while other delegations wanted no restriction on the interpretation of the law by the ICC judges.

The final wording of this article therefore represents a compromise between the two different stances. It is thus clear that the Elements of the Crimes cannot override those elements that have already been expressly stated in the ICC Statute itself, for example such as the definitions of the constituent elements of the crime of enslavement as provided for in article 7(2) (c).[135]

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134 Article 9(1) Rome Statute of the International Criminal Court (1998).

135 Kittichaisaree 2001: 51.

As far as the Rules of Procedure and Evidence are concerned, article 51(5) of the Statute makes it clear that the Statute shall prevail in the event that a conflict exists between the Rules and the Statute.[136]

In order to fill any vacuum created by the first two sources stipulated, the third source authorised by the ICC Statute provides that the ICC may resort to drawing precedent from case law in the criminal law field decided by national courts of the various legal systems of the world.[137]

6. Active complementarity

On 16 June 2003, the first prosecutor of the newly established International Criminal Court was inaugurated. The prosecutor faces enormous challenges including the need to increase the number of states ratifying and implementing the Rome Statute of the International Criminal Court. He is faced with the challenge to demonstrate that criticisms of the Court and of his powers made by the current administration of the United States are unwarranted. He has announced a number of significant innovative policy positions, which he intends to use to shape the work of the Court.[138] One is that he intends to pursue a policy of dynamic complementarity that transcends the largely *passive* concept of the principle by announcing that:

> "*…a major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes' through informal and formal networks of contacts, and, in certain instances, to facilitate such action by providing states with non-confidential information*".[139]

Rightfully, and not overly pessimistically in our view, Hall opines that given the failure of states over a half-century since Nuremberg to investigate and prosecute the millions of crimes under international law committed since

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136 Kittichaisaree 2001: 52.
137 Kittichaisaree 2001: 52.
138 Hall 2004: 121, 135.
139 Hall 2003: 136. See also Seguin 2000: 91 on complementarity.

World War II, and also the limited number of states parties that have enacted implementing legislation, the prosecutor certainly faces a daunting task.[140]

7. The Security Council and the ICC

Article 16 stipulates that the United Nations Security Council may, in a resolution adopted by that body in terms of Chapter VII of its Charter, request the Court not to proceed with an investigation or prosecution for a period of 12 months; which request may be renewed under the same conditions.[141] The Security Council, in a process which is referred to as "*deferral*", may thus prevent the Court from exercising its jurisdiction when it so directed.

This obviously was an extremely controversial issue at the Rome Conference. Broadly viewed, the final content of article 16 is regarded as an improvement of the draft statute that was prepared by the International Law Commission, which proposed that a prosecution before the ICC was to be prohibited if the particular case was dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the United Nations Charter, unless the Security Council decides otherwise. The provision in that form would have allowed a single state that was a member of the Security Council to prevent prosecution by placing the particular matter on the agenda of the Security Council, which could only be overridden by a decision of the Security Council itself. In addition of course, any decision by the Security Council could be blocked at any time by one of its five permanent members, the United States, the United Kingdom, China, France and the Russian Federation, by exercising its veto. The role of the Security Council in relation to the ICC presented the following dilemma: on the one hand the interference by the Security Council could be seen as severe interference in the independence and the impartiality of the court, while on the other hand, it could be recognised that difficult decisions have to be made about the desirability of criminal prosecution when sensitive negotiations may be under

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140 2004: 136. See also Roht-Arriaza 2000: 79 and further on complementarity and amnesty.

141 Rome Statute of the International Criminal Court (1998)

way. Any indiscreet action by the Court in the latter situation may possibly in the right circumstances be viewed as measures to sabotage measures, which are aimed at promoting international peace and security.[142]

It has been suggested that the role as has been assigned to the Security Council in the workings of the ICC casts a serious shadow on the credibility of the Court, which was, according to its preamble, set out as the establishment of "*an independent and permanent international criminal court*".[143]

Elaraby bases his statement on the observation that the abuse of the veto right in the Security Council has for many years "*frustrated hopes to consider the Council as the custodian for the application of the rule of law".*[144] The author notes that the International Court of Justice, which is a United Nations organ, while the ICC is not, is not subject to the same restrictions as the Rome Statute has subjected the ICC to.[145] While the ICJ, like the Security Council, deals with states, the ICC was created as a criminal court for individuals. It would have been expected that the scope of the authority of the Security Council on the ICC would have been minimal.[146] The author submits that provisions in the ICC Charter regarding the role of the United Nations Security Council "*smacks of undue interference and over politicisation*", for example the paramount role of the Security Council in article 13(b) in the triggering mechanism provided therein.

Yet, for the newly established ICC, it is of the utmost importance that good external relationships be established in regard to which an effective co-operative relationship with the United Nations in the current political environment will present major challenges as well as opportunities. A draft

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142 Schabas 2001: 65.

143 Elaraby 2002: 43. See also Kirch and Holmes 1999: 4. The authors describe the question of the role that was to be negotiated for the Security council in relation to the Court in Rome as follows: "*Without opposing a role for the Security Council vis-a- vis the court… many states believed that the Council could not be relied upon to administer justice in an impartial manner, and that care should be taken not to let the court's independence be undermined*".

144 1998: 43-47.

145 Elaraby 1998: 44.

146 Elaraby 1998: 44.

Relationship Agreement between the ICC and the United Nations envisages a key role for the Secretary-General and the Secretariat. This includes the provision of information to the Court, issuing a United Nations *laissez-passer* as a travel document to supplement Court travel documents where necessary, entering into supplementary agreements with the Court, entering into co-operation agreements with the prosecutor, and co-operating fully with the Court to allow it to exercise its jurisdiction should someone who enjoys privileges and immunities under international law with respect to his or her work with the United Nations contend that they preclude the Court from exercising its jurisdiction. These provisions will be of enormous importance in the context of United Nations peacekeeping operations and the approval of the draft Relationships Agreement should be of prime priority for the newly inaugurated prosecutor.[147]

8. Defences

It is relevant to establish whether the Statute of Rome establishes development in international criminal law regarding defences that may be raised in subsequent trials before the ICC. The term "*grounds for excluding criminal responsibility*" is used interchangeably with the term "*defences*". Both terms in the context used here are aimed at possible grounds which would prevent the punishability and/ or prosecution of a crime.[148]

Bantekas and Nash point out that the concept of "*defence*" in international criminal law is neither self-evident, nor does it clearly possess an autonomous meaning.[149] Instead, it has derived its legal significance as a result of its transplantation from domestic criminal justice systems through the appropriate processes of international law. The underlying theoretical underpinnings of the concept of defences are founded on well-established notions from criminal

147 Hall 2004: 137-138.

148 Kittichaisaree 2001: 258. See also Cassese 2003: 219 and further on the distinction between justifications and excuses.

149 2003:127.

law, originating from both the common law and the civil law traditions.[150] Thus, according to Bantekas and Nash, despite the elaborate character of the ICC Statute:

> "*…its drafters have been wise in detecting the inadequacy of the fledgling international criminal justice system, thus necessitating recource to national legal concepts and constructs*".[151]

This is evident in the Rome Statute's provisions regarding defences.[152] A defence is generally an answer and / or justification to a criminal charge. It is used to denote:

> "*…all grounds which, for one reason or another, hinder the sanctioning of an offence, this despite that the fact the offence has complied with all definitional elements of the crime*".[153]

Previous international criminal law instruments have made no real attempt at even a partial codification of defences.[154] There were no complete defences allowed under the Nuremberg Charter, or in the statutes of the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda. However, in all three of the latter tribunals, "*superior orders*" could be a factor, which could mitigate sentence. In the cases of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, the Rules of Procedure and Evidence do allow

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150 Bantekas and Nash: 2003: 127.

151 2003:127.

152 Bantekas and Nash 2003: 127.

153 Schabas 2001: 88. See also Bantekas and Nash 2003: 127: "*The concept of defences is broad, and this may encompass a submission that the prosecution has not proved its case. Since a criminal offence is constituted through the existence of two cumulative elements, a physical act (actus reus) and a requisite mental element (mens rea), the accused would succeed with a claim of defence by disproving or negating either the material or the mental element of the offence charged. Domestic criminal law systems generally distinguish between defences that may be raised against any criminal offence (so-called general defences), and those that can only be invoked against particular crimes (so-called special defences). Another poignant distinction is that between substantive and procedural defences. The former refer to the merits, as presented by the prosecutor, while the latter are used to demonstrate that certain criminal procedure rules have been violated to the detriment of the accused, with the consequence that the trial cannot proceed on the merits. The distinction is not always clear cut, but one may point to the following often claimed procedural defences: abuse of process, ne bis in idem, nullum crimen nulla sine lege scripta, passing of statute of limitations, retroactivity of criminal law*".

154 Schabas: 2001: 88

the raising of "*any special defence, including that of diminished or lack of mental responsibility*". The full range of defences common to national criminal law may thus be raised in the *ad hoc* tribunals.[155]

The first list of defences has now been created in articles 31 and 32 of the ICC Statute.[156] From a certainty point of view in international law, this may be regarded as a positive step in the further development and recording of prevailing international criminal law. The ICC Statute proceeded to partially codify available defences in articles 31, 32 and 33.[157]

When the Preparatory Committee prepared the draft statute, there was strong divergence on whether an open list of defences or an exhaustive list should be included. Protagonists favouring the latter were apprehensive of the Court's freedom and latitude, while the opposing side stressed the impossibility of reaching precise definitions of all possible and desired defences.[158] The final article 31(3) of the Rome Statute reflects a middle ground and reads as follows:

> "*At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph I (i.e., mental capacity, intoxication, self-defence, duress) where such a ground is derived from applicable law as set forth in Article 21*".[159]

Article 21(1) (c) further provides:

> "*General principles of law derived by the Court from national laws of legal systems of the world, including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and principles*".[160]

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155 De Than and Shorts 2003: 10.
156 De Than and Shorts 2003: 10.
157 2001: 88.
158 Bantekas and Nash 2003: 129.
159 Bantekas and Nash 2003: 129.
160 Bantekas and Nash 2003: 130.

The defences that are therefore listed in the ICC Statute are: mental disease or defect; intoxication; self-defence; duress; and "*other grounds deriving from applicable law as set forth in article 21*".[161]

The following are brief references to specific defences in terms of the Statute of Rome. They reflect to what extent there has been development in international criminal law.

(a) Age

The minimum age required for criminal responsibility differs from country to country. The ICC Statute accepts 18 years of age as jurisdictional limit relating to age in order to exercise its jurisdiction over persons allegedly guilty of a crime. In terms of article 26 of the ICC Statute, the ICC shall have no jurisdiction over any person who was under eighteen at the time of the alleged commission of the crime. This is despite the fact that the Statute proscribes that it is a war crime to conscript or enlist children under the age of fifteen or to use them to participate actively in hostilities.[162]

(b) Official capacity:

This defence has been rejected since as early as the Nuremberg trials, the latter holding:

> "*The principle of International Law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings…*"[163]

The defence was also raised before the Tokyo Tribunal and was rejected by that Tribunal holding that diplomatic privilege does not imply impunity from legal liability but only implies exemption from trial by the Courts of the State to

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161 De Than and Shorts 2003: 10.
162 Kittichaisaree 2001: 259. See also Schabas 2001: 64.
163 Kittichaisaree 2001: 259.

which that person was accredited. This in any event, so the Tribunal held, did not apply in relation to crimes against international law charged before a tribunal having jurisdiction. Article 7(2) of the ICTY Statute and the corresponding article 6(2) of the ICTR Statute provide that the official position of a person whether as head of state or government or as a responsible government official, shall not relieve that person of criminal responsibility nor shall it imply mitigation in punishment. The ICC Statute goes further and spells out the above in detail. Article 27[164] of the ICC Statute provides as follows:

> "*1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as Head of State or Government or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*
> *2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person*".

The above must be read in context with article 98(1) of the Statute,[165] which provides that the ICC may not proceed with a request for surrender or assistance which would require the state so requested to act inconsistently with its obligations under international law in relation to state or diplomatic immunity of a person or the property of a third state unless the ICC has first obtained a waiver of immunity from that third state.[166]

Kittichaisaree opines that it is unlikely that the provisions of article 98 of the ICC Statute will shield international criminals who happen to be heads of state or accredited diplomats.[167] This he argues is because of the judicial pronouncements as precedent of the Nuremberg and Tokyo Tribunals. In addition, such immunity has been rejected by the International Law Commission's *Principles of the Nuremberg Judgment* and this rejection has

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164 Rome Statute of the International Criminal Court (1998).
165 Rome Statute of the International Criminal Court (1998).
166 Kittichaisaree 2001: 260.
167 2001: 260.

been endorsed by the United Nations General Assembly, and states thus have no obligation under international law to grant state or diplomatic immunity to international criminals.

(c) The responsibility of commanders and other superiors

In terms of article 28[168] a military commander or another person who effectively acts as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court that are committed by forces which are under that person's effective control and command or effective authority and control, as a result of that person's failure to properly exercise control over such forces.[169] The criminal responsibility of that person shall exist in the following two instances: firstly, in the case where the person either knew or should have known that the forces were committing or were about to commit such crimes, and secondly, the person failed to take all necessary and reasonable measures within his or her powers to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[170]

Article 28(b) provides further for superior and subordinate relationships not described in sub-section (a) providing that the superior shall be criminally responsible for crimes that are within the Court's jurisdiction where the crimes were committed by subordinates under his or her effective authority and

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168 Rome Statute of the International Criminal Court (1998).

169 Wedgewood 1999: 94.The author commentates as follows: "*…the important idea of 'command responsibility'" was broadened to encompass civilian as well as military leaders. In an age of bureaucratic murder, where for example, the prefecture system in Rwanda was harnessed in service of the genocide, it is important to ensure that seniority is not used as a device to avoid responsibility*". See also Triffterer 2002: 179-205, who pints out that the relevant articles in the Statute of the ICTY (Article 7(3) and that of the ICTR (Article 6(3)) differ from Article 28 of the Rome Statute, the latter demanding *' ..a result of his or her failure to exercise control properly'.* The author investigates whether this '*failure*' overlaps with the '*omission to take all necessary or reasonable measures within his or her power',* and whether the last alternative *'failed [...] to submit',* requires a causal nexus, and concludes that a requirement of causality as a separate element of the doctrine of superior orders has to be proven in all cases where liability for punishment shall be established according to Article 28. Therefore, that causality is a common element of all alternative charges.

170 Article 28(a)(i) and (ii) Rome Statute of the International Criminal Court (1998).

control as a result of the superior's failure to exercise proper control over the subordinates.[171] This shall occur in the following three instances: firstly, where the superior either knew or consciously disregarded information which clearly indicated that the subordinates committed or were about to commit such crimes; secondly,where the crimes complained of concerned activities that were within the effective responsibility and control of the superior; and lastly, where the superior, as in the case of the military commander, failed to take all the necessary measures within his or her power to prevent or to repress their commission or failed to submit the matter to the competent authorities for the necessary investigation and prosecution.[172]

(d) Mistake of fact or mistake of law

Article 32(1) of the ICC Statute stipulates that a mistake of fact shall be grounds for excluding criminal responsibility only if it negates the mental element required by the particular crime.[173] Article 32(2) of the Statute stipulates that a mistake of law, in other words whether a particular type of conduct is a crime within the jurisdiction of the Court, shall not be grounds for excluding criminal responsibility. It may however, as in the case of article 32(1), also be grounds for excluding criminal responsibility if the mistake negates the mental element required by such a crime or as provided in article 33, which relates to superior orders, which is dealt with below.

As far as the mistake of fact is concerned, this stipulation is in accord with the maxim *actus non facit reum nisi mens sit rea* - the act itself does not constitute guilt unless the mind is guilty. The mistake of fact must be honest and reasonably made under the conditions that were prevalent at the time.[174] Further, the mistake must not result from negligence.[175]

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171 Rome Statute of the International Criminal Court (1998).

172 Article 28 (b) (i) (ii) and (iii) Rome Statute of the International Criminal Court (1998). See also Bantekas and Nash 2003: 141.

173 Rome Statute of the International Criminal Court (1998) See also Cassese 2003: 251 and further.

174 Kittichaisaree 2001: 264. See also Cassese 2003: 251.

175 Cassese 2003: 251.

As far as mistake of law is concerned, the particular stipulation in the ICC Statute refers of course to the general principle of criminal law that ignorance of the law is no excuse (*Ignorantia iuris neminem excusat)*. Like most domestic legal systems, international law does not regard ignorance of law as grounds for excluding criminal responsibility. There may however be instances where a mistake of law may become relevant as a defence where one may for example prove that the offender, because of his ignorance of a legal element, did not possess the required mental element, such as intent or recklessness or culpable negligence. Article 32 (2) of the ICC Statute thus codifies customary international law.[176]

(e) Superior orders

The dilemma regarding superior orders faced by a subordinate receiving those orders is simple: submit to the illegal order from a superior and commit a crime, or defy the order from the superior and face the wrath and penalties imposed by the superior.[177] In times of war, disobedience to a superior order often carries with it a penalty of summary execution.

Over the years, two schools of thought have emerged on the subject. The first, basing its argument primarily on notions of justice, is of opinion that the invocation of superior orders should be a complete defence. The second school of thought on the subject advocates a doctrine of absolute liability in which a defence of superior orders would receive no merit.[178]

From these two absolutes gradually evolved a conciliatory position on the issue, recognising the relevance of moral choice in such circumstances.[179] In terms of the principle of moral choice a subordinate would be punished, if in the execution of an order, he or she went beyond its scope, or if the order was

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176 Kittichaisaree 2001:265; Cassese 2003: 256.

177 Bantekas and Nash 2003: 131. See also Cassese 2003: 203 and further for the historical emergence of the notion.

178 Bantekas and Nash 2003: 131.See also Cassese 2003: 231 and further.

179 Bantekas and Nash 2003: 131.

executed in the knowledge that it related to an act which aimed at the commission of a crime and which the subordinate could avoid. Therefore the moral choice principle, later also styled the "*manifest illegality*" principle, involved an objective test: would the reasonable man acting in good faith have realised the illegality of the order? If the answer was negative, superior orders could be raised as a viable defence. Opposed to this, where the subordinate is aware of the unlawfulness of the order, although the order is not manifestly illegal, the subjective knowledge of the accused is relevant in the attribution of liability.[180]

The superior order defence became relevant as early as in 1900 when it was established that if a soldier "*honestly believes*" he is doing his duty in obeying superior orders and further that the orders "*are not so manifestly illegal*" that he ought to have known that they were unlawful, that soldier could invoke superior orders in his defence.[181]

The doctrine of absolute liability prevailed in the Nuremberg Charter, Control Council Law No 10, but did not feature in the Genocide Convention or the 1949 Geneva Conventions.[182]The Nuremberg Charter, article 8, provided that:

> "*The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires*".[183]

Article 6 of the Tokyo Charter,[184] provided:

> "*Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires*".

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180 Bantekas and Nash 2003: 132.
181 Bantekas and Nash 2003: 132.
182 Bantekas and Nash 2003: 132.
183 Nuremberg Charter (Charter of the International Military Tribunal) (1945).
184 Tokyo Charter (Charter of the International Military Tribunal for the Far East) (1946).

Subsequent to the Second World War, military tribunals mentioned that to plead superior orders one must show excusable ignorance of their illegality. The tribunals in these cases made it clear that if a defence was available to an accused under these circumstances, that that would be the defence of duress which could be brought about as a direct consequence of the severity and force of the superior order in the circumstances. In similar vein, article 7(4) of the ICTY Statute and article 6(4) of the ICTR Statute provides that acting pursuant to a superior or government order is not a complete defence but may be considered as a factor in mitigation of sentence if justice so requires.[185]

As far as the evolution of national case law on the subject is concerned and since the Second World War, the principle of manifestly illegal has received preference.[186]

When the Preparatory Committee discussed the issue of superior orders, it was initially generally felt that due to the absence of the defence in the Charters of the ICTY and the ICTR, as well as from the draft statute that would create the ICC, further discussion on the subject was redundant.[187] On insistence by Canada and France with the requirement of knowledge, supplemented by the manifestly illegal criterion, the matter however gradually resurfaced. By December 1997 the inclusion of the defence into the Rome Statute had gathered support and the only disagreement that remained, was the quantum of knowledge that was required and whether or not the defence should cover orders received from the Security Council. There was however

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185 Bantekas and Nash 2003: 133; Kittichaisaree 2001: 266.

186 Bantekas and Nash: 2003:133. The authors cite the *Eichmann* trial as example. They continue: "*Moreover, the US, who is not party to the ICC Statute, has consistently upheld the defence of superior orders under strict application of the manifest illegality test in both the Korean and the Vietnam Wars. The 1956 US Military Manual, in fact, not only recognizes the plea of superior orders as a valid defence; it also obliges courts to take into consideration the fact that subordinates 'cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of orders received'. Similarly the Canadian Supreme Court in the Finta case recognized the defence of superior orders to war crimes and crimes against humanity as having been incorporated in the Canadian criminal justice system and firmly accepted the manifest illegality rule*".

187 Bantekas and Nash 2003: 134.

strong support for the exclusion of the defence as far as crimes against humanity and genocide were concerned.

At the Rome Conference the two opposing schools of thought clashed for a final time. The US and Canada submitted that the defence of superior orders in those cases where the subordinate was not aware that the order was unlawful or where the order was not manifestly unlawful, was widely recognised in international law. This submission was strongly opposed by the UK, New Zealand and Germany. They argued that in cases where superior orders could otherwise be invoked, an accused could raise a plea of duress and mistake of fact or law. The parties came up with a compromise formula despite the fact that Germany and other delegations are still opposed to the inclusion of the defence in principle. What has resultantly emerged contained in article 33 of the Rome Statute is that the defence of superior orders is recognised subject to three qualifications that exist in customary international law. The first qualification presupposes "*an existing loyalty or legal obligation*", while the other two refer to the requisite standards of knowledge, consisting of both the subjective knowledge of the accused, and an objective test based on the manifest illegality rule.[188]

Superior orders under the title of "*Superior orders and Prescription of Law"* are addressed in article 33 of the Rome Statute of the International Criminal Court (1998). The article stipulates that a person shall not be relieved of criminal responsibility if a crime within the Court's jurisdiction were committed by a person acting pursuant upon an order of government or an order of a superior, whether that superior or government be military or civilian unless the person was under a legal obligation to obey orders of the government or superior in question, or the person did not know that the order was unlawful and the order was not manifestly unlawful. Article 33(2) prescribes that for purposes of the article, orders to commit genocide or crimes against humanity are manifestly unlawful.[189]

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188 Bantekas and Nash 2003: 134-135.

189 Article 33(1)(a)(b) and (c) Rome Statute of the International Criminal Court (1998)

As to the interpretation of the term "*manifestly unlawful"*, numerous national courts have construed this.[190] In the 1994 decided case of *R v Finta,* the Supreme Court of Canada ruled that an order is to be judged as manifestly unlawful if:

> "*…it offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously flagrantly wrong, patently and obviously wrong*".[191]

Taking into account that the crime of genocide firstly includes acts committed with the intent to destroy in whole or in part, national, ethnical, racial or religious groups by committing acts such as killing members of a group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions calculated to bring about its physical destruction in whole or in part, measures intended to prevent births within the group or forcibly transferring children of the group to another group, this proscription in the ICC Statute deals fully and comprehensively with knowledge that is imputed on would-be war criminals.[192] Certainly the statutes of the ICC's two predecessors, the ICTY and ICTR, do not include such corresponding and detailed proscriptions on the subject.[193]

Superior orders as defence as enumerated in the ICC Statute thus have a narrow range of application and scope to exclude criminal responsibility.[194] Cassese comments on article 33(3) of the ICC Statute whereby "*orders to commit genocide or crimes against humanity are manifestly unlawful*" as at odds with customary international law since it does not also include in the category of manifestly unlawful orders, those orders concerning *war crimes.*[195]*.* This inconsistency according to Cassese is all the more striking

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190 Kittichaisaree 2001: 267.
191 As quoted in Kittichaisaree 2001: 267.
192 Article 6 Rome Statute of the International Criminal Court (1998)
193 Kittichaisaree 2001: 267.
194 Kittichaisaree 2001: 268.
195 2003:241.

since whilst it could be said that customary international law was not clear on the list of prohibited war crimes, the ICC Statute enumerates them in detail.[196]

Kittichaisaree believes that it might be advisable to resort to duress as defence in the alternative if circumstances permit.[197] The Nuremberg Tribunal applied the so-called "*moral choice*" test when it dealt with the question of superior orders, as this would be more in line with the defence of duress.[198] There is a close relationship between superior orders and duress in the case of military staff or subordinates under the authority of persons in effective control, which was borne out by a statement of the US Military Tribunal in the *Einsatzgruppen* Trial as follows:

> " *If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order. It would not be an excuse, for example, if a subordinate under orders killed a person known to be innocent, because by not obeying he himself would risk a few days of confinement…* ".[199]

(f) Duress and necessity

Article 31(1) (d) of the Rome Statute, which deals with the defence of duress and necessity, "*has its roots not in the ignorance of its drafters, but rather in the divergent and inflexible views of the negotiating parties"*.[200] The relevant article 31(1) stipulates:

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196 2003:241.

197 2001:268.See also Cassese 2003: 246. The author is of opinion that there is no necessary connection between the two. Where superior orders are issued without any threat to life or limb, and where it involves the commission of an international crime, the subordinate is under a duty to disobey the superior order. If the order is however issued with the threat of life or limb, the defence of duress may be raised.

198 Kittichaisaree 2001: 268. The Nuremberg Tribunal laid down the test as follows: "…*The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible…Individuals have international duties which transcend the national obligations of obedience imposed by the individual State…Superior orders, even to a soldier, cannot be considered in mitigation where crimes have been committed consciously, ruthlessly and without military excuse or justification…Participation in such crimes has never been required of any soldier…*"

199 As quoted in Kittichaisaree 2001: 268.

200 Bantekas and Nash 2003: 135.

"*In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:*
(a)....
(b)....
(c)...
(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
(i) Made by other persons; or
(ii) Constituted by other circumstances beyond that person's control".[201]

Commenting on this article, Bantekas and Nash point out that what is not clear in the wording of sub article (d) is primarily the definition of "*duress*" and "*necessity*" as two distinct concepts, as well as the question of whether this defence is also available to a charge of murder.[202] According to the article, a person will be exonerated from the particular offence where: (a) the threat is not brought about by actions attributed to the accused, but by other persons, or as a result of circumstances beyond the control of the accused (obviously here in the case of necessity); (b) the accused has taken all necessary and reasonable action to avoid this threat; and (c) the accused does not intend to cause a greater harm than the one sought to be avoided. The ICTY Trial Chamber in the case of *Erdomovic* has confirmed the conclusion of the post-Second World War Crimes Commission that duress constitutes a complete defence if the above conditions are met.[203]

As far as duress is concerned and provided for under article 31(d),[204] both the Statutes of the ICTY and the ICTR are silent as to the availability of duress or coercion as possible grounds for excluding criminal responsibility.

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201 Article 31 Rome Statute of the International Criminal Court (1998)
202 2003:135.
203 Bantekas and Nash 2003: 136.
204 Rome Statute of the International Criminal Court (1998)

The majority of the Appeals Chamber of the ICTY held in the case of *Erdemovic* that duress does not provide a complete defence to a soldier charged with a crime against humanity and or a war crime involving the killing of innocent human beings.[205] Kittichaisaree points out that the stipulation of article 31(1) (d) is more in line with the dissenting judgment in the above case.

(g) Self Defence

Article 31(1) (c) of the Rome Statute stipulates that a person shall not be criminally responsible if, at the time of that persons' conduct :

> *"…the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph".*[206]

A contemporary international definition of self-defence as appears from the *Kordic* judgment delivered by the International Criminal Tribunal for the former Yugoslavia is:

> "…*broadly defined as providing a defence to a person who acts to defend or protect himself or his property (or another person or person's property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack'.*[207] *In the said case the Tribunal noted that the definition found in Article 31(1) (c) of the ICC Statute, reflects provisions found in the criminal codes of most national legal*

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205 Kittichaisaree 2001: 263: The two dissenting judges did hold that duress could be a complete defence on condition that the following requirements are fulfilled: (1) the act charged with was committed under the immediate threat of severe and irreparable harm to life or limb, (2) there was no adequate means to avert such a threat; (3) the crime committed was not disproportionate to the evil threatened; (4) the situation brought about by the duress must not have been brought on voluntarily by the person under duress.

206 Article 31(1)(c) Rome Statute of the International Criminal Court (1998)See also Cassese 2003: 222 and further.

207 Bantekas and Nash 2003: 138.

systems and that it may be regarded as constituting a rule of customary international law".[208]

(h) Intoxication

In terms of article 31(1) (b),[209] criminal responsibility will be excluded if, at the time of the person's conduct,

> "*…the person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the court*".

The aforementioned is not a departure of the practice in most states. Involuntary intoxication will excuse liability where *mens rea* is negated as a result thereof, whereas voluntary intoxication will only produce the same effect if the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime.[210]

(i) Diminished responsibility and insanity

Under article 30 of the ICC Statute, unless it is otherwise stated in the Statute, a person shall be criminally responsible and liable for punishment for a crime within the Court's jurisdiction only if the material elements of the crime are committed with intent and knowledge.[211] Sub-article 2 proceeds to provide that for the purposes of the article, a person has intent where: (a) in relation to conduct, that person means to engage in contact, (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Sub-article (3) stipulates that knowledge for the purposes of the article means awareness that a

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208 As quoted in Bantekas and Nash 2003: 138.See also Cassese 2003: 230.

209 Rome Statute of the International Criminal Court (1998).

210 Bantekas and Nash 2003: 140.

211 Article 30(1) Rome Statute of the International Criminal Court (1998) See also Cassese 2003: 224 on "*excuses based on lack of individual autonomy*".

circumstance exists or a consequence will occur in the ordinary course of events.

Article 31[212] proceeds to stipulate that in addition to other grounds for excluding criminal responsibility, a person shall not be criminally responsible if at the time of that person's conduct: (a) the person suffers from a mental disease or defect that destroys the person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control such conduct in order that it conforms to the requirements of law; (b) the person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or the nature of the conduct, or capacity to control the conduct in order to conform with the requirements of the law, provided the person did not voluntarily became intoxicated under such circumstances that the person knew or disregarded the risk that as a result of the intoxication he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court; (c) the person acts reasonably in order to defend him or herself or another person, or as in the case of war crimes, property which is essential for the survival of the person or other person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner which is proportionate to the degree of danger to the person, the other person or the property thus protected. The fact that a person accused was involved in a defensive operation conducted by forces shall not in itself constitute grounds for excluding criminal responsibility; (d) the conduct of the person which is alleged to constitute a crime within the Court's jurisdiction, has been caused by duress from a threat of imminent death or of a continuing or imminent serious bodily harm against that person or another person, and the person acts reasonably to avoid this threat, provided the person does not intend to cause a greater harm than the one sought to be avoided. The threat may be made by other persons or constituted by other circumstances beyond that person's control.

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[212] Rome Statute of the International Criminal Court (1998). See also Bantekas and Nash 2003: 141-142.

Sub-article (3) further provides that the Court may consider grounds for excluding criminal responsibility other than the ones referred to in the article where such grounds are derived from applicable law as set forth in article 21 of the Statute.[213]

9. Rules of Procedure and Evidence

As was mentioned above, one of the tasks assigned to a Preparatory Commission established when the Final Act was adopted on the 17th July 1998, was that such a preparatory commission would have to draft Rules of Procedure and Evidence for the newly established International Criminal Court.[214] These Rules of Procedure and Evidence were developed and adopted on 9 September 2002, entering into force the same day.[215]

An explanatory note to the Rules of Procedure and Evidence states:[216]

> "*The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases. In elaborating the Rules of Procedure and Evidence, care has been taken to avoid rephrasing and, to the extent possible, repeating the provisions of the Statute. Direct references to the Statute have been included in the Rules, where appropriate, in order to emphasize the relationship between the Rules and the Rome Statute, as provided for in article 51, in particular, paragraphs 4 and 5.*
> *In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute.*
> *The Rules of Procedure and Evidence of the International Criminal Court do not affect the procedural rules for any national court or legal system for the purpose of national proceedings*".

The Rules of Procedure and Evidence are divided into 12 chapters.[217]Below, brief attention is given to the content of these.[218]

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213 Rome Statute of the International Criminal Court (1998).

214 Schabas 2001:18.See also Ambos 1996: 526 and further for comments on the ILC's draft on procedural and other rules.

215 http://www.icc.int/about/official Journal.html 2/11/2006.

216 10. The Rules of Procedure and Evidence were obtained from the official website of the ICC on www.icc-cpi.int/home.html. Further reference in this paragraph to the Rules of Procedure and Evidence refers to the printed page numbers from this source.

(a) Records: the registrar of the Court is charged with keeping a database that contains all the particulars of each case that is brought before the Court. This charge is subject thereto that when a judge so orders, any document or information shall not be disclosed and that sensitive personal data be protected from disclosure.[219] **(b) Victims and Witnesses Unit:** in this Rule, the Registrar of the court is assigned with various functions and duties regarding witnesses and victims, such as providing notice or notifications to victims and witnesses or their legal representatives, assisting them to obtain legal advice and representation, assisting them to participate in the various stages of the proceedings, taking gender sensitive measures to facilitate the participation of witnesses and victims of sexual violence crimes at all stages. Where such witnesses and victims are at risk on account of their testimony, the Registrar shall perform the functions such as informing them of their rights and of the existence functions and availability of the Unit, and informing them of any decision by the Court that may impact on their interests. The Registrar may further negotiate agreements for the relocation and the provision of support services on behalf of threatened or traumatized victims or witnesses with those states concerned.[220] **(c) Rights of the defence:** in this rule the Registrar is responsible for organising the staff of the Registry in such a way, that the rights of the defence, consistent with the principle of fair trial as defined in the Statute are promoted. For these purposes, the Registrar is to facilitate the protection of confidentiality as defined in article 67, provide assistance, support and information to all defence councel appearing before the Court, and where appropriate, support the professional investigators where necessary for the efficient and effective conduct of the defence.

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217. Pages 20-107. Chapter 1 deals with general provisions, Chapter 2 with Composition and administration of the court, Chapter 3 : Jurisdiction and admissibility, Chapter 4: Provisions relating to the various stages of the proceedings, Chapter 5: Investigation and prosecution, Chapter 6: Trial Procedure, Chapter 7: Penalties, Chapter 8: Appeals and revision, Chapter 9: Offences and misconduct against the court, Chapter 10: Compensation to an arrested or convicted person, Chapter 11: International co-operation and judicial assistance and Chapter 12: Enforcement.

218 These were chosen by the author in so far it may have a bearing, directly or indirectly on the theme of this research.

219 Rule15.

220 Rule 16(2) (4). See Ingadottir: 2000: 149 and further on the Trust fund of the ICC.

Further, to assist arrested persons, disseminate information and case law of the Court to the defence councel.[221] **(d) Jurisdiction and admissibility:** the Registrar, when requested by the prosecutor, may inquire of a state that is not a party to the statute whether it intends to make a declaration in terms of article 12, paragraph 3. Where the prosecutor receives information under article 15 paragraph 1 or where oral or written testimony is received pursuant to article 15 paragraph 2, the prosecutor shall protect its confidentiality. *Procedure for authorization by the Pre-Trial Chamber of the commencement of the investigation*:[222] when this procedure is used by the prosecutor, he/she has to give notice thereof to victims known to him/her, or to the Victims and Witnesses Unit, or their legal representatives unless the "*prosecutor decides that doing so would pose a danger to the integrity and effective conduct of the investigation or to the security and well-being of victims and witnesses"*.[223] He/she may also give notice by general means in order to reach groups or victims. *Proceedings under article 19.*[224] When a Chamber of the Court receives a request or application that raises a challenge or a question concerning its jurisdiction or the admissibility of a case, it shall decide the procedure to be followed and may take the appropriate measures "*for the proper conduct of the case"*.[225] Rule 60 provides that a challenge to the Court's jurisdiction or the admissibility of a case will be made after the confirmation of the charges, but before the constitution or the designation of the Trial Chamber. Such challenge shall be addressed to the Presidency. *Rule 65: Compellability of witnesses*: (1) A witness who appears before the Court is compellable by the Court to provide testimony, unless otherwise provided for in the Statute and the Rules, in particular rules 73, 74 and 75. Rule 67 allows for the giving of *viva voce* evidence before the Court by means of audio or video technology provided that such technology allows the witness to be examined by the prosecutor, the defence and the Court.[226] In terms of

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221 Rule 20(1) (f).

222 Rule 50.

223 Rule 50 (1).

224 Rule 58.

225 Rule 58(2).

226 Rule 68 allows evidence that was prerecorded on condition that the Prosecutor and the defence had the opportunity to question the witness when the recording was made.

Rule 69, the prosecution and the defence may agree that certain facts are not contested in which event testimony on such matters does not have to be presented. Rule 70 contains principles of evidence that will guide the court in cases of sexual violence.[227] **e) Rule 76 Pre-trial disclosure relating to prosecution witnesses:** this rule provides that the Prosecutor shall supply the defence with the names of the witnesses it intends to call as witnesses as well as copies of any prior statements made by those witnesses.[228] **(f) Rule 79: Disclosure by the defence:** in terms of this rule, the defence shall notify the prosecution of its intent to raise the existence of an alibi with details, and/or its intent to raise grounds for excluding criminal responsibility with details of witnesses it intends to call.[229] **(g) Rule 86 provides general principles** for when the Court deals with victims and witnesses, particularly children, elderly persons, persons with disabilities and victims of sexual or gender violence.[230] **(h) Rule 95** sets out the procedure where the Court on its own motion, pursuant to article 75, makes a determination. **(i) Rule 112** makes provision for the questioning of persons, which shall be audio or video recorded, setting out a number of requirements. **(j) Rules 121 to 126** deal with the procedure with regard to the confirmation of the charges. **(k) Chapter 6** deals with the trial procedure.[231] **(l) Chapter 7** deals with penalties, with

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227 These include, in terms of Rule 70(a) that consent cannot be inferred by reason of words or conduct of the "*victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent*"; Rule 70(b): "*Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent*"; Rule 70 (c):Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; Rule70 (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness. See also Rule 71 that prohibits the Court from admitting evidence of the prior or subsequent sexual conduct of a victim or witness.

228 See also Rule 77 that provides for prior to trial inspection of books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial.

229 See also Rule 80 that sets out the procedure for raising grounds that exclude criminal responsibility.

230 The Court is charged to take the needs of these vulnerable groups of persons into account. See further Rule 87 on protective measures that the Court may grant for vulnerable victims and witnesses, and Rule 88 that provides special measures for these groups of vulnerable people such as the facilitation of such person's evidence.

231 The various rules deal with: 132: status conferences, 133: motions challenging admissibility or jurisdiction, 134: motions relating to trial proceedings,, 135: medical

Rule 145 dealing with the determination of sentences. Rule 145 (3) determines:

> "*Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances*".

(m) Rule 167 deals with **international cooperation and judicial assistance,** stating that the Court may request a member state to provide any form of international cooperation or judicial assistance. In every such case the Court shall indicate that the basis for the request is an investigation or prosecution of offences under article 70. **(n) Rule 168:** ***Ne bis in idem:***

> "*In respect of offences under article 70, no person shall be tried before the Court with respect to conduct which formed the basis of an offence for which the person has already been convicted or acquitted by the Court or another court*".

10. Composition of the International Criminal Court

The ICC has four organs: (1) the presidency, (2) a pre-trial division, a trial division and an appeals division, (3) the office of the prosecutor and (4) the registry. The working languages of the court are either English or French and all officials have to be competent in either one of them. A president, a first vice-president and a second vice-president constitute the presidency. The judges that serve the presidency serve the court full time while the other judges serve as the need arises. The pre-trial and trial divisions have three judges each and the appeals division is comprised of four judges as well as the president.[232] The Assembly of States Parties elects the judges by secret

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examination of the accused, 136: joint and separate trials, 137: record of trial proceedings, 138: custody of evidence, 139: decision on admission of guilt, 140: directions for the conduct of the proceedings and testimony, 141: closure of evidence and closing statements, 142: deliberations, 143: additional hearings on matters relating to sentence or reparations, 144: delivery of decisions by the trial chamber.

232 Boller 2003: 282. Any state party may nominate judges with one vote per nomination. Judges are to be of high moral character, impartial and with integrity with the qualification that is required by their respective states for appointment to the bench.

ballot.[233]The office of the prosecutor is considered to be independent of the ICC. The main function of the prosecutor is to receive referrals for investigations and to determine whether enough evidence exists to pursue prosecutions.[234]The Registry has the responsibility of carrying out the non-judicial aspects of the ICC, and is the "*principal administrative officer of the Court and as such is supervised by the president of the ICC*".[235]

11. Conclusion

11.1 Expanded use of universal jurisdiction

In conclusion, the creation of the ICC, which was undoubtedly inspired by the Nazi war crimes, the subsequent war crime tribunals, and the establishment of the *ad hoc* tribunals in the 1990s, may prove to be the most important step yet in the expanded use of universal jurisdiction in international criminal law. It has received the mandate of the majority of states that signed and ratified the treaty, in terms of which it was created, to exercise jurisdiction over persons for the most serious crimes of international concern.[236] Whether in fact the Rome Statute confers universal jurisdiction on the ICC is unclear because the Court's jurisdiction is largely limited to jurisdiction for offences that occurred on the territory of a signatory state or were committed by a national or signatory state. It could be argued that because jurisdiction is given to the ICC by a delegation of traditional *Westphalian* jurisdiction by the states that ratified the Rome Statute, no universal issues arise thereunder. There is however one exception to the jurisdictional constraint in the Rome Charter and that is when the UN Security Council refers a case to the ICC. When therefore the UN

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233 Boller 2003: 283. Two-thirds of states parties are required to be in attendance and voting. The judges receiving the highest number of the votes are elected. No two judges may be nationals of the same state. Furthermore, judges are elected for a term of nine years and cannot be re-elected.

234 Boller 2003: 283. The prosecutor is elected by secret ballot by the states parties. High moral fibre, experience in prosecution and proficiency in either one of the ICC languages are required as prerequisites.

235 Boller 2003: 284. The judges take advice from the States Assembly where after they appoint the Registrar. Again it is required that this person possess high moral character and be proficient in one of the languages of the court. The Registrar's office is 5 years with the possibility of one re-election.

236 Kontorovich 2004: 200. See also Mendez 2000: 71 and further.

Security Council, instead a member state or the prosecutor, refers a case to the ICC, the usual territorial and nationality limitations do not apply. It would therefore appear that the ICC could have jurisdiction over crimes, which are committed in non-signatory states by and against nationals of non-signatory states if the Security Council refers the matter to the ICC. It is not yet clear whether the ICC will assert such jurisdiction and thereby risk resistance from non-signatories such as the United States.

Kontorovich points out that the ICC's jurisdiction in non-signatory cases that are forwarded to it by the Security Council should be considered as "*delegated*", rather than the exercise of universal jurisdiction.[237] The reasoning behind this is that nations, by joining the United Nations, delegate to the Security Council the authority to deal with certain issues in a broad range of ways. Thus the Council could choose to deal with a particular matter by referring it to the ICC.[238]

11.2 A shrinking conception of domestic jurisdiction

Chayes and Slaughter raise an interesting point in that it may be concluded that with the creation of the ICC, there is the necessary implication that domestic jurisdiction is thereby reconstructed. This in itself represents a trend or development in international law. The authors suggest that :

> "*…if international law establishes rights and duties of individuals, it implies a radical reconstruction of the concept of domestic jurisdiction. The international architecture of 1945 preserved an insulated and carefully protected spheres of domestic affairs. Article 2(7) of the U.N. Charter provides: 'Nothing contained in the present Charter shall*

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237 2004: 201.

238 Kontorovich 2004: 200: The author points out that although this reasoning for the exercise of universal jurisdiction in a case referred to the ICC might be sound, cognisance should be taken of the fact that the United Nations Charter only authorises the Security Council to take measures against threats to 'international peace', that is against aggression between nations, and not crimes committed by a state against its nationals, even if such acts do constitute core crimes within the jurisdiction of the ICC. Thus the Security Council could not have been given delegated jurisdiction in these circumstances.

> *authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state*".[239]

But it was only three years after the adoption of the Charter, so the authors point out, "*that the Universal Declaration of Human Rights introduced 'a contrary movement that has burgeoned in recent years'*". A consequence and which has been bolstered by the establishment of the ICC is "*that the existence of exclusive domestic jurisdiction is now increasingly conditional on conformity with international rules and principles, especially human rights norms*". It simply means, and this trend has been confirmed with the establishment of the ICC:

> "*…that the international community is no longer prepared to stand aside while a government commits gross violations of fundamental human rights under the rubric of internal affairs*".[240]

The confirmation of this trend with the establishment of the ICC, relating to the development of international criminal law, is furthermore not limited to the latter. As Chayes and Slaughter point out:

> "*The contingent nature of domestic sovereignty is not confined to the field of human rights. It follows from the increasingly coextensive scope of domestic and international regulation. In the areas of economic integration, trade, environmental affairs, and internal conflict, international and domestic law now often regulate the same conduct. Laws drafted and implemented at both levels organize and constrain the behavior [sic] not only of states but also of the individuals and groups within them. National jurisdiction may be primary, but is no longer exclusive*".[241]

Thus the ICC Statute may be viewed as a natural product of this development in international affairs and law.[242]

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239 2000: 240.

240 Chayes and Slaughter 2000: 240.

241 2000: 241.

242 Chayes and Slaughter 2000: 241. See also Gallon 2000: 93 and further on the "*International Criminal Court and the challenge of deterrence*". According to the author the ideal "*independent*", "*effective*", and "*strong*" international court has not been created, but that the establishment of the ICC does provide future generations with international "*legal tools*" with which to deal with future atrocities.

11.3 General development of international criminal law

Antonio Cassese, the presiding judge of the Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia, referring to both the substantive and procedural features of the ICC Statute, describes it as "*revolutionary innovation*".[243] Substantive features, according to the author, include: the definition of the crimes within the Court's jurisdiction which is more specific than in existing international law, and detail that spells out general principles of international criminal law such as for *actus reus, mens rea, nullum crimen* and *nulla poena.* This is additional to various forms of international criminal responsibility. However, on substantive law the author opines:

> "*Certain of the substantive provisions, however, may be considered retrogressive in the light of existing law. These include: the distinction between international and internal armed conflicts needlessly perpetuated in Article 8; an insufficient prohibition of the use in armed conflict of modern weapons that cause unnecessary suffering or are inherently indiscriminate; the excessively cautious criminalization of war crimes offences; the omission of recklessness as a culpable state of mind at least for some crimes; and excessive breadth given to the defences of mistake of law, superior order and self-defence*".[244]

According to the author, the ICC's major contribution lies in the field of *procedural* development. In this regard the author finds remarkable the fact that the ICC Statute has created a complex judicial body with detailed regulations that govern all stages of the criminal adjudication.[245]

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243 1999: 144 and further.
244 Cassese 1999: 144 and further.
245 1999: 144 and further. See also Mendez 2000: 73 and further.

Chapter 9
Obstacles facing the International Criminal Court

1. Introduction

In this chapter the challenges and obstacles of the International Criminal Court will be investigated. Its greatest challenge is certainly the opposition it receives from the United States of America.[1] The chapter will first provide a general background and evaluation of the United States' opposition to the ICC and will then proceed to evaluate the four specific legal arguments that have been advanced by the United States in its opposition to the International Criminal Court. The chapter will conclude that the objections of the United States to the ICC are unfounded in the light of the provisions of the Rome Statute. It will argue that it is in the compelling interest of the international community that the United States should participate in the International Criminal Court. The last part of the chapter is dedicated to more general challenges that the International Criminal Court faces.

2. The United States of America's opposition to the Court

2.1 Background

The creation of the International Criminal Court has been described as the advancement of fifty years of international humanitarian law, with a noble goal that none should dispute.[2] In response to both the failure of individual nations

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1 See Ambos 1996: 522 who rightly points out: *'...an ICC's legitimacy depends heavily upon the acceptance of its jurisdiction by as many States as possible'.*

2 http://fto.int8.com/researchpapers/icc 5/13/2004: 4 See also www.cnfs-rcef.net on the need for establishing a permanent International Criminal Court. The author refers to the 1998 eight proposed fundamental principles drafted by the Lawyers Committee for Human Rights, which would ensure that a permanent criminal court would operate independently, fairly, efficiently, and effectively. The following four justifications for a permanent international criminal court were given by the committee: (1) an ICC would efficiently address offences of universal human rights and provide relief for victims of

to bring genocide leaders to justice, and also because of the difficulties that presented themselves when the *ad hoc* tribunals were established, leaders around the world hailed a permanent International Criminal Court as the solution.[3] The worldwide call for the establishment of a permanent International Criminal Court and the drafting of the Statute establishing the court, has always received American support. [4] However, the United States, which led 7 countries, including China, Israel and Iraq, voted against the International Criminal Court.[5] Among the countries that ratified the Rome Statute are some of America's closest allies, Canada, France, the United Kingdom, and the entire European Community. The German Bundestag approved ratification by a vote of 561-0, Russia has signed the Statute, and even China has expressed its support for the court.[6] There seem to be two primary reasons for states generally not to support the court. The first is that states with poor human rights records and no value for democracy obviously have little incentive to cede criminal jurisdiction to an international court, while states that do value human rights and democracy, argue that their sovereignty is better protected by attacking or ignoring an International Criminal Court.[7]

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such offences, (2) an ICC would counter judicial systems that are unable or unwilling to enforce international criminal laws, (3) an ICC would provide a remedy to the limitations of ad hoc tribunals, and, (4) an ICC would provide a central enforcement mechanism for international criminal law.

3 Seguin 2000: 86. According to him an International Criminal Court would help to assist those countries who were unable to bring individuals to justice and would alleviate the problems with the *ad hoc* tribunals.

4 Seguin 2000: 86. See also, Franck and Yuhan 2003: 519 and further, Wippman 2004: 151 and further, Schabas 2004: 702. The last author states that: "*Since international criminal justice first became truly operational, in 1945, it has had no greater friend or promoter than the United States. Besides playing a central role in the great post-war trials at Nuremberg and Tokyo, United States military tribunals also held a series of thematic trials that set precedents followed to this day. More recently, it has been the United States that has taken the initiative to promote the ad hoc tribunals for the former Yugoslavia, Rwanda and Sierra Leone, and that has used its financial muscle to make these projects a reality. The United States participated actively in the process leading to the establishment of the International Criminal Court, and made many productive and helpful contributions to the final product*".

5 Van der Vyver: 1999: 108. According to the author, the American delegation had a simple mandate: *"opt for a viable tribunal subject only to the condition that the United States be given the competence to prevent the prosecution of American citizens in the ICC"*. See also Wippman 2004: 151.

6 http://csab.wustl.edu/image/sadat-Transcript.pdf. 05/18/04: 8

7 Yacoubian *et al* 2005: 70.

Despite the United States' opposition to the International Criminal Court, it has and will in future continue to have "*a compelling interest*" in a permanent international criminal court. This is so because the United States has been a supporter of human rights and the rule of law in international affairs for a long time.[8] There are however a number of background factors, that prepared the stage for the United States' present attitude to the International Criminal Court.[9]

It is well known that the United States was fundamental in the establishment of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda to the extent that it became clear that the international community, acting through the Security Council, could create fair and credible international criminal tribunals.[10] After the establishment of the *ad hoc* tribunals, President Clinton himself stated that the next logical step would be the establishment of a permanent international criminal court.[11] Negotiating a treaty that was acceptable to the United States was a daunting task from the beginning.[12] Senator Jesse Helms, in a letter to Secretary of State Madeleine Albright, expressed the United States' view:

> "*...that any treaty establishing a permanent U.N. International Criminal Court without a clear U.S. veto... will be dead on arrival at the Senate Foreign Relations Committee*".[13]

The United States has consequently continued to demand seriously that a triggering mechanism through the Security Council exist before cases before the International Criminal Court are heard. This has been referred to as the

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8 Scheffer 1999:12; Brown 1999: 855. See also Schabas 2004: 702. The author notes that the United States is still the only country with a dedicated ambassador for war crimes.

9 Brown 1999: 856 and further. See also Franck and Yuhan 2003: 519 and further for a discussion of the US' response to the Rome Statute.

10 Brown 1991: 857. See also Seguin 2000: 86 who quotes Ambassador Scheffer when before the Senate Foreign Relations Committee he stated: "*Our experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda had convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost-efficient in its operation*".

11 Brown 1999: 857.

12 1999: 858. See also Van der Vyver 1999: 108.

13 Brown 1999: 858.

first prerequisite for the "*Helms standard*".[14] In this regard Goldstone has remarked that extending the United Nations veto privilege to the International Criminal Court's investigations and prosecutions will compromise the principle of uniform global justice and would render the International Criminal Court powerless.[15] The second *Helms standard* prerequisite would be to bestow upon every state the right to veto the prosecution of its nationals. [16] This would however have effectively left the International Criminal Court powerless.[17] It has been observed that American opposition serves to isolate that country internationally and reduces the effectiveness of the court.[18] A strong court is in America's best interests, as it will lead to a new era of international responsibility and justice.[19]

On why the United States should support the International Criminal Court, Chayes and Slaughter remark as follows:

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14 Brown 1999: 857.

15 1996:502. This according to the author would be to adopt the procedure that the Security Council followed when it established the ICTY and the ICTR. Before it adopted the resolutions to set up the tribunals, it appointed a Commission of Experts to investigate whether serious violations of humanitarian law and human rights law had been committed. It was only after these commissions reported back to the Security Council that it resolved to establish the tribunals. Therefore Goldstone suggests that a workable compromise in a treaty establishing an International Criminal Court would be the requirement that such a committee be appointed first to determine whether or not an investigation by the international criminal court should be instituted. The Security Council decision to establish such a commission should not be subject to veto power. After the report of the Commission of Experts has been placed before the Security Council, the decision as to whether an ICC prosecutor should investigate and indict, could be subject to the veto power.

16 Brown 1999: 859.

17 Brown 1999: 859.

18 http://fto.int8.com/researchpapers/icc 5/13/2004: 4. See also Latore 2002: 164 and further.

19 http://fto.int8.com/researchpapers/icc 5/13/2004:4; As to the need for establishing an international court, the author indicates the most telling evolution of warfare from World War 1 to the modern day is that ninety percent of all casualties in World War I were military; during World War II this percentage dropped to fifty percent, and in present conflicts, the percentage of casualties that is military is 10%. The rest represent civilian casualties. Thus, the principle aim in many recent wars, including those in Bosnia and Rwanda, has not been the destruction of an opposing army, but rather the displacement and murder of civilians. In the light of the increasing destruction and violation of the rights of non-combatants, it was inevitable that the notion of an international criminal court to punish criminals would be high on the world agenda as a priority.

> "*The United States has traditionally maintained the importance for its own national security of an international system governed by the rule of law. Skeptics [sic] have often dismissed this invocation of an international rule of law as utopian rhetoric of a few internationalists. In the post- Cold War world, however, it is hardheaded realism. An increasingly interdependent world is bound together by law. Much of what the United States can and must do to enhance its own prosperity and well-being depends on reliably functioning frameworks*". [20]

In addition to these general introductory remarks on the United States' opposition to the International Criminal Court, the United States has also based its opposition to the Rome Statute on the jurisdictional structure of the Statute.[21] To illustrate the basis of its opposition, the United States preferred an arrangement where the International Criminal Court's jurisdiction over certain crimes would be optional. In terms of this arrangement, all state parties would accept automatic jurisdiction over the crime of genocide. For a ten year transitional period however, states could decide to "*opt out*" of the Court's jurisdiction over the crimes against humanity and war crimes. After the ten-year "*opt-out*" period, the United States, at the negotiations for drafting the Rome Treaty, favoured one of three options: a state could accept inherent jurisdiction of the court over all three crimes, it could cease to be a party to the Statute, or thirdly, it could seek an amendment to the treaty extending its 'opt-out' period.[22]

The United States has argued that the rationale for this proposal is that the "*opt-out*" provision would allow it to evaluate the Court's performance and

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[20] 2000:237. The authors continue referring to the need for the rule of law in an "*increasingly interdependent world*": "*The processes involved in the globalization of the economy,international funds transfers, trade in goods and services, investment, worldwide air transport, telecommunications, and much more, all operate within well-defined regimes of law*'. And further*: 'The requirement of the rule of law is not limited to the global economy. Efforts to deal with major environmental problems-climate change, the protection of the ozone layer, maintenance of fish stocks, and management of waste-all operate within a legal framework that defines the rights and the obligations of public and private actors. Close to traditional national security areas, the attempts to control drug traffic, to defend against terrorism, and to prevent biological weapons proceed against a highly developed international legal backdrop defining prohibited activities and establishing modalities for cooperation. Of particular importance in recent years has been the strengthening of human rights and the humanitarian laws of war. This responds to the most fundamental demand of a legal system: that it should protect the physical security of those who live under it"*.

[21] Barrett 1999: 99.

[22] Barrett 1999: 100.

attract a broad range of state parties.[23] The argument goes that this would allow the United States and other nations to participate in the Court on a limited basis before relinquishing sovereignty to an untried tribunal.[24] The United States has also expressed its opposition to the International Criminal Court's jurisdiction over the yet-to-be-defined crime of aggression.[25] It argues that the historical precedent for the crime of aggression is slight. It has argued that there is a historical precedent for criminalising wars of aggression, but that there exists no such precedent for the proscription of individual acts of aggression. This is despite the fact that the International Military Tribunal at Nuremberg considered aggression to be the "*supreme*" international crime. In response to this objection it has thus been argued that the condemnation of aggressive acts has become part of customary international law and should therefore be included in any international criminal statute.[26]

Despite the international community's, and the United States', painstaking efforts to establish an International Criminal Court, the US openly opposes the court. It not only opposes the court but has enacted two pieces of legislation that are aimed at hindering the International Criminal Court in its operation.[27]

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23 Barrett 1999: 100.

24 Barrett 1999: 100. Barrett indicates that despite the fact that an "*opt-out*" provision might have provided 'nervous' nations with a measure of security, the inclusion of an "*opt-out*" provision in the Rome Statute would likely not have been entirely favourable to the United States. He shows that the drawback of the "*opt-out*" or "*opt-in*" approach to jurisdiction is that a much weaker Court is created as a result. A country prone to heinous acts could 'opt out' of jurisdiction over one or more of the crimes against humanity, war crimes and the crime of aggression. Thus the "*opt-out*" provision could have operated to the detriment of the United States by causing the court to be unable effectively to exercise jurisdiction over non-genocidal acts conducted by heads of state and government officials.

25 Barrett 1999: 103. See also Brown 1991: 867.

26 Barrett 1999: 104. The author points out that the United States has also expressed its opposition to the inclusion of aggression by pointing out the lack of an accepted definition for such a crime. The United States have thus warned that the inclusion of the crime of aggression could 'impose unnecessary risks' on foreign military forces acting for the international community. This is probably, and pointed out by the author, the United States' chief concern with the entire statute, namely that United States soldiers could be accused of aggressive acts even where they act in self-defence or for humanitarian purposes. The United States is also concerned that individual members of the military could be accused of aggressive acts even though those acts were committed as part of official military operations.

27 Yacoubian et al 2005: 47-70. This is the *Admiral James W. Nance and Meg Brown Foreign Relations Authorization Act* which prohibits the U.S from providing monetary support to the ICC and the *American Servicemembers' Protection Act* which prohibits

The United States bases its legal arguments for its opposition to the International Criminal Court on four grounds, which will be examined and evaluated below. The topic has, since the adoption of the Rome Statute in 1998, received wide reaction from international legal scholars.

2.2 Legal objections

2.2.1 The law of treaties

The essence of the argument by the United States is that the Rome Statute is a deviation from the *pacta tertiis* rule in that it creates direct legal obligations for non-state parties.[28] As a result, so the United States has argued, a non-state party is obliged to prosecute its own nationals in order to prevent the International Criminal Court from exercising its jurisdiction.[29] An obligation is thus placed on a non-state party, which according to this argument it cannot do for the reason that the non-member state is not a party to the treaty.[30] The alleged obligation that the Rome Statute places on non-state parties, arises out of the so-called "*complementarity principle*" built into the Statute which generally states that the International Criminal Court will only prosecute in a given circumstance if the state that does have jurisdiction is unwilling or genuinely unable to carry out the investigation or the prosecution.[31]

Du Plessis notes that in terms of the complementarity principle, the ICC Statute does not place a legal obligation on a non-party state to prosecute its

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American cooperation with the ICC, restricts military assistance to countries that have ratified the Rome Statute and even authorises the US President to use force to free American staff from captivity if they are held by or on behalf of the ICC.

28 Du Plessis 2002: 312. See also Megret 2001: 249. According to this author the argument that the Rome Statute is radically flawed because it violates the *pacta tertiis* rule, is based on a confusion between the notions of obligation and interest. The author continues: "*…clearly, the Rome Statute does not create any obligations for non-party states. Their diligence in prosecuting their nationals will merely be judged as a fact entering into the Court's evaluation of whether a given case is receivable or not under the standard of complementarity contained in Article 17 of the Statute".*

29 Du Plessis 2002: 312.

30 Leigh 2001: 126.

31 Schabas 2001:67.

nationals in respect of offences committed abroad.[32] According to the author, the ICC Treaty does not *per se,* impose "*obligations*" (in the sense of duties or responsibilities) on non-state parties, but that it might perhaps be better articulated to state that because the International Criminal Court's Treaty bestows jurisdiction over nationals of non-members in certain circumstances, this could be regarded as to "*abrogate the pre-existing rights of non-parties which, in turn, would violate the law of treaties"*. Du Plessis argues that while nationals of non-state parties may fall under the jurisdiction of the court, non-state parties, unlike state parties, will under the Rome Statute, be under no legal obligation to assist or cooperate with the prosecution. What the complementarity principle however does do is to provide a non-state party with a choice to either prosecute its own nationals at home, or to cooperate or assist the court to prosecute them on international level. This, according to Du Plessis, is little more than a "*practical consequence of the International Criminal Court regime instead of a legal obligation being placed on a non-state party*", such as the US.[33]

An evaluation of this particular objection necessitates that one examine whether in fact the International Criminal Court's jurisdictional competence, which permits the Court to exercise jurisdiction over the nationals of states that have not consented to the Court's jurisdiction, amounts to a violation of the *pacta tertiis* rule. This necessitates in turn that reference here be briefly made to the proscriptions of the Rome Statute on jurisdiction. Article 12 of the Rome Statute provides that the court will have jurisdiction over: (1) crimes committed on the territory of the states parties, regardless of the nationality of the offender, and (2), it provides that the court will have jurisdiction over nationals of a state party who are accused of a crime, no matter where the crime was committed. The court's jurisdiction is therefore based on either territoriality or nationality. The jurisdictional competence of the court in (1) is controversial because it allows a state party to bring a case before the ICC

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[32] Du Plessis 2002:313. See also Dixon and McCorquodale 2003 on the binding effect of treaties and the distinction between "*law-creating*" and "*obligation-creating*".

[33] Du Plessis 2002:313.

against a national of a state that is not a party, on condition of course that the crime was committed on its territory.[34]

Thus at the Rome conference the United States delegation sought to require the consent of the state of nationality of the accused in every circumstance before the court could exercise its jurisdiction.[35] This did not attract much support from delegates at Rome for the simple reason that this would enable a state to shield its national by simply withholding consent to the court's jurisdiction, and especially because in cases of states that were ruled by dictators, it would spell impunity for those rulers who could be guilty of the most gross violations of human rights. Article 12(2) thus requires either the consent of the state of nationality of the accused *or* of the state on whose territory the crime was committed.[36] Is article 12 of the Rome Statute then in conflict with the *pacta tertiis rule*? Du Plessis argues that for two reasons it is not: firstly he argues that article 12 has its basis in the traditional international law grounds of jurisdiction, namely those of nationality and territoriality.[37] On the grounds of nationality, international law has long recognised that a state may prosecute its own nationals for crimes committed anywhere in the world. On the basis of the territorial principle, international law allows that a state

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34 Rome Statute of the International Criminal Court; Du Plessis 2003:310.

35 Du Plessis 2003:310. See also Leigh 2001:126: The US negotiators sought to insert a clause in the "*relationship*" agreement between the United Nations and the court that would provide that the new court will not attempt to exercise jurisdiction over nationals of a non-party state if such nationals are acting under the overall direction of the non-party state, or unless the court obtains on a case-by-case basis, the consent of the non-party state of nationality of the accused. This also meant that the nationals of rogue states most likely to commit atrocities would go unpunished.

36 Du Plessis 2003:310. See also Dugard 1999: 154.

37 2003:310. See also Kittichaisaree 2002:38 who notes that jurisdiction over criminal matters, is primarily territorial. The author mentions that states however also assert extraterritorial jurisdiction over events outside their territory on the following bases: (1) the conduct in question was perpetrated by a national of the state asserting the jurisdiction (the nationality or active personality principle); the perpetration is against nationals of the State asserting jurisdiction (the passive personality principle); and the conduct affects the security of the state asserting the jurisdiction (the protective principle).'Universal jurisdiction' is asserted in certain circumstances to prosecute offences irrespective of where these offences were committed, the nationality of the offenders, or any connection with the state which is asserting this jurisdiction. See also Schabas 2001: 59: the author states that states exercise jurisdiction in the field of criminal law on five bases: territory, protection, nationality of offender (active personality), nationality of victim (passive personality) and universality. Territory is the most common according to the author.

may claim jurisdiction over a person who commits crimes on its territory, regardless of that person's nationality. It is the territorial principle with all its implications for non-state parties that forms the basis of the United States' objection to the court.[38] However, as Du Plessis indicates, this is a principle that has been recognised internationally for many years. He cites one of the earliest criminal law treaties, the *Treaty of International Penal Law,* which was signed at Montevideo in 1889, which stated that:

> "*Crimes are tried by the Courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, or the injured*".[39]

The author shows that the United States is itself party to numerous international conventions that empower states parties to exercise jurisdiction over perpetrators of any nationality found within its territory regardless of whether the state of the accused's nationality is also a party to the particular treaty.[40] Van der Vyver also indicates the extent to which the United States itself and indeed many other countries have endorsed and applied the principle of universal jurisdiction.[41] Firstly, the author cites the following as examples: (1) since early times it has recognised the power of its courts to prosecute persons for acts of piracy; (2) it participated in the Nuremberg and Tokyo trials and in doing so it recognised the validity of the principle of universal jurisdiction in respect to at least war crimes and crimes against humanity; (3) American courts themselves have often referred with approval to the principle with regard to crimes other than piracy.[42] The author cites the *American Restatement of Law,* which is explicit on the recognition of the principle in American Law:

> "*A state has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern,*

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38 Du Plessis 2002: 311.
39 Du Plessis 2002:311.
40 Du Plessis 2002:311.
41 1999: 118 and further.
42 Van der Vyver 1999: 118.

> *such as piracy, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction...is present".* [43]

Therefore, when the International Criminal Court is being allowed by the states parties to exercise the type of jurisdiction it has under article 12 of the Rome Statute, the court is being allowed to do so only on the grounds of established jurisdictional grounds. Du Plessis concludes by stating that there is no known rule in international law that prohibits a state within its sovereign power from confering its adjudicatory authority, grounded in territoriality and nationality, to an international court.[44]

Du Plessis' views are shared by Brown[45], who indicates that it must further be noted that the International Criminal Court treaty will not bring about any radical change in international law or in the international system. Whether states are party to the treaty or not, they will maintain their fundamental rights which include the right to try those accused of committing crimes on their territory and also the right to try their own nationals for crimes that are committed anywhere. Therefore it will remain true that a foreign national who is accused of committing a crime on the territory of the United States, could either be tried by the United States or his home country.

In addition to the above argument, Brown argues that each state has certain legal rights with regard to its nationals, but that these rights are neither unlimited nor exclusive.[46] General international law does not grant states exclusive jurisdiction over crimes committed by their nationals. Instead, international law recognises that states may have concurrent jurisdiction "*when the crimes committed affect the interests of more than a single State"*.[47] Brown continues:

> "*No State, whether a party to the Statute or not, has a legitimate interest in shielding its nationals from criminal responsibility for genocide, crimes*

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43 As quoted by Van der Vyver 1999:118.
44 2002:312. See also Brown 1999:870.
45 1999: 869 and further.
46 1999:870.
47 1999: 870.

against humanity or serious war crimes. Suggestions to the contrary evoke a colonialist concept of exclusive extraterritorial rights that was prevalent in earlier centuries but has little relevance to modern practice".[48]

2.2.2 Legal foundation

A fundamental issue regarding the United States' opposition to the International Criminal Court concerns its nature as an international institution.[49] The jurisdictional structure of the International Criminal Court is based on the view that the International Criminal Court is a criminal court, *tout court.* In terms of this view, the purpose of the International Criminal Court is that it will adjudicate on the guilt or innocence of individuals accused of recognised international crimes. It therefore makes sense to give the court meaningful powers of compulsory jurisdiction**,** in order to ensure that serious perpetrators of international crimes are brought to justice.

However, so Morris foresees, the preceding approach reflects only one of two types of cases that will conceivably be heard by the International Criminal Court. In addition to the kind of cases that might be solely concerned with individual culpability, there may be a second category of case before the International Criminal Court that focuses on the unlawfulness of official acts of states. Thus, so it is predicted, there will be cases before the International Criminal Court in which individuals will be indicted for official acts taken pursuant to state policy and even further, under state authority, for the actions that may constitute the basis of charges before the court. Such cases

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48 1999: 871. According to Brown there were instances in the Middle Ages in which treaties were used by Western states in order to protect their nationals from the application of foreign law and the jurisdiction of foreign courts even when they travelled and lived abroad. However, so Brown argues, when the nation-state system emerged in Europe, this aspect of extraterritorial rights was weakened by the doctrine of absolute territorial sovereignty. For these reasons, so the author states, the principle was generally applied only to systems seen as "*inferior*" to those of Western Christian countries. Brown 1999: 872 states: "*Treaties granting broad exclusive extraterritorial rights are a relic of the 19th century colonial era in which a more 'state-centric' concept of international law prevailed, and they have no relevance to the debate of the ICC. The arrest of Chilean General Augusto Pinochet demonstrates widespread recognition that any state has jurisdiction to try those accused of certain serious international crimes*".

49 Morris 2000: 220.

according to Morris may conceivably arise where there has been for example some military intervention, for example, or deployment of a particular weapon, recourse to a certain method of warfare, or other official act that the responsible state maintains was lawful. These kinds of cases will probably represent *bona fide* legal disputes between states, and the International Criminal Court thus becomes an international court for the adjudication of international legal disputes. This argument, according to Morris, then proceeds along the line that because there is a wide range of mechanisms suited to deal with interstate disputes, adjudication by prosecution is not always the approach best suited to a given dispute.[50] The author proceeds to examine two possibly plausible theories to justify as legal foundation the jurisdiction given to the International Criminal Court, namely that of delegated universal jurisdiction and that of delegated territorial jurisdiction.[51] Because the two theories have regularly surfaced in the debate concerning the legitimacy of the United States' objection to the jurisdiction given to the International Criminal Court, they are briefly examined.

(a) Delegated universal jurisdiction

In terms of this theory, it allows a state party is allowed to delegate to the international court its power to exercise universal jurisdiction. Reliance on this theory as basis for the International Criminal Court's jurisdiction results in a number of difficulties according to the author: The first problem with the argument of universal jurisdiction, and the validity of the possibility that the International Criminal Court may exercise such jurisdiction, according to Morris, is that the International Criminal Court Treaty does not provide the court with universal jurisdiction, but rather requires consent to jurisdiction, as a state would express by ratifying or acceding to the Treaty, or by special consent on a case by case basis by the state of nationality or the state on whose territory the crimes were allegedly committed. Although this provision

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50 Morris 2000: 221. The author continues: "*Because in many circumstances states see diplomatic, non-adjudicatory dispute resolution as posing fewer risks and offering potentially more constructive resolutions than litigation would, states often are reluctant to submit their disputes to third-party adjudication*".

51 Morris 2000:235 and further.

requires the consent of either the state of nationality or the territorial state, it could be viewed as simply reflecting a choice that the International Criminal Court will exercise as a part of the full range of jurisdiction that it legally could exercise under customary law of universal jurisdiction. The theory however faces additional problems. According to Morris:

> "*The theory of delegated universal jurisdiction as a basis for ICC jurisdiction fails to account for the ICC's jurisdiction over a number of crimes that the Treaty places within the subject-matter jurisdiction of the ICC but which are not subject to universal jurisdiction*".[52]

Examples would be certain violations of Protocol 1 to the Geneva Conventions of 1949, which under customary international law are not subject to universal jurisdiction. The most fundamental problem however with the reliance on the delegation of universal jurisdiction by states is vested in the question of whether such universal jurisdiction may in fact be delegated to an international court. In order to answer this question, one must take cognisance of the fact that the principle of universal jurisdiction arose as a matter of customary international law. If, therefore, it were established by custom that universal delegation was in fact delegable to an international court, it follows that states would be obliged to accept such delegation. If, on the other hand, such delegation constitutes an innovation beyond the customary meaning of universal jurisdiction, then the legal status of jurisdiction based on delegation would remain to be determined.[53]

Is the exercise of universal jurisdiction by the International Criminal Court then an innovation that stretches beyond the customary meaning thereof?

Brown is of opinion that:

> "*International law rises above the narrow interests of any state in recognizing the universal jurisdiction of all states to prosecute those believed to be responsible for certain special crime of concern to the entire international community. This extraordinary jurisdiction was first applied to pirates who were recognized as 'hostes humani generis'*

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52 Morris 2000:236.
53 Morris 2000:244.

> *enemies of all humankind, and was extended to slave traders in the 19th century when international law forbade that commerce. Today this universal jurisdiction applies to the core crimes defined in the ICC Statute*".[54]

Brown contends that the International Criminal Court Statute is not dependant on the principle of universal jurisdiction. Instead it relies on a very conservative jurisdictional base: either the territorial state or the state of nationality of the accused must consent to every case prosecuted by the International Criminal Court, except, of course, those referred to it under the authority of the United Nations Security Council. In a broader sense, however, the International Criminal Court does build upon the same considerations:

> "*…that lie behind the concept of universal jurisdiction, namely that every State has an interest in the prosecution of certain of the most serious international crimes*".[55]

Proponents of the Rome Treaty have responded to objections to its jurisdiction over nationals of non-party states by arguing that the ICC jurisdiction in this case is based on the principles of universal jurisdiction pursuant to which the courts of any state may prosecute the nationals of any state for certain serious international crimes. Because individual states may prosecute perpetrators regardless of their nationality, proponents of this theory have argued that a group of states may create an international court that is empowered to do the same.[56] Under this theory, each state thus delegates its power to exercise universal jurisdiction to the international court.

The main obstacle, according to Morris, is however still whether universal jurisdiction may be delegated to an international court. In this regard, Wilson examines the Nuremberg and Tokyo Tribunals and concludes that they provide no precedent that their jurisdictional basis was in fact by delegation of universal jurisdiction. Neither do the International Criminal Tribunals for the

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54 Brown 1999: 873.
55 Brown 1999: 874.
56 Morris 2000: 235.

former Yugoslavia and for Rwanda provide such precedent.[57] This absence of precedent, according to Wilson, precludes:

> "...*the possibility that delegability has been affirmatively entailed within the customary law of universal jurisdiction as it has developed through state practice and opinio juris*".[58]

Megret points out that the:

> "...*finding that an individual is guilty of committing a crime in the context of a state policy implies at most an obiter dictum as to state responsibility, and it will often fall short of that, state conduct being more akin to a factual than a legal element*".[59]

The International Criminal Court only has jurisdiction to try individuals and it cannot adjudicate on something over which it does not have jurisdiction. The legal part of the Morris argument, therefore, is either irrelevant (no case will involve adjudication of inter-state matters *strictu sensu)* or unreasonable (many cases may involve *consideration* of official policy).

(b) Delegated territorial jurisdiction

A possible alternative to the delegation of universal jurisdiction theory, which could be advanced as justification for the International Criminal Court's jurisdiction over nationals of non-party states, is according to Wilson that of so-called delegated *territorial* jurisdiction.[60] This theory entails that when a non-party national is prosecuted before the International Criminal Court for crimes committed on the territory of a state that consents to the International Criminal Court's jurisdiction, the International Criminal Court in such an instance exercises territorial jurisdiction that is delegated to it by the territorial state. If then the territorial state, which would ordinarily have jurisdiction, may delegate that territorial jurisdiction to a court outside its own national judicial system, including an international court, so the argument runs, then the

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57 Wilson 2000: 236 252.
58 2000: 253.
59 2001: 254.
60 Wilson 2000: 253. See also Franck and Yuhan 2003: 553 and further.

International Criminal Court may legitimately exercise that delegated jurisdiction. As in the case of delegation of universal jurisdiction, Wilson concludes that there is an absence in state practice for the delegation of territorial jurisdiction, thus that delegation to an international court may be objectionable.[61] It thus lacks grounding in customary international law.

This contention is not supported by Megret who argues that the delegation of jurisdiction to the International Criminal Court is incompatible with the principle that legal relations that are based on mutual consent may not be altered by one party to the detriment of the other.[62]

2.2.3 Constitutionality

Another United States objection relates to what is termed the "*constitutional dimension*" objection to the ICC.[63] In terms of this argument, (1) the full range of US constitutional guarantees must apply to an international criminal court before the United States may in terms of its constitution participate, and (2) US criminal procedure guarantees, most notably, the right to trial by jury, must apply to international trials in order to gain United States participation.[64]

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61 Wilson 2000: 254, 255.

62 Megret 2001: 252. See also Franck and Yuhan 2003: 541 and further. These arguments can be divided into sub-categories in the way that the authors do, namely (1) objection to constitutionality on the ground of lack of due process guarantees, (2) so-called Article 111 objections: this argument proceeds on the basis that participation in the ICC will violate Article 111 of the US Constitution which vests exclusive judicial authority in the federal judiciary and the states.

63 Barrett 1999: 106.

64 Barrett 1999: 106. The author concludes that there appears to be no valid constitutional or policy rationale for distinguishing between an international tribunal and the courts of a foreign nation for extradition purposes. He uses the 'extradition model' to come to this conclusion: if one considers the ICC to be an independent entity, the surrender of a person to the court may essentially involve extradition to the court. Even if the process by which suspects are handed over to the court is not extradition in the true sense, it is sufficiently close to extradition for United States Constitutional purposes. The model would allow the United States assent to the Rome Statute because according to the rule of non-inquiry, United States courts generally do not review the procedural or substantive rights an extradited party would have in the requesting nation.

Put differently by Gallaroti and Preiss,[65] the constitutional objection centres on two contentions: (1) that for the United States to participate in the International Criminal Court, the International Criminal Court would have to guarantee defendants all of the rights granted under the United States Constitution and United States criminal law, and (2) that international laws are insufficiently precise to fulfil the *nullem crimen sine lege* expectations of the United States Constitution.

Constitutional critics of the ICC therefore argue from an absolutist interpretation of the extraterritorial applicability of the United States Constitution, that the United States must consider constitutional expectations even in instruments of international criminal law. A more contextual interpretation of the issue of constitutional expectations governing foreign legal instruments, on the other hand, would allow the US to become a member of the ICC.[66]

Gallaroti and Preiss favour the contextual approach for the reason that it is founded on a long train of legal practices by the United States. Firstly the authors note that the International Criminal Court is not an instrument of the United States government and it would therefore not be subject to United States law. This part of their argument would not answer the objections of the absolutist camp were it not for the fact, and this is a convincing one, that the authors proceed to argue that legal precedent in the United States has clearly established the independence of foreign and international tribunals from the United States Constitution and that the United States has routinely extradited United States citizens as well as non-citizens having committed crimes in the United States without expectations that foreign tribunals observe American constitutional principles. Under United States law, extraditions are only marginally judicial functions. They do not carry the same constitutional guarantees as trials do in the United States courts. The authors consequently argue that in constitutional terms, giving up a suspect to a permanent

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65 1999:40.

66 Gallaroti and Preiss 1999: 41.

international court under treaty obligation would not fundamentally differ from extradition.[67]

With respect to the objections based on the issue of *nullem crimen sine lege,* the authors argue that the pre-established code of crimes in the statute would solve the problem of *ex post facto* laws. The International Criminal Court would furthermore be consistent with American practices involving international law because the United States has historically supported international conventions of international criminal law, to wit, the *Geneva, The Hague, Nuremberg and Genocide Conventions.* The Rome Statute codifies these conventions within one instrument of the International Criminal Court. Further, individual criminal responsibility has long been recognised in United States law.[68]

Marquardt, in a meticulously thorough investigation into the constitutional compatibility of the then proposed Charter establishing an International Criminal Court, concludes as follows:

> "*While the extradition analogy provides the strongest evidence of the compatibility of an international criminal court with the United States Constitution and is sufficient in itself, an examination of other constitutional doctrines provides further support for the conclusion that the United States may participate in such a court. A contextual approach to the extraterritorial application of the Bill of Rights, an approach that both fully incorporates existing precedent and recognizes the role of the United States as a member of the international community attempting to address international problems, reveals that the variations from standard United States domestic practice in the proposed international criminal court would not be significant enough to render the entire project unconstitutional, even if the enterprise were conceived of as a United States instrumentality with power crimes committed abroad. Moreover, even an Article 111 analysis that assumes that an international criminal court must be viewed as a United States instrumentality tends toward a finding of constitutionality, although there are fewer settled principles for the latter finding. Congress' power to define and punish offenses* [sic] *against the law of nations probably supports the creation of non-Article 111 courts to try offenses* [sic] *and may even justify variations in criminal*

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67 Gallaroti and Preiss 1999: 41.

68 Gallaroti and Preiss 1999: 41. The authors indicate that the US armed forces criminalise and prosecute breaches of international humanitarian law.

> *procedure in cases where the crime, suspect, and trial are all within the United States*".[69]

2.2.4 State sovereignty

A principle argument that has been advanced against American support for the international court is that it would irrevocably erode American sovereignty, unduly exposing its nationals to potentially hostile prosecutions brought by a runaway prosecutor and supported perhaps by a biased judiciary.[70] In the words of David Scheffer, who headed the United States delegation to the Rome Conference:

> "*...a completely independent prosecutor would have free rein to probe into any and all decision-making processes and military action anywhere…*".[71]

The United States has indicated some flexibility on this issue, showing a willingness to consider a self-initiating prosecutor at a later time. However, it is clear that the United States wants a weaker prosecutor in order to protect members of its military.[72] Is it a valid argument to argue that an international criminal court will infringe on American sovereignty?

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69 1995: 132.

70 Senguin 2000: 94. The author quotes a statement by the US Department of State which underlies the motivation for the objection: "*The court must ensure that national legal systems with the will and ability to exercise jurisdiction are permitted to do so. We have complete confidence in the US legal system; it should investigate and prosecute allegations involving Americans without concern that an international court will intrude unnecessarily*". See also Forsythe 2002: 986. The author indicates that the US's main objection to the ICC is an objection to the possibility that an independent prosecutor, with the approval of a chamber of three judges, could bring indictments against US personnel. The US would prefer that cases be brought to the ICC only by reference of the Security Council, where the US of course holds the veto. Another argument advanced by the U.S. according to Forsythe, relates to the US's commitment that national law is supreme over that of international law because of what is referred to as the "*democratic deficit*". The argument goes that because the ICC will in effect "*legislate*" on a variety of weighty issues and in doing so the judges of the court will have the opportunity to overturn policy established domestically, there is no political check on the ICC and thus should be opposed. See also Cassese 2003: 292 on the objections to the principle of universality.

71 Barrett 1999: 96. See also Seguin 2000: 94 and Latore 2002: 160.

72 Barrett 1999: 97.

As was seen in the discussion on the Nuremberg precedent, international criminal law, according to Marquardt:

> "*...has seen a shift from the traditional conception of international law, a set of essentially contractual norms between states, to one in which individuals are accountable members of an international community. In fact, the existence of international criminal law implies that ties to the global community trump national ties; under the principles established at Nuremberg, an individual has a legal duty, on pain of prosecution, to disobey his sovereign national government if it attempts to violate international legal principles*".[73]

The individual obligations implicit in a Nuremberg-type international criminal court will clearly involve a derogation of state sovereignty. By necessary implication it cannot do otherwise. This is so because, though rules formally bind individuals, they factually bind states as well because a state cannot act except through the individual members of that society who compose it. This however, is not a unique concept to an international court because limitations on state action are, by their nature, implicit if the world community is to recognise the types of crimes that were prosecuted at Nuremberg.[74] The expansion of national principles of jurisdiction and the implied erosion of sovereign immunity have created the same potential for individual liability at Nuremberg as for potential individual liability before an international criminal court.

Marquardt therefore states that:

> "*…if the critics really want the United States and its leaders to be unaccountable to international law under any circumstances, their position seems indefensible*".[75]

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73 Marquardt 1995: 142.

74 1995: 142, 143.

75 1995:143. The author refers to the opening statement of judge Jackson at Nuremberg in which he described the role of international criminal law: "*While this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those who sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law*".

Barrett argues that there are safeguards built into the Rome Statute that would not protect the United States' interests in every conceivable situation, but that would significantly minimise the risk of abuse by a prosecutor. The first safeguard is that the prosecutor must in terms of the Rome Statute obtain independent authorisation to continue an investigation from the pre-trial chamber before he can continue with a case. Secondly, the United States has a backup protection in the form of a Security Council deferral.[76]

Wexler also argues that there are various safeguards to prevent politically motivated prosecutions against American nationals: first, the International Criminal Court's jurisdiction is limited to crimes against humanity, war crimes and genocide. Criminal proceedings regarding such crimes must be authorised by states before the International Criminal Court can proceed.[77] Second, because the ICC is a complementary court, which can act only when national judiciaries are unwilling or unable to enforce international criminal law, this would allow the United States to investigate accusations against its citizens. The International Criminal Court further has a pre-trial division, which is responsible for scrutinising accusations brought before the court. Even if an unwarranted accusation passes the pre-trial scrutiny, the Security Council can delay a trial for up to one year, giving the country of the accused the opportunity to investigate the charge. The judges elected to the International Criminal Court are to be highly respectable and of impeccable credentials, and, finally, there are procedures for removing ICC officials who engage in politically motivated investigations.[78]

Wexler convincingly argues that, as a result of the principle of complementarity that has been built into the Rome Treaty, the United States could render a case impermissible to the International Criminal Court simply by opening an investigation itself. The International Criminal Court is a court

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76 Barrett 1999: 97, 99. See also Seguin 2000: 101 and further.

77 www.cnfs-rcef.net 05/06/2004: 10: this, according to the author, represents a high form of pre-trial scrutiny, and is one which the US was instrumental in defining.

78 Wexler www.cnfs-rcef.net 06/05/2004: 10.

of last resort, not a court of first resort.[79] It is regarded, and rightfully should be regarded, as a facility to states parties and also a facility to the Security Council. It is ironic that by rejecting the ICC Treaty, the American government has deprived its soldiers of an important legal protection they could rely on in the event that they were to be captured abroad and accused of war crimes by a hostile nation. Surely, it could be argued, the United States would prefer to see the captured soldier transferred to The Hague instead of being tried in the courts of a hostile nation such as Afghanistan or Iraq. Moreover, article 124 of the statute, a provision which was proposed by the United States in Rome, and which was adopted, permits a country to opt out of the war crimes jurisdiction of the court for seven years.[80] By ratifying the Statute, United States nationals are eligible to be named to the Court's bench as judges, or to serve as the court's prosecutor, and more generally, to shape the court's staff and jurisprudence as an influential insider rather than a hostile outsider.[81] The other governments who object to the court include the governments of Yemen, Libya, and the former Iraqi government, all of whom are accused of violations of human rights against their own citizens and whose leaders are indifferent to notions of international justice, human rights and democracy-core values of the United States of America. On the question of terrorism, which is not within the International Criminal Court's jurisdiction as a crime, and on how ratification of the Statute by the United States could possibly have affected the war against terrorism, Wexler makes some interesting remarks especially in light of the 11 September attacks. The 11 September attacks, by their very nature nature, would in all likelihood, qualify as crimes against humanity. Therefore if Al Qaeda were to carry out similar attacks in future, such attacks would come under the International Criminal Court's jurisdiction as crimes against humanity. Again, the court is a facility to states parties, it is

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79 Wexler www.cnfs-rcef.net 06/05/2004:9. See also Barrett 1999: 101 and Zwanenberg 1999: 124 and further.

80 Van den Wyngaerdt 2000: 196: The author refers to Article 124 of the Rome Statute: "*Transitional Provision; Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or in its territory*…".

81 Wexler www.cfns-rcef.net 06/05/2004:10.

not mandatory and therefore if the United States were to capture international terrorists, it could try them itself. If however the terrorists were to be captured in another state subsequent to 1 July 2002 the date that the treaty entered into force, it might provide a very positive incentive for that state to turn over the terrorist to the International Criminal Court rather than to the United States because it is possible that some of the accused might be captured in states that are very hostile to the United States.[82]

Robinett states that the arguments against American involvement are flawed and that American influence can and has been able to mould the court more to its liking.[83] He cites as an example of American influence on the drafting of the Statute, the provision that the ICC would only take on cases in which the home country was unwilling or unable to prosecute those accused of war crimes. The "unsigning" of the treaty process has resulted in the implication that the United States lacks true commitment to self-proclaimed values of human rights and justice. Secondly, in a time when President Bush is seeking participation in tracking down terrorists throughout the world, American opposition to the International Criminal Court strains relationships with key allies who are totally committed to the International Criminal Court.[84]

3. Other obstacles

3.1 The nature of individual accountability

Ratner observes that the key obstacle to the effectiveness of the International Criminal Court is the nature of individual accountability, that is, personal or individual criminal accountability as opposed to interstate accountability. The *ad hoc* tribunals have illustrated this, according to him, as well.[85] He observes as follows:

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82 Wexler www.cnfs-rcef.net 06/05/2004:11.
83 http://fto.int8.com/researchpapers/icc 5/13/2004:3.
84 Robinett http://fto.int8.com/rearchpapers/icc 5/13/2004:4
85 2003: 447.

> "*It is one thing for states to sign on to international regimes that allow for the creation of political organs, courts, or quasi-judicial bodies that can impose damages upon states. These might be damages as imposed by the European Court of Human Rights (ECHR) or the Inter-American Court or the sanctioning of reciprocal tariffs by the WTO Dispute Settlement Body. That is, however, a far cry from seeing one's own leaders in the dock or in jail, even if it is a nice jail in Norway, where the ICC might have its jail*".

To illustrate, Ratner uses the example of the *Rainbow Warrior Affair,* the 1985 incident when the French government arranged for the sinking of the Greenpeace boat in a New Zealand harbour. The valid point that Ratner makes is that countries in general and specifically France in the illustration, is that:

> "*…interstate accountability, apologies, fines and damages were tolerable to France. But seeing its officials, whether a leader or an underling, in jail, whether a New Zealand jail or a jail under the supervision of other states, was not acceptable".*[86]

A further important point, and one which Ratner does not make in context of the illustration, is that the focus of the world was so much occupied by the incident itself, that the initial primary concern- the nuclear testing in the South Pacific ocean by France- went unnoticed. Implicit to the ramifications of the personal versus interstate accountability issue, which point is convincingly made by Ratner, is that states with a poor human rights record are the least likely to ratify the International Criminal Court Treaty. He points out that states with a good human rights record are the ones that are likely to prosecute domestically. As for states that have not ratified, the International Criminal Court cannot assume jurisdiction without a Security Council referral. In such a case, as shown by the author, the state of nationality of the offender and the state of territoriality are the same state, and as long as that state is not a party to the Rome Statute, the International Criminal Court cannot hear any cases involving those crimes.[87]

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[86] Ratner 2003: 448.
[87] Ratner 2003: 449.

3.2 Politics

The role and influence of politics in the shaping of international law has become abundantly clear, throughout this work.[88] Gallaroti and Preiss opine that while an institutional analysis of the International Criminal Court suggests that the Rome Statute creates a more than sufficient platform for the fair and effective administration of international criminal law, its effectiveness will however depend more upon political will and co-operation than on the institutional strength of its organisational structure. In this sense, so the authors predict, the International Criminal Court will operate within the same context that the current extradite-or-prosecute regime operates.[89] The form that justice thus will ultimately assume will be the outcome of diplomacy between states. The jurisdiction and the operation of the International Criminal Court are absolutely founded on the consent of sovereign states. Politics will be an integral part of the functioning of the International Criminal Court. The authors label the International Criminal Court weak in the sense that it contains no internal institutional mechanisms in terms of which it can impose its will on sovereign nation-states. There are no severe limits in the International Criminal Court Statute on state sovereignty: there are many loopholes for national discretion, the penalties for non-compliance are vague and unthreatening, and the process for reform of the statute is difficult and cumbersome. From all this it is clear that the International Criminal Court Statute does not replace a system of international politics with a supranational judicial institution but rather, according to the authors, "*infuses politics into the process of international justice".*[90] The Statute lacks a certain level of specificity, which is necessary to ensure compliance with the spirit of the International Criminal Court's mandates. Internal mechanisms that govern compliance are all the more deficient because the statute lacks (1) rules for co-operation with non-member states, (2) specific penalties that address non-compliance by both non-member and member states and (3) rules that

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88 For insights on how politics and international law undeniably "*inter-relate*", see Reus-Smit 2004: 14 and further and Wippman 2004: 151 and further.

89 1999: 27.

90 Gallaroti and Preiss 1999: 28.

specifically specify the precise complementary role of the International Criminal Court *vis-à-vis* national courts. These, according to the authors, are all relevant in the context that the International Criminal Tribunals for the former Yugoslavia and the International Criminal Tribunal for Rwanda have proven that lack of co-operation between states is a serious impediment to the fair and effective protection of human rights in those regions.[91]

These views are generally shared by Scharf who, basing his conclusions on the ICTY experience, states that when the International Criminal Court prosecutes on the basis of a referral by a state party or where the prosecutor of the International Criminal Court initiates the investigation, the International Criminal Court will rely on the voluntary cooperation of states for the surrender of indicted persons and the provision of evidence. The ICTY experience suggests that states will frequently refuse to provide such cooperation despite their clear treaty obligations to comply with the court's orders. In this situation, the International Criminal Court's only recourse is to make a finding that the state has failed to cooperate and then to refer the matter to the Assembly of States Parties. The Assembly's only enforcement mechanism is the issue of a statement in which the failure to cooperate is condemned; something which Scharf,[92] points out is unlikely to have much effect. This would not be the situation if the case were a referral to the International Criminal Court by the Security Council, in which case non-cooperation could result in a referral of the matter back to the Security Council, which then have sanctions at its disposal as enforcement mechanism. Experience with the ICTY indicates however that the Security Council is unlikely to impose sanctions in the event of non-cooperation with the International Criminal Court, and even more so

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91 Gallaroti and Preiss 1999: 29. And so the authors indicate that in those regions suspects were sheltered and protected; governments sought to impose their own procedures on the Tribunals; and investigations and the collection of evidence were seriously hampered. The authors indicate that not even in the case of the least problematic area of jurisdiction in regard to genocide, is it clear that the ICC can independently pursue its mandates because (1) it will depend on the sovereign states for the putting into operation of its rulings, (2), the Security Council's jurisdiction under the UN Charter and the statute give it the power to block cases, even those involving genocide, (3) the statute does not even prevent the Security Council from creating tribunals.

92 2000: 943 and further.

where the target state's trading partners include one or more of the permanent members with the veto power. To overcome this obstacle and having learned from the ICTY's Milosevic experience, the International Criminal Court should, when the Security Council has referred a case to it, make use of the freezing of assets of the individual procedure, which the Security Council was not so reluctant to use.[93]

3.3. Financial constraints

Scharf sets out the immensity of the financial requirements of the *ad hoc* tribunals and in the light thereof, not unrealistically, concludes:

> "*…the financial prospects of the International Criminal Court are likely to be even more precarious. According to Article 115 of the Rome Statute, the International Criminal Court is to be funded from assessed contributions made by State Parties, as well as funds provided by the Security Council when a case is referred to the ICC by the Security Council. Since the State Parties to the Rome Statute will be substantially fewer in number than the members of the United Nations and may not include many of the nations which pay the largest percentages to the UN budget, the pool of resources available to the ICC will be much more limited than those available to the ICTY. This will mean that the ICC, like the ICTY, will likely experience persistent financial difficulties which will negatively affect, and may ultimately thwart, its mission*".[94]

3.4. Litigation before the International Criminal Court

Litigation in the International Criminal Court is bound to be complex. Reference has been made to the complementarity scheme of jurisdiction that was introduced by article 17 of the Rome Statute. It has been shown that a prosecutor of the International Criminal Court would be able to prosecute a referred case only if it is proven that a particular state is unable or unwilling to prosecute the case itself. This will involve the determination of highly complex jurisdictional facts of a systematic nature, without precedent in domestic criminal trials.[95] Therefore, in order to demonstrate inability, it is the whole

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93 Scharf 2000: 946.

94 2000:933 and further.

95 Arbour 2001: 4 and further: The author indicates that: "*in order to demonstrate a State's unwillingness to genuinely prosecute or investigate, an inquiry into the State's*

criminal justice system of a state that would be put on trial.[96] This kind of investigation by the International Criminal Court will be quite political in nature and would involving the passing of value judgments on entire legal systems.[97]

4. Conclusion

The non-membership of the United States of America of the Rome Treaty is perhaps the greatest challenge the ICC faces. Not only was the United States of America instrumental in shaping the court, but has in world history played a major role in the general development of international criminal law and justice. Since the end of the Cold War, the United States has taken the position of the number one world power in terms of international politics.[98] It is thus common

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good faith will become necessary. Thus, the ICC would have to decide whether the domestic investigation or prosecution has in fact been undertaken in order to shield the accused from criminal responsibility and whether the delays, or the manner in which the proceedings are conducted, including the level of independence and the impartiality of the country's judiciary, are consistent with genuine intent, on the State's part, to bring the person to justice".

96 Arbour 2001: 4. The author considers "*that a judgment will have to be made about the quality of a country's justice system, often a country whose institutions have been devastated by the conflict itself*". See also Crawford 2003: 113 on the "institutional" problem of the ICC. Whereas national criminal jurisdictions had evolved and continue to so over many years with advantages such as a territorial base, a police force, prosecution services with executive powers, goals and so forth, the ICC is territorially disembodied and a court lacking executive authority.

97 Arbour 2001: 5.

98 Wippman 2004: 186. In this regard, so the author illustrates, the United States "*…conceives of itself, in Madeleine Albright's words, as the* "*indispensable nation*"*. By virtue of its political, military, and economic pre-eminence, the United States can, does, and should assume unique global responsibilities. US participation, and sometimes US leadership, is often essential to the management of global problems. As a result, the United States tends to assume that it should receive unique accommodations in multilateral treaty negotiations when its interests suggest a course of action at variance with the preferences of its allies. According to the author, and in the context of the overwhelming role of politics in International Law, the author effectively describes the process at Rome with the establishment of the International Criminal Court as a process where 'delegates effectively legislated for all states, even non-consenting states, by establishing legal rules applicable to all persons, including nationals of non-parties'.* Wippman recognizes that whilst the lack of a central legislative authority in international law has been central in certain critique of international law as law, and that the quasi-legislative process at Rome partly *'…answered that critique, it was at the cost of alienating some powerful states. Therefore for the United States, Rome represents a relatively unusual form of international law making, in which other states, acting without the consent of the United States, can fashion an international institution and international legal rules that could 'constrain US power".* At the heart of the United States' objection to the

knowledge that its peacekeeping operations are extensive, that it is often called upon to execute Security Council mandates to ensure peace under Chapter VII of the United Nations Charter, that it provides large numbers of troops to United Nations missions, to regional missions, as well as logistics for all these operations and additionally pays a large proportion of the bill for these various missions.[99] But, as Justice Richard Goldstone, a former prosecutor in the ICTY and the ICTR has remarked, a remark one agrees with in the light of what has been said in this chapter,

> "*I really have difficulty understanding that policy. What the US is saying is, 'In order to be peacekeepers...we have to commit war crimes'. That's what the policy boils down to*".[100]

Whilst the previous remarks should be duly accounted for when evaluating the United States' opposition to the International Criminal Court, its objections as examined above, from a legal point of view, hold no water. Yes, the Rome Treaty may, as Morris describes it,[101] be technically an abrogation of pre-existing rights of non-parties in terms of customary international law and thus a violation of the law of treaties regarding the court's jurisdiction over non-

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International Criminal Court according to Wippman (187) is the fact that nations proceeded to implement the International Criminal Court on the basis of sovereign equality of nations, namely one nation, one vote. Whilst not opposing the idea of sovereign equality of nations by reason of the fact that if states so desire, they may exclude themselves from a multilateral treaty; it does become problematic when a multilateral treaty effectively governs the actions of non-party states. From the latter then, the issue of simple "*majoritarianism*" of the Rome process was illegitimate because it represents an effort to shift some decision-making on peace and security issues from the Security Council with its veto power regime which is based on historical power differentials, to a system where a state like the United States with all its power, engages on equal footing with all states. This may very well be at the heart of the whole issue of the United States' opposition argument: the Treaty of Rome simply implies a power shift that deviates from the 'usual' power differentials of the traditional United Nations power regime, which the United States cannot accept.

99 Du Plessis 2002: 306. See also Franck and Yuman 2003: 532 and further who overviews the US forces stationed overseas and state that on 31 August 2002, there were a total of 44 260 military observers, troops and civilian police officers deployed on seventeen UN peacekeeping missions. According to the authors, these peacekeepers originate from ninety countries, with Bangladesh contributing the largest number at 5422, as opposed to the US with 692 persons, ranking 18 and participating in eight UN peacekeeping operations. Add to this the fact that the US has entered into Status of Forces Agreements (SOFA) and most of its peacekeeping missions are in countries with whom a SOFA exists, the US's objections and fears are unfounded.

100 Van der Vyver 1999: 110.

101 Shelton 2000: 234.

party states, but (1) given the political will of the international community to establish an international criminal court, of which the US professed to be part, (2) given the reason and purpose of the court,[102] and (3) given the complementarity of jurisdiction of the International Criminal Court as opposed to primacy of jurisdiction of the International Criminal Court over national jurisdictions, the Treaty of Rome represents the majority *opinio iuris* internationally, which represents significant development and progressive consensus on various issues.

After evaluation of the United States objections to the Rome Statute, it is clear that most of that country's concerns may be allayed.[103] The Rome Statute is essentially a document that is fundamentally consonant with the United States' interests. Much of the Statute reflects that nation's influence on its creation. By ratifying the Rome Statue, the ICC would inevitably be bolstered.

Franck and Yuhan, after an analysis of the United States' objections, conclude:

> "*…we found that the ideology underlying the US view of the Treaty of Rome also is not supported by international law. At its core, the US position must be viewed as another manifestation of a starkly unilateralist foreign policy".*[104]

Ratner observes on United States non-participation:

> "*On the other hand, the opponents of the ICC Statute in the United States completely misunderstand how international organisations work and how international courts work. International courts are not out to entrap the United States, but instead will want to work with it and gain its trust. The United States' exposure at the ICC is fundamentally not a legal question about the language of the Statute or about the powers of the judges; it is a political question about the ways that international organisations function".*[105]

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102 See Articles 6, 7 and 8 of the Rome Statute of the International Court enumerating and defining the crimes over which the court will exercise jurisdiction, i.e. Genocide, Crimes against humanity and War crimes.

103 Barrett 1999: 110.

104 2003: 555.

105 2003:451.

Wippman opines:

> "*Rather than pursue an aggressive unilateralism, it should work hard to generate compromise solutions. In the context of the ICC, this means that the United States should adopt a 'good neighbour' policy. It should not oppose the institution, as it is now doing, but should continue to pursue its interests by contributing to ongoing discussions, in keeping with the prior Administration's policy*".[106]

Perhaps the truest, but certainly not the expected last word on the reasons for the United States opposition to the International Criminal Court, comes from Professor William Schabas who concludes that the objection stems from the role of the Security Council in the operation of the International Criminal Court:

> "*The result at Rome was a new international institution, distinct from the United Nations and yet exercising authority in a field that had previously been occupied, albeit on a piecemeal basis, by the Security Council. In a sense, the Rome Statute was an attempt to effect indirectly what could not be done directly, namely reform the United Nations and amendment of the Charter. This unprecedented challenge to the Security Council accounts for the antagonism of the United States…".*[107]

These views are supported.

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[106] 2004:188.

[107] 2004: 720.

Chapter 10
Transitional justice: alternatives to international courts and tribunals as mechanisms for accountability and international justice

1. Introduction

This chapter will address the question of alternatives that have developed internationally in order to attain justice in societies that were previously subjected to human rights abuses. These mechanisms are alternatives to achieving accountability and therefore justice, as opposed to prosecutions before international criminal courts and tribunals. They all justify and establish the need for a credible international criminal justice order. Different mechanisms and the aims of transitional justice mechanisms are explored. The special court in Sierra Leone is used as illustrative example of a hybrid court and its relation to another transitional justice mechanism, namely that of a Truth and Reconciliation Commission. The chapter highlights obstacles and the impact of transitional justice models on the development of an international justice order. The chapter concludes that despite the obstacles of transitional justice efforts over the last two decades, important lessons may be learned from them and holistically viewed, the international community has made substantial progress in the establishment of a credible international justice order.

2. Transitional justice mechanisms

In transitioning societies, in other words, societies in a post-conflict situation, the new government is generally under obligation to provide measures of accountability and measures for redress of human rights violations and

abuses which were committed by its predecessors.[1] The latter statement cannot go unqualified however. Van der Vyver refers to Dugard who maintains that:

> "...*state practice at this time is too unsettled to support a rule of customary international law obliging a successor regime to prosecute those alleged to have committed crimes against humanity in all circumstances, and that it is unlikely that international law will develop 'sufficiently' to support such a rule*". [2]

That was however before the adoption of the Rome Statute establishing the International Criminal Court (1998). According to Van der Vyver, the ICC Statute:

> "*...has remedied that uncertainty as far as crimes within the subject matter jurisdiction of the ICC is concerned (which includes crimes against humanity): if the successor government is unwilling to bring perpetrators of any of those crimes to justice, the ICC can step in, secure the surrender of suspects to the ICC, and institute proceedings for their prosecution*".[3]

This obligation, according to Evenson, stems from the need for the creation of a social order that is capable of preventing future abuses.[4] They are therefore charged with what is referred to as "*transitional justice*", which in recent times has been the subject of much research.[5] The author confirms that it is recognised that as a minimum requirement for an effective regime of

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1 Evenson 2004: 730. See also Newman 2002 who states that "*A perennial challenge in post-conflict societies is how to balance claims for justice, truth and accountability with the need for peace and stability*". See also Cassese: 2003: 5 and further on the responses of individuals to gross atrocities and international crimes. These are (1) *revenge* whenever a collective or institutional response is lacking, (2) *forgetting* through the granting of amnesties, which invariably allows old wounds to 'fester' and manifest sometime in the future and (3) bringing perpetrators to trial.

2 1999: 13.

3 1999: 13. The interesting question is then posed as to whether the amnesty hearings of truth commissions will qualify as proceedings of 'another court' for purposes of the *ne bis in idem* rule, which aspect however will not be addressed in this work. See also Robinson 2003: 481 and further that makes certain propositions for the ICC in relation to other transitional mechanisms.

4 Evenson 2004: 730. See also Cassese 2003: 3 who observes: "*One of the striking features of the present-day international community, however, is the failure of collective bodies to discharge their function of preventing or punishing large-scale and serious violations of human rights amounting to international crimes".*

5 Evenson 2004: 730. See also Backer 2003: 297, for an analysis of the role that civil society has played in the development of transitional justice.

transitional justice, it is required that a record of past abuses be established, that it prevent future abuses through legal and institutional reform, and that it provide remedies for victims and punish perpetrators.[6] Criminal prosecution is the most common form of justice. It is not however always the most appropriate form of justice in every case, as Goldstone states.[7] Public and official exposure of the truth is itself a form of justice, which can also be brought about by truth commissions as well as by civil or criminal litigation. Therefore *justice* comprises two elements: the first is one in terms of which the victim is compensated, or the perpetrator is punished (retribution), and the second is the element of the revelation and recording of the truth.[8]

Apart from this basic model for an effective transitional or restorative justice system, Stromseth enumerates the following goals of accountability efforts[9]: *Justice:* the idea being, so she indicates, that "*individuals deserve to be punished for their offences but also warrant fair treatment and due process*". *Truth:* an accurate record of what took place is critically important, especially for families of victims. An accurate record of events is a recording of history for further generations, not only of the particular state, but also for humankind to learn from. *Deterrence and Prevention, Reconciliation:* however difficult and different to different cultures this may be. *Re-establishing the rule of law.* A point which the author does not make in this regard which is important, is that citizens of a state emerging from conflict are invariably are likely to have little, if any respect for the rule of law and this needs to be restored as a matter of great priority in order to prevent future recurrence of any form of lawlessness. This can only be achieved in its enormity, by intense public education. There is inevitably always some part of the citizenry which will come from a conflict situation feeling that they have been cheated and let down by the rule of law as the latter was evidenced to them during the repressive regime. Stromseth indicates that accountability efforts:

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6 Evenson 2004: 730.See also Werle 1995: 70 who states,…'*How the new order deals with the wrongs of the past is important to the legitimacy of democracy and a human-rights protecting rule of law'.*

7 1999:491.

8 Goldstone 1996: 491.

9 2003: 7 and further.

> "*...frequently are part of a larger struggle to establish or rebuild the rule of law domestically after a period of enormous conflict and trauma*".[10]

She indicates that it would *inter alia* also involve the strengthening of domestic legal institutions and capacities. Goldstone opines that there are five positive contributions which justice can achieve: (1) exposure of the truth can help to individualise guilt and thus avoid the imposition of collective guilt on an ethnic, religious, or other group; (2) it brings public and official acknowledgement to the victim, which is usually the first step in their healing;[11] (3) public exposure of the truth is the only effective way of ensuring that the history of the human rights violations is recorded accurately and faithfully than would otherwise have been the case; (4) there is only one way, according to Goldstone, to curb criminal conduct, and that is through good policing and the implementation of efficient criminal justice. This is no different in the international arena: if political and military leaders believe they are likely to be called to account by the international community for committing war crimes, that belief according to the author will have a deterrent effect; and (5) exposure of the nature of the human rights violations will assist in the identification and the dismantling of institutions responsible therefore and deters future recurrences.[12]

Within this emerging field of transitional justice, the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, the establishment of the International Criminal Court and the attempts to exercise universal jurisdiction by states such as Spain and Belgium amongst others, are cited as examples of transitional justice currently in practice. These developments are taken as strong indication of evidence for a general push towards prosecution as a primary mechanism of transitional justice.[13]

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10 2003:11. See further Werle 1995: 83.
11 Goldstone 1996: 489.
12 1996: 488 and further.
13 Evenson 2004: 731.

Where prosecutions are legally barred in a particular country because of possible amnesties[14] being granted to perpetrators of human right violations, or are otherwise found to be impracticable in the context of often-fragile peace in post-conflict situations, resort has been had to the so-called truth commissions as an alternative accountability mechanism.[15] Of late, truth commissions and criminal prosecutions through hybrid courts have begun to operate concurrently with one another in some post-conflict situations such as in East Timor and Sierra Leone.[16]

Evenson states that legal issues raised by the concurrent operation of these two transitional justice mechanisms include whether statements obtained by truth commissions should be admissible evidence in criminal prosecutions, and conversely, whether evidence obtained in court proceedings should be available to truth commissions. It is correctly pointed out as fairly obvious to accept that unless provision has been made for amnesty provisions, it is unlikely that a person will willingly testify before a truth commission if the person thereby exposes him/herself to criminal prosecution. The author points out that non-participation by perpetrators in truth commissions again affects the value or quality of the truth obtained by a truth commission.[17]

Much of the discussion relating to transitional justice has centred on four types of accountability mechanisms, namely: (1) international criminal justice bodies such as the ICTR, ICTY and the ICC, (2) the use of truth commissions,

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14 See Burke-White 468 on an analysis of amnesty legislation. See further Roht-Arriaza: 2000: 77 and further on amnesty and the International Criminal Court. See further also Meintjies 2000: 83 on the national and international legal effects of domestic amnesties. The author concludes that: "*[the] proposition that a domestic amnesty may be valid even when it conflicts with an international obligation to prosecute, serves to separate the issue of individual criminal accountability under international law from the question of whether a state has fulfilled its international obligations".*

15 Evenson 2004: 731. See also Backer 2003: 297-313 for the role of civil societies in transitional justice.

16 Evenson 2004: 731.See also Cassese 2003: 343. The author lists a multitude of historical and practical reasons to warrant the establishment of courts that are neither national nor international, but mixed. These are (1) an emergency situation, (2) a breakdown of a national judicial system, (3) that it is not necessarily a pure international tribunal that provides the most suitable solution to the particular circumstances, due to various reasons and (4) the using of the national judiciary under some kind of international scrutiny, is advantageous in various respects.

17 Evenson 2004: 732.

pioneered in Latin America and developed in South Africa, and now being used around the globe from East Timor to Nigeria and Peru, (3) transnational accountability efforts such as in the case of Spain's efforts to extradite Augusto Pinochet and (4) the use of the *Alien Tort Claims Act* in the United States to allow civil tort claims that are brought by victims of human rights abuses.[18]

Goldstone states that a country that wishes to deal with a past of serious human rights violations has a choice of four solutions: (1) the granting of blanket immunity from criminal prosecution or indemnity for past criminal acts; (2) allowing the regular justice system to operate and ordinary courts to try and sentence anyone proven guilty of criminal conduct prior or subsequent to the transition to democracy; (3) establishing truth and reconciliation commissions; or (4) establishing modified truth commission under which the most serious offenders remain subject to loss of office or even prosecution. Alternatively, according to Goldstone,[19] there is the opportunity to invoke the international community.

Evenson points out that comparatively little attention has been paid to a fifth and newly-emerging mechanism to ensure accountability and reconciliation, namely that of *hybrid courts*; so called because of its hybridism between that of a domestic and an international court.[20] The author illustrates that these courts are styled hybrid because their institutional apparatus as well as the applicable law that is used by them represents a blend of the international and the domestic. In these courts foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from foreign countries.[21] The hybrid model as transitional mechanism was developed in post-conflict situations where there existed no fully-fledged international tribunal such as in the case of East Timor or Sierra Leone or in places where an international tribunal did exist but could not cope

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18 Dickinson 2003: 295.
19 1996:492. See further Werle 1995: 70-83.
20 Evenson 2004: 732.
21 Dickinson 2003: 295.

with the caseload as in the case of Kosovo.[22] One reason advanced by Dickinson why hybrid courts have received relatively little attention may be that their hybridism has left them open to challenge both from those advocating increased use of formal international justice mechanisms and those who resist all reliance on international institutions.[23]

3. Sierra Leone: an illustrative example

In the summer of 2000, a severe accountability crisis developed in Sierra Leone at the end of a long civil conflict.[24] The justice system in this country was further strained to its limit as a result of the civil war. It was characterised by corruption and was ill equipped to handle the prosecution for atrocities that were committed during the civil war. The incoming Sierra Leonean president was opposed to a fully-fledged international tribunal because he was of the opinion that Sierra Leonean participation and ownership in the process of prosecution was important. Thus, in June 2000, the Sierra Leonean government requested the United Nations for aid in setting up a Special Court to try those who:

> "*…bear the greatest responsibility for the commission of crimes against humanity, war crimes and serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law within the territory of Sierra Leone since November 30, 1996*".[25]

A feature distinguishing of the Sierra Leonean tribunal from those of East Timor and Kosovo, is that it operates outside of the national court system.[26] ,

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22 Dickinson 2003: 295: The author points out that most recently an agreement has been reached to create a hybrid court in Cambodia and there is discussion that such a court may be established in postwar Iraq.

23 2003:296.

24 Dickinson 2003: 299. See also Evenson 2004: 733 who indicates the magnitude of the conflict by quoting the numbers of people who were victims of the conflict as 50 000 dead, 4 000 amputation survivors, 2, 000, 000 displaced internally, 500 000 refugees and at least 50 000 children who were turned into 'brutal' combatants. See 733 and further for a full description of the historical development of the civil crisis in Sierra Leone. See also Dougherty 2004: 311.

25 Dickinson 2003: 299.

26 Dickinson 2003: 299. See also Frulli 2000: 857 and further. Although the Sierra Leonean special court is a mixed tribunal referring to its staff composition, it differs

The hybrid institutional features are the same, however the staff are both international and domestic, the applicable law is a blend of the international and domestic, and its statute states that it will be guided by the decisions of both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda in respect to the interpretation of international humanitarian law.[27] Prior to the establishment of the special court/tribunal in Sierra Leone and in consequence of the *Lome Peace Accord*, the Sierra Leonean Truth and Reconciliation Commission was established with the mandate:

> "*to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story [and] get a clear picture of the past in order to facilitate genuine healing and reconciliation*".[28]

The *Lome Peace Agreement* of 7 July 1999, between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone, provided a controversial amnesty for perpetrators of the atrocities committed during the course of the civil war that began in March 1991.[29] The signing of the Lome Peace Accord did little to put an end to hostilities, as a result of which the request was made to the United Nations for the establishment of the special court by the signing of the *Special Court Agreement.*[30] The situation in Sierra Leone, where a special court and a truth and reconciliation commission run concurrently, highlights the potential problem mentioned above pertaining to evidence/statements obtained by the one being available for use by the other.
The Special Court in Sierra Leone is a treaty-based international institution implemented domestically by the *Special Court Ratification Act,* which binds the Truth and Reconciliation Commission, which is a national institution,

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from the ICTY and the ICTR in that it has jurisdiction over both international crimes and crimes that are prohibited under Sierra Leonean criminal law.

27 Dickinson: 2003: 300: the author points out that the court has jurisdiction to consider both cases both under international humanitarian law and under domestic Sierra Leonean law.

28 Evenson 2004: 737. See also Dougherty 2004: 318.

29 Schabas 2003: 1036.

30 Evenson 2004: 738.

created by national legislation.[31] The Special Court to a large extent is a response to this amnesty because the national courts that would ordinarily have had jurisdiction over offences committed in Sierra Leone are prevented from prosecuting offenders. In respect to events that have occurred since 7 July 1999, the Sierra Leonian national courts and the Special Court exercise concurrent jurisdiction.[32]

The establishment of the Special Court in Sierra Leone, despite obstacles, represents another positive step in the international struggle against impunity.[33]

3.1 The relationship between TRC and the Special Court

The special court is an international organisation and institutionally, it largely resembles the *ad hoc* tribunals of the ICTY and the ICTR, although the latter were created by the Security Council and are therefore blessed with international enforcement powers.[34] The latter is thus bound to comply with the orders of the former, relying on the primacy provisions contained in article 8 of the Special Court Statute.[35] The Special Court itself has confirmed this supremacy of the Special Court in the hierarchy between the two institutions. The Special Court was given, by article 8 of its Statute, a primacy over

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31 Evenson 2004: 745. See also Schabas 2003: 1037: The author points out that Sierra Leone, like most common law countries based on English law, is dualist and international agreements are not directly enforceable before its courts in the absence of such implementing legislation. The author shows that the Truth and Reconciliation Commission is a creation of the Parliament of Sierra Leone in pursuance of an undertaking found in Article XXVI of the Lome Peace Agreement. Further, that although it is seen as a national institution, it does possess an international dimension because of the participation of the Special Representative of the Secretary-General and the High Commissioner for Human Rights in its establishment. The bulk of the financing for the Commission has come from international donors, with the Office of the High Commissioner assuming principal responsibility for fund raising.

32 Schabas 2003: 1041.

33 Frulli 2000: 869.

34 Schabas: 2003: 1040. The author notes that like the Sierra Leonean Truth and Reconciliation Commission, the Special Court is funded by voluntary contributions from the international donors and its budget has been scaled down from an amount originally exceeding $100 million to approximately $56 million over a period of three years.

35 Evenson 2004: 745.

national courts of Sierra Leone (and, by implication, over national bodies like the TRC.)[36]

This clearly established a hierarchy between the Special Court and the TRC, although it does not address the issue of information sharing between the two, and may even be the cause of conflict between the two institutions.[37] In the TRC legislation there is explicit language providing for discretionary confidentiality for its hearings, while the Special Court's founding documents warrant the conclusion that the Special Court may possibly use coercive measures to force the TRC to share information, making vulnerable any protection of confidentiality before that body where apposite. It is recognised that the TRC is thus confronted with what it sees as a problem of public perception, and a fear that its ability to fulfil its mandate may be compromised by public confusion about the relationship between the two bodies.[38] Opposed to this conclusion, the TRC was left without a reciprocal ability to force disclosure of materials of the Special Court "*because its premises were made inviolable by international treaty and subsequent domestic implementing legislation*".[39]

The dilemma of information sharing was recognised and foreseen by the Special Court Task Force, which went so far as to identify certain factors, which it felt would limit the possibility negative impact of sharing information between the two institutions.[40] Ultimately,the Special Task Force recommended that the Special Court accept guidelines to protect

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36 Evenson 2004: 745.

37 Evenson 2004: 745. See also Schabas 2003: 1048-1051.

38 Schabas 2003: 1050.

39 Evenson 2004: 746.

40 Evenson 2004: 746: The author lists these as the pre-existing ban on using information gathered by the TRC as evidence in the Special Court, a ban imported through both the Special Court's adoption of the Sierra Leonean Criminal Procedure Act and the ICTR's Rules of Procedure and Evidence, which exclude truth commission statements as evidence because they are not cross-examined. The Special Court Task Force also relied on the ability of Special Court investigators to treat TRC information confidentially, and the ability of judges to conduct in camera sessions to receive confidential TRC information.

confidentiality, which guidelines however were never accepted by the Special Court.[41]

3.2. Self-incriminating evidence before the TRC

It is clear that it is probably that individual witnesses will present evidence before the TRC that is likely to incriminate them, and this is an issue that needs to be addressed. Schabas indicates that there is nothing in the *Truth and Reconciliation Act 2000* or in the Sierra Leonean Constitution, or in international human rights instruments to which the country is party, that prevents the Truth Commission from asking questions that might incriminate a witness, nor does anything entitle a witness to refuse to answer such a question. Non-cooperation with the TRC may be sanctioned by punishment for contempt of court and of course giving false testimony can be dealt with as the crime of perjury. This is in contrast to South African legislation, which specified that self-incriminating evidence given before the Commission could not be used in criminal prosecutions before the courts in South Africa.[42]

Thus, there would appear to be no legal guarantee against self-incriminating evidence being used against an accused in a prosecution before the Special Court or before the Sierra Leonean Courts.[43] Both institutions in Sierra Leone commenced their respective operations without clear guidelines to solve areas of possible conflict regarding information sharing and other coordination procedures.[44]

4. Impact and challenges of transitional justice experiences

4.1 Compromising justice

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41 Evenson 2004: 746.

42 Schabas 2003: 1051-1052.

43 Schabas 2003: 1052: According to the author, this could either be because the Sierra Leonean Parliament when it enacted the relevant legislation did not foresee any prosecutions, a consequence of the amnesty in the Lome Peace Agreement. Because of the amnesty it was probably thought there was no need to deal with the point directly.

44 Evenson 2004: 747.

The biggest obstacle in the way of establishing the Special Court in the case of Sierra Leone and others was how to pay for the court. At the time, during discussions on the establishment of this particular court, the ICTY and the ICTR were taking up more than 10% of the regular annual UN budget. For the reason of financial constraints, there were areas of great contention in the processes and discussions that led to the establishment of the Special Court in Sierra Leone, as a result of which it could be argued that the possibility existed that certain compromises could be made to the detriment generally of justice being sought and attained by that court. For example: the Secretariat suggested that the court's personal jurisdiction extends to "*those most responsible*", which is a broader formulation than the Security Council's wording of those "*who bear the greatest responsibility*". The Secretary-General recommended that the court have two trial chambers and have alternate judges available; the Security Council argued for a single chamber with no alternate judges. The Security Council got its way on virtually every aspect.[45] There was a considerable delay before the first trials could be heard which was the direct result of the standoff between the Secretariat of the United Nations and the Security Council over financial implications in establishing the court. This delay inevitably caused suspects to be held in custody for long periods, which in itself is arguably, contrary to international norms of due process. It is perhaps opportune that the international community be reminded in the words of Antonio Cassese, who was the first president of the ICTY:

> "*...that if the United Nations wants to hear the voice of justice speak loudly and clearly, then the Member States must be willing to pay the price*".[46]

There is no doubt that Cassese was referring to monetary contributions by member states. It is recognised that the Special Court of Sierra Leone was passive in its first 18 months of operation, and it is clear that it is asked to do too much with too little.[47] Is justice compromised by a lack of funding?

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45 Dougherty 2004: 318-319.
46 Dougherty 2004: 324.
47 Dougherty 2004: 324.

4.2 Legitimacy

Again learning from the Sierra Leonean experience, particularly its special court, it seems clear that a transitional justice mechanism needs to be perceived as legitimate in the eyes of the community it serves. Gberie [48] points out that critics of the Special Court in Sierra Leone have noted the dominance of Americans on the prosecutor's staff and in other key positions in the court. This created the perception that it is driven by an American agenda to undercut the arguments for the International Criminal Court which the United States has so far opposed on the grounds that the International Criminal Court will be used for politically motivated trials of American peacekeeping soldiers or servicemen who have seen action in foreign countries. This perception is further underscored by the fact that the US has pledged 30 percent of the court's budget and the fact that it was the US State Department which nominated the first prosecutor of the Special Court.[49]

It is further significant that the statute for the Special Court explicitly rules out the prosecution of foreign troops, unless a request is made for such a prosecution by the country sending the troops. The result of this is that it rules out prosecutions of Nigerian and other West African troops, some of them who are no doubt, according to Gberie, implicated in gross violations, including atrocities such as summary executions, rape and looting. [50] These negative perceptions were fuelled further when, in April 2002, the United States government reached an agreement with the Sierra Leone government, which committed Sierra Leone to an agreement not to surrender US soldiers to the ICC.[51]

Another point of criticism implicating negative perceptions of the Sierra Leonean Special Court is that the Court's huge budget compares negatively

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48 2003:643.
49 Gberie 2003: 643.
50 2003: 643.
51 Gberie 2003: 643.

with the under resourced Sierra Leonean judicial system.[52] This has led to the following complaint by local judiciary officials:

> "*...is the world only interested in the prosecution of a handful of notorious criminals while people in the country must continue to make do with a collapsed judicial system and the same venal petty officials who compounded the problems that plagued civil society in the country before, during and after the war?*"[53]

A holistic approach is required, taking into consideration the particularities of each country that stands to benefit from a particular transitional justice mechanism, to avoid perceptions as illustrated above and the international community needs to take cognisance. The challenge of post-conflict societies is how to balance claims for justice, truth and accountability with the need for stability and peace.[54] Newman describes this as follows:

> "*The rule of law is integral to democracy and, thus, within the framework of the law, accountability is essential for the justice that is owed to victims and the families of the victims, and also so that society and the institutions of democracy can be purged of repressive elements. In this context, justice and accountability involve the reform of institutions (such as the police, judiciary and armed forces). While impunity survives and where the perpetrators of injustice remain prominent in public or private society, democracy has little meaning*".[55]

4.3 Pragmatism

It has become clear that transitional justice in post-conflict and post-authoritarian situations is more often a process that is dictated by political compromises and practical constraints that are not present in normal societies. Often the way to deal with a past of human rights abuse is dictated by the terms of peace settlements and political transitions within the particular society. The expected result is that although justice is a key element in post-conflict situations it often stands to be neglected in the interests of peace and stability. As a result, increasingly in recent years, international norms are

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52 Gberie 2003: 643.
53 Gberie 2003: 643.
54 Newman: 2002:31.
55 2002: 35.

influencing the process as a result of which there is an increased consensus that some form of justice and accountability is integral to, rather than in tension with, peace and stability. This phenomenon is likewise witnessed by the role that the United Nations recently played in transitional justice endeavours and that, opposed to the idea of impartiality/neutrality, it is increasingly realised that there is "*an ethical dimension to peace*". As such the United Nations is now a conduit for the application of international norms and standards of accountability. More and more however the question is posed as to whether international justice is really viable in such situations or pragmatism and the need for stability, rather than justice, will be predominant.[56]

The opposing needs and challenges of transitional justice (in which lies the subtle dilemma) may be described as such: on the one hand, a sense of justice and accountability for the past is integral to peace building and installing a sense of trust and confidence into public life but simultaneously, on the other hand, the search for truth and accountability may be destabilising, and may prolong and obstruct the transition and consolidation of democracy and peace in the short term. Often the transition process requires the cooperation of the very individuals directly involved and responsible for human rights abuses in the past. In the end, the choice is simple: pardon or prosecute.[57]

There is however a further angle: justice and accountability in transitional societies may be necessary under international law covering human rights, and particularly crimes against humanity, genocide and torture.[58] Newman[59] cites as examples of a type of codified internationalisation of human rights the *Universal Declaration of Human Rights of 1948* and the subsequent *International Covenant on Civil and Political Rights in 1966*. The movement has strengthened in recent years, and has had, as a result, the placing of

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56 Newman 2002: 31, 47.See also Gberie 2003: 644 and further regarding the Taylor indictment in the case of the Special Court in Sierra Leone.

57 Newman 2002: 34.

58 Newman 2002: 35.

59 2002:36.

significant limitations upon the ability of governments to grant amnesties and clemency.[60] So, for example, Articles V and VI of the *Convention on the Prevention and Punishment of the Crime of Genocide* hold that perpetrators of genocide shall be punished irrespective of position or office, and that international mechanisms for pursuing justice shall be used if necessary.

Pressure against impunity was further witnessed by the influence of the *Inter-American Commission on Human Rights,* resulting in the observation that amnesties granted in Latin America in the recent past were arguably invalid under international law. Despite the interest in and role played by the international community however resources must also be used towards the development of indigenous capacity in transitional situations because many dilemmas and challenges would have to be addressed locally. In a broad context, transitional justice mechanisms have had the following profound influence on the development of international criminal and humanitarian law. Firstly, transitional societies have given rise to the development of a wide array of innovative instruments to expose and punish perpetrators of human rights abuses, and secondly, the transitional justice mechanisms or instruments has had an influence on how state sovereignty is influenced in the quest for international or global justice. Once-powerful heads of state, the designers and perpetrators of the some most serious human rights abuses of recent years are now faced with criminal prosecution and humiliation.[61] Such globalisation and new norms have converged to create a robust international sub-regime that can topple governments, jail once-powerful presidents, and cause tyrants to pause before committing war crimes. It must surely be hailed and acknowledged as substantial development in international law.[62] Sadly, serious flaws, which ought to be recognised, hamper these innovative measures.[63]

Call points out the following flaws:

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60 Newman 2002: 36.
61 Newman 2002: 36; Call 2004: 102.
62 Call 2004: 102.
63 Call 2004: 103.

(a) Truth Commissions

Truth commissions have served as second-best options to judicial punishment for perpetrators. They present the opportunity for misuse and deflect trials to lesser suspects and crimes. Many truth commissions have taken the statements of thousands of victims but very few from perpetrators. Partial accounts do not establish a widely agreed-upon account of the past, especially in circumstances when one faction is defeated and delegitimised in war. At the very best truth commissions are instruments of social peace and harmony and only complement mechanisms of retributive justice.

(b) International Criminal Tribunals

Although it is widely recognised that international criminal tribunals such as the ICTY and the ICTR have made major contributions towards breaking the cycle of impunity for gross violations of human rights abuses, these much-heralded new international instruments also have serious flaws. Again, there is a perception problem namely, as in the case of the ICTY, that it is a conspiracy, basically to punish the main enemy of NATO, the United States, and the west.

In the case of the ICTR, that tribunal is criticised for its slim accomplishment given its extraordinary cost. The meaningfulness of the endeavour is undermined further by the fact that the Tribunal is located outside Rwanda; only a tiny percentage of the hundred thousand perpetrators would be tried and the fact is that almost no public education or publicity surrounded the court's work.

(c) The International Criminal Court

Although according to Call the ICC is likely to address important deficiencies of the transitional justice mechanisms such as *ad hoc* tribunals, domestic trials, amnesties and third-country exercise of universal jurisdiction such as

the need to establish *ad hoc* tribunals wherever and whenever they may be required, creating procedures that apply more uniformly and fairly to states rather than leaving tribunal creation to an unrepresentative United Nations, is likely to leave serious obstacles in the way. The failure of some countries according to Call, notably the United States, to participate in the ICC, raises the following question about transitional justice: "*do individuals from wealthy and powerful countries enjoy impunity even as these countries 'apply justice to the rest of the world'*"?[64]

(d) Hybrid Courts

The East Timor experience shows that despite the fact that its Special Court finalised cases more speedily than did the ICTR or ICTY, it has also been beset by its own problems, particularly that of fairness. Many questioned whether the accused persons had received adequate defence. What is however more important in the case of East Timor is that those most responsible for human rights abuses live freely in Indonesia while their lower ranking officials spend years in jail.[65]

The hybrid court and truth commission created in Sierra Leone echoes many of the same flaws according to the author.[66] He points out that the court has had difficulties in meeting its budget; high-ranking suspects either died or fled and public education about the Special Court was ineffective as only 59 percent of the population in Sierra Leone supported the court's work.

On the one hand therefore, it is pointed out that the relatively new set of international norms that drive the development of international humanitarian law, including the development of international criminal law, has moved in the right direction for the creation of a global justice system. It is quickly and perhaps not unwarranted, as pointed out by authors like Call, that a structural problem in terms of the transitional justice sub-regime exists. This indicates

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64 2004:106.
65 Call 2004: 108.
66 Call 2004: 108.

disparities in that individuals from powerful or wealthy countries, especially the United States, enjoy significantly more immunity from international criminal prosecution. The disparity is illustrated in that while enforcing the norms of global justice, peacekeeping troops also generally enjoy the diplomatic immunity that is apportioned to intergovernmental bodies. It is further pointed out by Call that disparity also arises, based on where international organisations and donor governments choose to dedicate resources to dispense transitional justice. The author shows that in Bosnia, for example, the ICTY's indictments remained without effect until cooperative governments came to power or major powers decided to risk their troops in order to arrest war criminal suspects. In Indonesia, too, no major power has committed serious diplomatic leverage to take custody of those indicted by the Special Panels. Is transitional justice therefore really just if it occurs only to the extent that wealthy countries decide to support the creation of justice mechanisms, help to capture suspects and adequately fund these transitional mechanisms?

On a more positive note, and on the relationship between hybrid courts and international courts, Dickinson points out that although some critics have pointed out that hybrid courts are a mere second best alternative to international courts, the ICC's complementary regime ensures in general that it can only assume jurisdiction in instances in which national courts are unable or unwilling to investigate or prosecute. [67] It is often in these circumstances, so he points out, that national courts are unable to deal with large numbers of cases and because the volume of cases might also outstrip the ICC's ability to deal with them, that hybrid courts might be usefully employed. In addition, he believes, there are further positive spin-offs from the use of hybrid courts. They may foster a broader public acceptance, both as a result of national prosecutions, prosecutions by truly international courts such as the ICC and of course prosecutions by the hybrid or special court itself.[68] Hybrid courts may help, Dickinson points out, to build the capacity of the national judiciary itself as, as has been seen, the composition of hybrid courts is both domestic and

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67 2003: 308.

68 Dickinson 2003: 308.

international and because the judiciary in transitional societies are often incapacitated for various reasons after the occurrence of civil strife. They may further help to disseminate norms. No doubt the author is referring to acceptable international norms regarding the protection of human rights and the recognition of the emerging global quest for justice, including compensation for victims and accountability for perpetrators. He notes that this may help the ICC to function properly, in that it may help the ICC to gain legitimacy if it is seen and perceived to be working in tandem with a hybrid court. As far as norm penetration is concerned, he concludes that the existence of a hybrid court is more likely to foster the regional and domestic implementation of the norms articulated and interpreted in the jurisprudence of the international court.[69]

6. Conclusion

It is clear from the above that transitional justice mechanisms are not without their own peculiar obstacles, least of all when the international community requires intervention and financial commitments must be made. Valuable lessons may be taken from the various transitional justice mechanisms that have been applied in the last two decades. The credibility issue is an important one and the transitioning society needs to conceptualise itself as the owner of the whole process. Despite obstacles, a holistic view of what has been achieved by the international community since World War II and in particular in the last two decades, reveals that giant leaps have occurred to ensure that perpetrators of atrocities are brought to justice. This was in part brought about by a commitment by the international community of states that certain crimes are too heinous in nature to go unpunished or at the very least, unrecorded for future generations. The conclusion may therefore safely be made that recent time has ensured that even in the remotest corner of the global village, people and states are sensitised to their individual rights and duties in terms of human rights and humanitarian law.

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[69] Dickinson 2003: 309.

Chapter 11
International criminal law and prosecutions: a South African perspective

1. Introduction

This chapter investigates the status of international law in South African domestic law. When individual states exercise extraterritorial or universal jurisdiction over crimes, it is important to ascertain what status international law is accorded in the domestic law of that state.[1] For this purpose this chapter considers this status as having regard to the position prior to and after the enactment of South Africa's first democratic Constitution.[2] It refers to treaties as well as to customary international law and their incorporation into South African law, and considers the constitutional endorsement it now receives in sections 39, 231, 232 and 233 of the final Constitution of the Republic of South Africa 108/1996.[3] The chapter proceeds to record the *Implementation of the Rome Statute of the International Criminal Court Act,*[4] and considers South Africa's obligation to enforce international criminal law. Reservations have already been expressed in relation to the country's handling of the ex-Ethiopian dictator, Menghistu.[5] The chapter concludes that the necessary legislative measures have been put in place to allow South African Courts to exercise extraterritorial and universal jurisdiction over

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1 See Shaw 1997: 99 and further on international and municipal law. The author states: *"The role of the state in the modern world is a complex one. According to legal theory, each state is sovereign and equal. In reality, with the phenomenal growth in communications and consciousness, and with the constant reminder of global rivalries, not even the most powerful of states can be entirely sovereign".*

2 Act 108/1996.

3 This is relevant also in the sense that the general rule in international law regarding the position of domestic law is that a state which has broken a stipulation of international law cannot justify itself by referring to its domestic legal situation. See Shaw 1997: 102 and further.

4 27/2002.

5 Jessberger and Powell 2001: 353.

international core crimes, but that success will depend on the political will of the country in fulfilling its international obligations under international law.

2. The status of international law in the domestic law of South Africa

Botha, in an article written before the enactment of either the interim or the final Constitution for a democratic South Africa, points out the anomalous position of South Africa's past.[6] On the one hand it was a founder member "*of one of the first experiments at global international co-operation"* as a founder nation of the League of Nations and it further was the recipient of a mandate created and monitored in terms of public international law in its mandate over the then South West Africa (now Namibia). On the other hand, however, it was for a long time severely and universally condemned for its internal policy of apartheid long time. It has the dubious distinction to have been the first member state of the United Nations to have had its credentials rejected and its voting rights in the General Assembly suspended, and to have had international sanctions imposed against it in terms of Chapter VII of the United Nations Charter.[7]

It is therefore to be expected, as Botha notes, that when a government is at the receiving end of international displeasure, that that government's official approach to public international law must of necessity be hostile and reactionary. Such was the case with South Africa prior to its democratization.[8]

The position of international law arising from treaty as between states and including treaty law arising from multilateral conventions, has always been clear. This is also the case South Africa. The position is that treaty law must be incorporated into municipal or domestic law before the domestic courts of a state may apply it.[9] This interplay between South African domestic law and public international law is, however, not always clear-cut in Botha's view,, and

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6 1992/93: 36.
7 Botha 1992/93: 36, 37.
8 1992/93:37.
9 Botha 1992/93: 41.See also Shaw 1997: 124 and further.

has given rise to considerable debate in the past in South African academic circles. Botha identifies two principle schools of thought. The first approach as propagated by Dugard is that international law is part of South African law, and the second as proposed by Booysen, is that international law is a source of law available to South African courts in appropriate cases. The approach by South African courts reflected the one proposed by Dugard, but showed a stringent curtailment on the reception of international law "as part" of South African law.[10] Illustrative of this curtailment by South African Courts at the time, is the judgment in the case of *S v Petane*.[11]

The accused was *inter alia* charged with contraventions of section 54(1) of the *Internal Security Act 74 of 1982* but refused to plead to the charges because, so he claimed, the court had no jurisdiction to try him.[12] The accused alleged that he was in terms of the provisions of article 45(1) and 45(2) of Protocol 1 to the Geneva Conventions, entitled to be treated as a prisoner of war and as such he was entitled to have notice of an impending prosecution:

> "*...for an alleged offence given to the protecting power appointed to watch over prisoners-of-war, and since no such notice had been given, the trial could not proceed*".[13]

The principle question for decision in this case was thus whether Protocol 1 of this particular Geneva Convention was part of South African law. [14] The accused argued that despite the fact that neither party to the conflict agreed to

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10 Botha 1992/93:42.

11 1988(3) SA 51(C): See also reference to the case by Prevost 1999: 220.

12 1988(3) SA 52 (C): D-I.

13 1988(3) SA 52 (C) 54, A.

14 *S v Petane* 52: D-J and 53: A-D.: According to the head note to the case: "*Protocols 1 and 2 to the Geneva Conventions, both of which came into force at the end of 1978, were formulated to afford protection to victims and combatants in conflicts which fell outside the ambit of the provisions of the Conventions (which apply, in the main, to armed conflicts between states). The state of affairs existing in South Africa had been characterized as falling within the ambit of Protocol 1, Article 1(4) of which extended the scope of article 2 common to all Conventions to include 'armed conflict in which peoples are fighting against colonial domination and alien occupation and against racist regimes in their rights of self-determination. South Africa did not assent to Protocol 1. The other party to the conflict, namely the ANC through its military wing, in 1980 stated that it would endeavour to respect the terms of the Protocol but which the court found, fell short of an agreement to abide by it".*

abide by the Protocol, it nevertheless still bound them because the Protocol's provisions had been accepted by the international community, which acceptance made it part of customary international law. The accused further argued that such acceptance was evidenced by the practice of nearly every state in the world of expressing their frequent condemnation of South Africa's policies at the United Nations General Assembly.[15]

The court held that if a line of conduct that is frequently adopted by states (*usus*) was considered legally right or obligatory by those states (*opinio iuris*) then the rule that may be construed from the conduct may be considered as recognised customary international law. Despite this, the court found that such a rule would have to be widely accepted before it could be regarded as forming part of South African law. The court found further that it was doubtful whether resolutions passed by the United Nations General Assembly qualified as state practice and that it was only the material, concrete and specific acts of states that were relevant as manifestations of *usus.* Non-ratification, the court further held, was strong evidence of its non-acceptance into South African law. The court, in comparing the number of states that had assented to the terms of Protocol 1 by December 1986 (65 states) with the number of states that were parties to the Geneva Conventions (165 states), concluded that the approach of the world community to Protocol 1 was too half-hearted to justify an inference that it had been accepted as customary international law that would form part of South African law[16].

Botha, writing prior to the enactment of the Constitution of the Republic of South Africa,[17] expresses the hope that the new South African Constitution

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15 *S v Petane*: 52:H-J.

16 *S v Petane*: 52H-53C.

17 1992/93: 48. See also Botha 1996: 177 and further where the author examines the South African courts' application of international law and in particular the judgment in *Fose v Minister of Safety and Security 1993(2)BCLR 232(W).* The case *inter alia* concerned the application and interpretation of section 35 (of the South African Constitution) rights, where the plaintiff referred to decisions of the European Court of Human Rights delivered under the European Convention for the Protection of Human Rights and Fundamental Freedoms and Van Schalkwyk J somewhat summarily dismissed reliance hereon, stating that "…*the rights and their enforcement, all the product of international treaties, are so entirely distinguishable from an existing*

would afford recognition of international law as part of the South African law, remarking as follows:

> *"The prodigal son of the international community has come of age directly as a result of the workings of public international law. It has been a painful and very expensive process. It is no secret that our legal system is facing a credibility crisis. It would be somewhat naïve to expect that the mistrust and hostility generated over decades should be directed solely at the actual laws, which wrote apartheid into our statute books. For the general populace, these statutes have been applied and propped up by the common law, a common law, which has become tainted in the process".*

Oliver, writing on the status of international law in South African municipal law prior to democratisation, states that public international law has long been:

> "*...regarded as inferior by the South African government, legal practitioners and the judiciary alike*".[18]

The bench, so she opines, seemed reluctant to use its influence to temper the harsh effect of apartheid legislation by resorting to international common law principles.[19]

Prevost states:

> "*…under the doctrine of parliamentary sovereignty, the courts saw it as their task to give effect to the intention of the legislature, no matter how morally reprehensible such intention might be*".[20]

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common law system…that the precedent sought is more likely to confound than enlighten". This, according to the author, and it is submitted respectfully justifiably so, "*does not seem to reflect the reality of South African law in 1996"*. This is so because the drafters of the South African Constitution saw fit to include public international law (and particularly customary public international law) in the South African system of law as 'part of our law'. In terms of the South African Constitution, so the author argues, public international law is not the "*poor cousin*" in the common law of South Africa; the two are on equal footing. Botha proceeds to validly point out that that proper application of public international law by South African courts, may serve to restore the credibility of the common law, which in the case of South Africa, is perceived as fatally "*flawed*" by many.

18 1993/94: 1 and further

19 Oliver 1993/94: 1.See also Dugard 1999: 77 and further. The author reiterates that in the "old order" international law was generally viewed as an alien and hostile legal order.

20 1999: 219.

It was therefore hardly surprising according to her that:

> *"…one of the main points of criticism directed by the international community against apartheid South Africa was the country's non-compliance with norms of international law".*[21]

Previous South African constitutions made no mention of the status of international law in the South African legal order.[22] This era changed with the new South African constitutional dispensation. Both the 1993 (interim) and 1996 (final) constitutions changed this omission.[23]

3. Treaties and their incorporation into South African domestic law

Prior to enactment of the South African Constitution, the South African courts followed the dualist approach, requiring legislative transformation for treaty norms to have effect in South African domestic law.[24]

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21 Oliver 1993/94: 1. See also Prevost 1999: 211 on the driving forces and reasons for the change in South Africa concerning the 'new dynamic role for international human rights as continuously in dialogue with domestic mechanisms of human rights protection, thus ensuring compliance with internationally accepted standards'. The author points out that until the mid-twentieth century, the world's prevailing view was that international law was reserved to arrange relations between states. States and not individuals were seen as the subjects of international law. This all changed particularly after World War II as this study has indicated and the world community began to play a more active role in the enforcement of international law mainly, in the field of international criminal and humanitarian law, to prevent the recurrence of past atrocities. The change can secondly be ascribed to a change in the United Nations approach from passive to more active, which in the case of South Africa, led to increased UN action against South Africa. Prevost therefore ascribes the development of UN policy from initial non-intervention in domestic policies to eventual enforcement action as important in two respects: first it was instrumental to change in South Africa and secondly, it implies a recognition of the role of international human rights norms within domestic legal orders, particularly as a norm against which national policies may be judged. See also Vereshchetin 1996: 29 and further. The author (on 31) notes: "*The relationship between State and individual that traditionally existed in the domain of internal law, no longer can be considered a purely domestic affair*".

22 Shaw 1997:124 and further. The South African Constitutions of 1910, 1961 and 1983 were silent on the question of the status of international law within national law.

23 Dugard 1999: 51. See also Dugard 1997: 77. The author observes: "*Whereas international law was previously seen as a threat to the state, it is now viewed as one of the pillars of the new democracy".* See also Shaw 1997: 125.

24 Prevost 1999: 220. See also Dugard 1997: 81 and further.

Section 231 of the South African Constitution deals with international agreements.[25] Before 1994 South Africa followed the dualist approach regarding treaties and their incorporation into South African law. Only those treaties incorporated by act of Parliament became part of South African law.[26] This situation was departed from radically in the 1993 (interim) Constitution in which the executive, (while retaining its power to negotiate and sign treaties) the National Assembly and Senate were required to agree to the ratification and accession to treaties.[27] Treaties ratified by resolutions of the two houses of Parliament became part of South African law, "*provided Parliament*

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[25] Act 108 /1996. "*(1) The negotiating and signing of all international agreements is the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification of accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. (5)The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect*". Dugard 1999: 58: is of opinion that the proviso built into section 231(4) regarding a "*self-executing*" provision of an agreement, is bound to create problems as it has in the United States. South African courts will be required to decide whether a treaty is self-executing in the sense that existing law is adequate to enable the Republic to carry out its international obligations without legislative incorporation of the treaty or whether obligations without legislative incorporation of the treaty is non-self-executing in which case further legislation is required. See also Shaw 1997:125.

[26] Dugard 1999: 54, 55. See also Maluwa 1998: 48 and further on the "*monist*" and "dualist" approaches on the question of incorporation of international law into domestic legal systems, particularly the English common law and civil law approaches.

[27] Dugard 1999: 55. See also Maluwa 1998: 43 and further. The author notes that in comparison to the rest of Africa, the constitutional recognition of customary international law in South Africa are virtually unparalleled in that most African States in their constitutions, only recognise the inclusion of treaty law as part of their municipal systems of law. The question therefore in those countries of whether customary international law is part of their domestic law, according to the author, is therefore one that has to be resolved through a consideration of the relevant theories on the relationship between international law and municipal law, and not on the basis of the particular constitution in question. Similarly the author notes, the question of whether or not the courts may invoke international law as an aid to interpretation, is one that has depended on the particular rules governing statutory or constitutional interpretation in the legal system concerned. The consideration of such a theoretical question in South Africa is unnecessary due to the constitutional inclusion of the recognition provisions in the South African Constitution.

expressly so provides".[28] The drafters of the final Constitution elected to return to the pre-1994 position relating to the incorporation of treaties, without abandoning the need for parliamentary ratification of treaties.[29] Dugard comments that:

> "*…it is unfortunate that the realities of the bureaucratic process compelled the Constitutional Assembly to require an Act of Parliament or other form of 'national legislation' in addition to the resolution of ratification, for the incorporation of treaties into municipal law*".[30]

According to him this represents an "*abandonment of the idealism of 1993 that sought to bring international law and domestic law in harmony with each other".* The 1996 (final) Constitution further recognises the distinction between formal treaties that require parliamentary ratification and less formal treaties that do not.[31] Where an international agreement is however not of a "*technical*", "*administrative*" or "*executive*" nature, that treaty in terms of Section 231(4) does not become part of South African law, until it is enacted into law by national legislation.[32]

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28 Dugard 1999: 55: According to the author the clear purpose was to facilitate the incorporation of treaties into domestic law. Dugard however points out that the drafters of the interim Constitution failed to take bureaucratic delays in mind in that Government departments required to scrutinize treaties before they were submitted to Parliament in order to ensure that there would be no conflict between the treaty provisions and domestic law. This resulted in few treaties being presented to Parliament expeditiously and parliamentary procedures for dealing with treaties further delayed ratification. The overall result was that few of the treaties ratified by Parliament were incorporated into domestic law.

29 Dugard 1999: 55.

30 1999: 56.

31 Dugard 1999: 56. The author points out that while treaties that expressly or by necessary implication require ratification will have to be approved by Parliament after signature, "technical", "administrative" or "executive" agreements, and agreements that do not require ratification or accession will come into force upon signature. The author recognises that this may lead to disputes as to the meanings of "*technical*" "*executive*" or "*administrative*" in the context of treaty law and suggests that ultimately these matters will be decided as a question of intention. He continues: *"Where parties intend that an agreement is to come into force immediately without ratification at the international level, it would be ridiculous for the South African Parliament to insist on parliamentary approval".*

32 Dugard 1999: 57. The author points out that three methods are employed by the legislature to transform treaties into domestic law: the provisions of a treaty may be embodied in the text of an Act of Parliament; the treaty may be included as schedule to a statute; and thirdly an enabling Act of Parliament may give the executive the power to bring a treaty into effect in domestic law by means of proclamation or notice in the Government Gazette. See also Oliver 2003: 239 and further. See further Dugard 1997: 83. According to the author, the proviso to section 231(4) of the South

The succession to existing treaties by the new democratic regime in South Africa did not involve any change in the statehood of South Africa, simply a change in government. It was consequently, as a matter of international law, not necessary to provide for succession to treaties as a new government automatically succeeds to the rights and obligations of its predecessor.[33] Despite this, the final Constitution provides in section 231(5) as follows:

> "*The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect".* ***34***

4. Customary international law

Customary international law had been recognised as part of South African common law prior to democratisation, and the courts were free to rely on it unless it conflicted with South African legislation.[35] The judiciary however:

> "...*took a very narrow view of the meaning of customary international law"*.[36]

Customary international law is now given constitutional endorsement by section 232 of the final Constitution, which provides that:

> "*Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*".[37]

African Constitution is 'bound to create problems as it introduces the concept of self-executing of treaties into South African law. The provisions of a treaty ratified by Parliament, but not incorporated into municipal law by the Act of Parliament, that are 'self-executing' become part of municipal law unless inconsistent with the Constitution or an act of Parliament. Whether the provisions of a treaty are self-executing or not has troubled the courts of the United States for many years. Now South African courts will be required to develop their own jurisprudence on this subject'.

33 Dugard 1997: 83.

34 108/1996.

35 Prevost 1999: 219.

36 Prevost 1999: 219. The author refers to the case of *Nduli and another v Minister of Justice and others 1978(1) SA 893 (A)* in which the South African Court of Appeal was called to decide on the matter and in which it confirmed that international law was part of South African law but found that the *fons et origo* of this proposition had to be found in Roman Dutch law. It then limited the rules of customary international law in order for it to be recognised, to those which were either universally recognised or assented to by a country. The author proceeds to refer to *S v Ebrahim 1991(2) SA 553 AD* in which the court held that that case had to be decided in terms of the Roman-Dutch common law and not international law rules.

37 Dugard 1999: 51.

Dugard points out that the first effect of the "*constitutionalisation*" of the rule gives it additional weight. Second, that customary international law is no longer subject "to subordinate legislation". It is only a provision of the Constitution itself, or any other Act of Parliament that is clearly inconsistent with customary international law that will take precedence over it.[38] This aspect is confirmed by section 233 of the Constitution that provides:

> "*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law*".[39]

Dugard points out that the effect of this provision is that there can be no suggestion that a new rule of customary international law must give way to South African judicial decisions recognising an earlier rule. The effect is that the doctrine of *stare decisis* cannot be invoked as an obstacle to apply a new rule of international law.[40]

For the sake of comprehensiveness on the status of international law in South African domestic law, section 39 of the South African Constitution,[41] should be mentioned. This section determines:

> *"39(1) When interpreting the Bill of Rights*
> *(a) a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
> *(b) must consider international law; and*
> *(c) may consider foreign law.''*
> *.*

Dugard concludes that the 1996 South African Constitution seeks to ensure that the South African law will evolve in accordance with international law. In this regard the Constitution itself serves as the corner-stone for this to happen.[42]

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38 Dugard 1999: 52.
39 Act108/1996.
40 Dugard 1999: 52.
41 108/1996. See also Oliver 2003: 293 and further.
42 Dugard 1997: 92.

5. Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

South Africa was one of the driving forces for a strong and independent International Criminal Court. In order to facilitate South Africa's early ratification of the Rome Statute, an interdepartmental committee was established under the responsibility and auspices of the South African Department of Justice.[43] South Africa ratified the Rome Statute on 10 November 2000 and in July 2001 the Minister of Justice introduced an Act:[44]

> "*To provide for the incorporation of the Rome Statute of the International Criminal Court into South African law; the implementation and enforcement of the Rome Statute of the International Criminal Court in South Africa; cooperation with the International Criminal Court; the arrest and surrender of persons to the International Criminal Court; and to provide for matters connected therewith".*[45]

On 18 July 2002, the South African Parliament passed the *Implementation of the Rome Statute of the International Criminal Court, Act 27 of 2002*.[46] The act ensures that South Africa complies with its obligations as a state party to the Rome Statute of the International Criminal Court. The act illustrates South Africa's support of the International Criminal Court system.[47] South Africa was the twenty-third state to ratify the Rome Statute on 27 November 2000. In the preamble to this Act, the programme of action or declaration of intent with regard to the broad principles of the Act is captured, referring firstly to the suffering that millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression of international law. Secondly it briefly refers to the history of the Republic of South Africa "*with its own history of atrocities and the fact that since 1994 the country had become an 'integral and accepted member of the community of nations'"*[48]

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43 Jessberger and Powell 2001: 344-345.
44 Human Rights Watch on http://www.hrw.org/press/2000/11/safricaicc.htm 9/6/2004.
45 Jessberger and Powell 2001: 345.
46 Human Rights Watch on http://www.hrw.org/press/2000/11/safricaicc.htm 9/6/2004.
47 Du Plessis 2003: 1.
48 Preamble Act 27/2002.

Thirdly it proceeds to reflect the Republic's commitment to:

> "*...bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute; and carrying out its other obligations in terms of the said Statute".*[49]

States that have ratified the Rome Statute now have the obligation, as South Africa has, to make its national criminal law coextensive with the international criminal justice system in general and the International Criminal Court in particular.[50] The pertinent questions that need to be addressed in the implementation process, as the South African Implementation Act purports to do are, first whether the domestic legislation has been adapted to ensure that the crimes within the International Criminal Court Statute are also crimes under domestic law, and second, whether the domestic legislation should be adapted to ensure that, if international crimes are committed outside the territory of a state, these crimes may be prosecuted by the domestic courts of that state.[51] Du Plessis feels that the advantage of the Rome Statute is that it brings into South African law a codified statement of the elements, which make up the crimes of genocide, war crimes and crimes against humanity. The ICC's definitions of the core crimes were therefore directly incorporated

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49 Preamble: Act 27/2002. See also McGregor: 2001: 32 and further on individual accountability in South Africa. The "*other obligations*" that are referred to in the preamble of the act undoubtedly refer to: (1) section 14, "*areas of cooperation and judicial assistance*",(2) section 15, "*request for assistance in obtaining evidence*", (3) section 16, "*examination of witnesses*", (4) section 20, "*transfer of prisoner to give evidence or to assist in investigation*", section 21, "*service of process and documents*", (5) section 27, "*registration of confiscation order*", section 30, "*entry, search and seizure*", section 31, "*designation of Republic as State in which sentences of imprisonment can be served*", section 32, "*enforcement of sentence of imprisonment*". See further Du Plessis: 2005: 197.

50 Jessberger and Powell 2001: 346.See Werle and Jessberger 2002: 191-223 on the implementation process of the ICC Statute into German domestic law.

51 Jessberger and Powell 2001: 346.

into South African law. These crimes are thus now part of South African law through the Act.[52]

Article 4(1) of the Act establishes jurisdiction for a South African court over ICC crimes.[53] Extra-territorial jurisdiction is provided for in article 4(3) which provides that a South African court's jurisdiction will be triggered when a person commits an ICC crime outside the territory of the Republic, and (a) that person is a South African citizen,[54] or (b) that person is not a South African citizen but is ordinarily resident in the Republic[55] or (c) that person, after the commission of the crime is present in the territory of the Republic,[56] or (d) that person has committed the crime against a South African citizen or against a person who is ordinarily resident in the Republic.[57]

Section 2 of the ICC Act provides that a South African Court, which is charged with the prosecution of a person responsible for a core crime, shall apply "*the Constitution and the law*".[58] The "*law*", according to Du Plessis, will include "*conventional international law and in particular the Rome Statute*".[59]

6. The obligation to enforce international criminal law

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52 Du Plessis 2005: 197.

53 Act 27/2002.

54 This asserts the nationality basis for jurisdiction.

55 Du Plessis 2005: 199. This exerts jurisdiction over South African residents on the basis that they have a close and substantial connection with South Africa at the time of the offence.

56 This trigger according to Du Plessis 2005: 199 is grounded in the idea of universal jurisdiction, namely jurisdiction which exists for all states in respect of certain crimes that attract universal jurisdiction by their repulsive nature. According to Du Plessis this kind of jurisdiction must be welcomed as the crimes of genocide, crimes against humanity and war crimes are amongst the most serious crimes that concern the international community as a whole.

57 Du Plessis 2005: 198. This trigger is founded in the passive personality principle in international law according to which a state has the competency to exercise jurisdiction over an individual who causes harm to one of its nationals abroad.

58 See also Du Plessis: 2005: 199.

59 2005:199. This according to the author means that the general principles of international criminal law that are applicable to the crimes of genocide, war crimes and crimes against humanity, including the available defences contained in the Rome Statute, ought to find application in a South African Court should such prosecution take place.

Tradition within international criminal law generally differentiates between the direct and indirect enforcement of the law. In terms of the former, the responsibility for enforcing international criminal law vests with international institutions, while the latter leaves it to the individual state to prosecute and punish (or extradite for) crimes against international law.[60] The success of an international criminal justice system therefore depends hugely on the cooperation and assistance of states in apprehending and handing over alleged offenders and where possible, apprehending, prosecuting and punishing within the domains of the national justice system.[61] So also the South African ICC Act is premised on the understanding that the ICC will in most circumstances rely heavily on the support of member states' national jurisdictions in order to gain custody of suspects.[62] After the arrest pursuant upon a warrant, the South African authorities will in terms of section 10 of the ICC Act become engaged in the "*surrendering*" or "*delivery*" of the suspect to the ICC.[63]

It is therefore one thing to have supported the newly-created International Criminal Court so enthusiastically, but quite another, and one that only the future will tell, for South Africa to fulfil its obligations in terms of the Rome Statute. Already reservations have been expressed regarding South Africa's true commitment in this regard in relation to its reaction to criminal charges

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60 Jessberger and Powell 2001: 347. See also Du Plessis: 2005: 196. According to the author South Africa had no domestic legislation on the subject of war crimes and crimes against humanity and no prosecutions of international crimes had taken place in South Africa.

61 Jessberger and Powell 2001: 347. See also d'Oliviera 2003: 323 and further on the South African contribution to international co-operation in criminal matters. See also Werle and Jessberger 2002: 193.

62 Du Plessis 2005: 201.The author points out that the ICC Act envisages two types of arrest. The first is an arrest in terms of an existing warrant for arrest issued by the ICC and the second is an arrest warrant issued by the South African National Director of Prosecutions. In both instances the warrant will have to be endorsed or issued and executed in a manner as near as possible to the requirements thereof in terms of existing South African law.

63 Du Plessis 2005: 202. The author points out that in order to make a committal order on a warrant of arrest, a South African magistrate would have to be satisfied that (1) that the person named in the warrant is the person before the court, (2), that the person has been arrested in terms of the procedures dictated by domestic law, (3), that the arrested person's rights as contemplated in the South African Bill of Rights have been respected in so far as they may be applicable.

against the ex-Ethiopian dictator, Menghistu.[64] The establishment of the International Criminal Court creates an independent international prosecuting agency permanently added to national justice systems, but ironically, increases the responsibility of individual national criminal justice systems to enforce international criminal law indirectly.

Realistically, one must recognise that the International Criminal Court will be able to prosecute only a few symbolic cases. Growing world awareness and resultant media coverage will increase the pressure on domestic justice systems to prosecute, which was so dramatically illustrated in the Pinochet case. States will therefore bear increased responsibility for the prosecution of international crimes because of their declared commitment, as in the case of South Africa, to the principle of complementarity and the decentralised justice system that underlies the International Criminal Court Statute.[65]

7. Implementing international criminal law

This may also be referred to as constitutional issues.[66] A state that ratifies the Rome Statute has to ensure that its national law is compatible to that of the Rome State because of the obligations that the latter places on the ratifying state.[67] According to Duffy, this raises three issues: first, the particular state's compatibility with the Rome Statute as far as constitutional prohibition on the extradition of its nationals is concerned, and second, the compatibility as far as constitutional immunities are concerned such as those conferred on heads of state or parliamentarians, and third, relating to compatibility issues on constitutional prohibitions on imposing life imprisonment. An important factor, on which the implications of potential inconsistency will depend, is the

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64 Jessberger and Powell 2001: 353.

65 Jessberger and Powell 2001: 348.

66 Duffy 2001: 6 and further.

67 See however Werle and Jessberger 2002: 194 who note as follows: *'However, the ICC Statute does not establish any obligations as regards the transposition of the substantive criminal law of the Statute into national legislation. In this respect it differs from most other international treaties in the field of criminal law. Neither Statute provisions nor the underlying principle of complementarity oblige states parties to enact criminal legislation or even to ''copy'' the ICC Statute. The threshold test established by the Statute is willingness and ability of the state to prosecute'.*

relationship between international treaty law and the constitution in any particular domestic legal system.[68]

Two basic models can be distinguished when the process of insertion of international crimes into domestic legislation takes place. The first approach is the "*reference*" model, which is "*simple and economical"*.[69] The national legislation would simply refer to the international law it wished to implement. The only disadvantage of this model is however, that the actual content of the crime is taken out of the hands of the national legislative process.[70] A second clear indication of this method is that the Rome Treaty will take precedence over other constitutional provisions in the case of any conflict or incompatibility. The second model is referred to as the "*codification*" model.[71] This lattermodel has the advantage that it is clearer and that it really forces Parliament to thoroughly analyse and approve every detail of the international law it wishes to legislate. It also allows the national legal system to adjust international criminal law to the structure and characteristics peculiar to its own national justice system.

Most Southern African states are, like South Africa, in favour of a strong International Criminal Court and are supportive of the ICC project. To help and facilitate the implementation process, the Southern African Development

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68 Duffy 2001: 7. The author indicates that this differs from country to country: many constitutions provide that certain ratified treaties, particularly those relating to human rights, take precedence over domestic laws. Others afford such treaties constitutional rank, or provide that in certain circumstances they should have pre-eminence over certain constitutional provisions. In some exceptional cases, some national constitutions, and the author cites Paraguay as an example, provide that the 'country accepts a supranational legal system that would guarantee the enforcement of human rights, peace, justice and cooperation, as well as political, socio-economic, and cultural development'. Reactions by states to these constitutional issues, according to the author, fall into two categories: there are those states, relatively small in number, that have decided to amend their constitutions to ensure compatibility with the Rome Statute, and the second growing number of states that have concluded that their constitutional provisions are consistent with the Rome Statute and thus that amendment is unnecessary.

69 Jessberger and Powell 2001: 353. See also Cassese 2005: 220 and further.

70 Jessberger and Powell 2001: 352. See Duffy 2001: 9. So for example article 53.2 of the French constitution now reads: "*The Republic may recognize the jurisdiction of the International Criminal Court under the conditions specified by the treaty signed on July 18, 1998*".

71 Jessberger and Powell 2001: 352.

Council (SADC) presented its members with a "*Model Enabling Act*" in 1999. Under part II of the *Model Act*, the International Criminal Court crimes are incorporated by reference in that section 5 provides for the imposition of a criminal sanction on any person who commits any of the crimes specified in Articles 6 and 7 and of the International Criminal Court Statute. Like the Southern African Development Council Model Act, the South African Act follows the "*reference model*" in that section 4(1) of the Bill provides that:

> "*…any person who commits a crime contemplated in Article 5, read with article 6,7, 8 and 9 of the ICC Statute, shall be liable to conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment*".[72]

Basic to, and a feature of the complementarity principle as expounded by the International Criminal Court Statute, is that crimes should be prosecuted regardless of where they have been committed. The grand vision is a:

> *"…worldwide net of jurisdictions, willing and able to prosecute, with as few loopholes as possible".*[73]

Here the ideal would be that in this system every individual state should be able to prosecute a crime whether it is committed on its territory or on the territory of any other state. This requires the exercise of extra-territorial jurisdiction by a state wishing to prosecute, an aspect extremely relevant in international law and controversial as a possible infringement of state sovereignty, as has been alluded to previously in this thesis. This is despite the fact that certain principles in international law already allow states to exercise extra-territorial jurisdiction.[74] Ways in which national or domestic criminal law may be extended to cover acts committed outside the territorial borders of a state wishing to prosecute, are by application of the principle of universal jurisdiction. The rationale for the universal jurisdiction principle is

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72 Jessberger and Powell 2001: 356.

73 Jessberger and Powell 2001: 356.

74 Jessberger and Powell 2001: 357. See also Du Plessis 2003: 7: The author notes: "*The International Criminal Court, with sufficient deference to state sovereignty, works on the assumption of co-operation between itself and national law-enforcement systems of States Parties in the bringing to justice of individuals accused of committing core crimes*".

simply, as has been pointed out before, that certain crimes are so heinous by their nature, that they constitute crimes against humanity as a whole. Alternatively, extending national law to acts committed outside the prosecuting state's boundaries is accomplished by applying the nationality or passive personality principles, which link jurisdiction to the citizenship of the offender or the nationality of the victim. Most common law jurisdictions provide for only territorial jurisdiction.[75] Here New Zealand is one of the few exceptions. Canadian law is far-reaching, but does however require a link to Canada. Section 6 of their *Crimes against Humanity and War Crimes Act* makes it an offence to commit the crime of genocide, crime against humanity or war crimes, not only on Canadian territory but also outside of Canada. Any such crimes may be prosecuted in Canada, but section 8 clarifies that a prosecution for a crime under section 6, namely a crime committed outside of Canada, will only be brought against a person if there is present one of several links to Canada.[76] Section 8(a) makes it clear that Canada employs the active and passive personality principles when it exerts its jurisdiction over any Canadians who commit International Criminal Court crimes and over any non-nationals who commit such crimes against Canadian citizens. Additionally, and this is styled "*limited universal jurisdiction*", or "*custodial jurisdiction*" in terms of section 8(c), the offender may be prosecuted in Canada even if the offender or the victim is a non-Canadian citizen, on condition only that the offender is present in Canada.

Although the SADC Model Act, like the New Zealand Act, recommends pure universal jurisdiction, the South African ICC Act does not follow the model to the full. Article 4(2) provides for extraterritorial jurisdiction over South African nationals and non-nationals, ordinarily resident in South Africa, as well as

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75 Jessberger and Powell 2001: 357. The authors point out that in this regard, New Zealand is a remarkable exception: it is "*one of only a few countries to claim true universal jurisdiction. Under section 8(1) (c) of the International Crimes and International Criminal Court Act, proceedings may be brought for a crime of genocide, war crimes or crimes against humanity regardless of the nationality of the accused, whether or not the crime was committed in New Zealand or abroad, and whether the accused was in New Zealand at the time a decision was made to charge the person with an offence*". No link to New Zealand is therefore necessary.

76 Jessberger and Powell 2001: 357.

non-nationals who commit the crimes against South African nationals. In addition however, the Act does employ limited or custodial jurisdiction by allowing South African courts to prosecute any person who is present in South Africa after commission of an offence under the Act.[77]

8. Conclusion

The above illustrates South Africa's response to the need for an international criminal justice system and demonstrates the international community's demand that individual states take a strong stand against international core crimes. However, the success or not of South Africa's re-entry to its rightful position within the international community will depend, as with the rest of the world, on its political will to utilise the opportunities it has created for itself against international criminals.[78]

Finally, the warning of Katz should be heeded. In an article on the incorporation of extradition agreements into South African law, the author states that:

> "*...provisions in extradition agreements, whether bilateral or multilateral, assist not only in the operation of international co-operation in criminal matters, but also in the protection of the rights of persons subject to an extradition request. It is important that extradition agreements are properly incorporated in South African law in accordance with the requirements set out in the Constitution. This is so because it is important not only to protect the rights of those subject to extradition but also to deal with transnational criminal activities in the on-going and increasingly complex nature of international crime in a lawful manner".*[79]

The question of immunities remains contentious because although the ICC Act provides South African courts with jurisdiction over all persons who may have committed the crimes proscribed in the ICC Act, including heads of state

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77 Jessberger and Powell 2001: 359.
78 Du Plessis 2003: 1.
79 Du Plessis 2003: 321.

and government officials, the position in international law pertaining to immunities before national courts remains less obvious.[80]

South Africa has attempted to escape this controversy by providing in section 4(2) (a) of the ICC Act that notwithstanding "*any other law to the contrary, including customary and international law, the fact that a person is or was a head of state or government or parliament, an elected representative or a government official*", is neither grounds for defence nor grounds for mitigation of sentence.[81] Even if a South African court were to decide to uphold the immunity of a foreign official, it should be borne in mind that it then would still be expected of South Africa, as a states party to the ICC, to ensure that the latter indeed does exercise its jurisdiction over the accused.[82]

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80 Du Plessis: 2005: 207. This was referred to in Chapter 7 of this thesis where it was indicated that the British House of Lords retained absolute *rationae personae* immunities for serving international functionaries. This was also confirmed by the subsequent *Congo v Belgium* case before the ICJ. Du Plessis 2005: 208 observes as follows: "*With regard to the provisions precluding immunity found in the constitutive instruments of a myriad of international criminal tribunals (the most recent being the Rome Statute of the ICC), the Court expressly held that this exception to customary international law was not applicable to national courts. This case law therefore suggests that the diplomatic or head of state immunity of an accused prevents national courts from dealing with allegations of international crimes unless that immunity has been waived, or the senior official has left office".* Quite justifiably Du Plessis points out that this lack of clarity is problematic in the light of the fact that national courts of states parties to the Rome Statute are expected to act in a 'complementary' system with the ICC, prosecuting individuals for ICC crimes and only deferring to the ICC when they are either unwilling or not able to prosecute themselves.

81 Du Plessis 2005: 208. The author further observes that support for the argument that section 4(2)(a) of the ICC Act indeed does do away with immunity under customary international law derives from the South African Constitution itself which in its section 232 provides that "*customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*".

82 Du Plessis: 2005: 209. The author further points out that such an obligation will only rest on South Africa if the accused was a national of a state that is also a party to the Rome Statute. This is so because it may then be said that both states, by subscribing to the Rome Statute, in particular with reference to article 27 of the ICC Statute, have accepted that the constitutive instrument has scrapped immunities for heads of state and other government officials. An attempt to prosecute an individual in these circumstances where the accused is not a national of a state that is not a party to the Rome Statute, conversely would mean that South Africa is acting inconsistently with its obligations under customary international law and similiarly the ICC would not be able to request surrender of the accused from South Africa. See also in this regard Cassese 2003: 301. The author indicates that State practice shows that there are no international *customary* rules that allow a general obligation on States to exercise jurisdiction on any other grounds as have considered above. It is only treaties, such as the Rome Treaty establishing the ICC that allow for such general obligation on states.

Chapter 12
Conclusion: is the world moving towards an international criminal justice order and is such a need validated?

1. Introduction

This chapter concludes the research. It draws the conclusion that accountability is a cornerstone for a credible international criminal justice order and that the establishment of the ICTY, the ICTR and the ICC has provided much of the impetus for this. Finally, in recent years, as is aptly described,

> *"…enforcement has finally begun to catch up with the development of substantive law, beginning the transformation of international criminal law from a set of unenforced, seemingly hortatory norms into a body of law backed by institutions, precedents, and convictions of offenders".*[1]

It further concludes that opposition of states to the ICC should not impede on the accelerated development of an international criminal justice order due to the fact that states have grown aware of international community's regard for the reprehensibility of core crimes and their responsibility to either prosecute domestically or to submit to prosecution by an international court. The original conception of the international legal order was a kind of "*private law*" between equal sovereign nations. It was thus viewed as the contractual relationship between states parties. As a result of this conception, the idea of an international criminal law, which by its nature had to involve a public law dimension with an underlying system of shared social ethics, seemed at first totally inappropriate if it is considered that the international community has no central sovereign and that it is divergent on its views of common morals.[2] Recent developments, including the establishment of the International

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1 Anonymous 2001: 1948.

2 Du Plessis 2003: 304.See also Cassese 2003: 441 on the merits of international criminal justice.

Criminal Court, in the field of international criminal, human rights and humanitarian law to which this thesis bears witness, have made it abundantly clear that international law is the "*fully effective law of a fully functioning international society*".[3] This is despite serious impediments that it must overcome.

2. The long-term credibility

In this study we have referred to the international community's often belated reaction to some of the worst atrocities and violations of human rights. We know that while too many human rights violations have occurred or are still occurring, we have yet to see the world respond in a consequent fashion.[4] The ideal has therefore been established for an international justice order to be credible and legitimate. In the words of Ambos,[5]

> *'' Finally, in spite of the euphoria surrounding certain positive political developments, it should not be overlooked that the internationalisation of criminal law, in particular the creation of mechanisms of international criminal justice, will only meet its expectations if the corresponding competences or even obligations to prosecute certain criminal acts defined as 'international crimes' are internalized, i.e. recognized and accepted by the prosecutors, the accused and the victims, as materially valid and just''.*

In this regard this study has demonstrated that the international community's response to atrocities has in the past been selective and sometimes cumbersome. Declared good intentions and resolve have been numerous; as evidenced by Justice Jackson in his opening address at Nuremberg:[6]

> "*… While this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law*".

In 1959, an idealistic Roscoe Pound stated that:

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3 Allott 199: 33 and further.
4 Penrose 2000 196 and further.
5 1996: 538-539
6 Marquardt 1995: 143.

> *"… the essential thing, as it stands today, is a world legal order- a world regime of due process of law"*.[7]

In 1991, a resolute President George Bush when he announced the beginning of the air strikes against Iraq:

> "*We have before us the opportunity to forge for ourselves and for future generations a new world order, a world order where the rule of law, not the law of the jungle, governs the conduct of nations*".[8]

President Bush a few months later, this time quoting Winston Churchill's definition of a world order in which "*the principles of justice and fair play…protect the weak against the strong*".[9]

It is to be noted that in comparison with the prevention of ongoing atrocities through military intervention, peacekeeping missions, post-conflict economic assistance and social rehabilitation of victim societies, resort to international criminal tribunals to establish accountability, incurs modest financial and political cost.[10] If this is so, it is respectfully submitted that this thesis has indicated that prosecution for core crimes and establishing accountability for those responsible, serves a pivotal role, not only for the social and economic healing of a victim society, but it also entrenches confidence for a just and equitable international society under the rule of law.[11] Establishing accountability through prosecution for core crimes is, quite simply,an essential component for international justice. Arbour declares that criminal justice is here to stay. She states convincingly that the:

> "*…old strategy of peace without accountability, to which there have been some historical exceptions, Nuremberg being the most noted, is no longer effective, nor is it keeping pace with human rights expectations even of those who did not until recently know or believe that they were themselves human rights holders*".[12]

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7 Kelly 1992: 223.
8 Kelly 1992: 223.
9 Kelly 1992:223.
10 Akhavan 2001: 30.
11 For an insightful article on the term, or "*doctrine" of an 'international community'*", see Kritsiotis 2002: 961 and further.
12 2001: 2.

However, if "*post mortem*" justice follows without preceding attempts to stop atrocities in whichever part of the world, international criminal justice becomes:

> "*…an exercise in moral self-affirmation and a substitute for genuine commitment and resolve…*".

of the international community to proactively prevent gross violations of crimes globally reprehensive in their nature.[13] This has been alluded to in this thesis with various commentators on the former Yugoslavia and the Rwanda Tribunals, who commented that the international community's reaction to atrocities was too slow, and that if it had been quicker, much human suffering could have been prevented. It will need a concerted effort by the whole international community, including and notably a recently more proactive United Nations, states, and non-governmental organisations (which role is increasingly appreciated in the shaping of a just international society) to achieve this.

As far as the long-term credibility of international criminal justice is concerned, it cannot become that if it is used as an instrument by especially powerful states in terms of which power is selectively exercised only in their self-interest. Akhavan echoes this notion as follows:

> "*Understandably, in a slightly primitive international order built on the anarchy of power and state sovereignty, the early glimmerings of international criminal justice manifest themselves in selective ad hoc accountability. It is reasonable to assume that the progressive internationalization of international criminal justice will gradually spread*

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[13] Akhavan 2001: 30. See also Allott 1999: 50, who states: "*The new paradigm of the international legal system is a new ideal of human self-constituting. It has three leading characteristics. (1) The international legal system is a system for -aggregating the common interest of all-humanity, rather than merely a system for aggregating the self-determined interests of so-called states. (2) The international legal system contains all legal phenomena everywhere, overcoming the artificial separation of the national and the international realms, and removing the anomalous exclusion of non-governmental transnational events and transactions. (3) The international legal system, like any legal system, implies and requires an idea of a society whose legal system it is, a society with its own self-consciousness, with its own theories, values and purposes, and with its own systems for choosing its future, including the system of politics".*

> *from the periphery to the center [sic] and give rise to a more inclusive universal framework, possibly through a widely ratified ICC statute together with vigilant and invigorated national or foreign courts. If the international community is to move beyond the currently fragmented assortment of jurisdictions to a coherent system of justice, a great burden falls on the shoulders of influential states to set a fitting example*".[14]

It must be noted that in terms of the difference between head of state immunity and state immunity, it has now become accepted international law that the international community may scrutinise a plea of state immunity, when it relates to violations of human rights.[15] This in itself probably represents one of the most significant developments towards the establishment of a credible international criminal justice order.

Bianci notes as follows:

> "*As noted earlier, the notion of individual accountability for crimes against humanity can be fully grasped only in connection with the international human rights doctrine and other recent developments in the structure and the process of international law. Particularly relevant, in this respect, is the notion of obligations erga omnes, namely obligations which are not owed to any particular state but to the international community".*[16]

Therefore,so Bianci argues, the emergence and the subsequent consolidation of the notions of *jus congens* and obligations *erga omnes* provide a solid conceptual background for the justification of the exercise of jurisdiction by a state over *individuals,* regardless of their official position who commit offences that are universally regarded as infringements of the common interests and values of the international community.

This work has also alluded to the strengthening of peremptory norms of general international law (*ius cogens).* Central to this process of strengthening remains the enforcement of these norms. De Wet concludes that:

> "*It is a challenge which national and international courts will increasingly be confronted with in the years to come, as the role of jus congens is bound to become more prominent in an increasingly institutionalised*

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14 2001: 30.
15 Bianci 1999: 267.
16 1999: 271.

international order, accompanied by an increasing interaction between different sets of rules in the international and national legal orders".[17],

3. The establishment of the *ad hoc* tribunals and the ICC

The quest for an international criminal justice order is really a quest for a just and safe world legal order. It is a quest by citizens of this world for a world environment where justice prevails and where the rule of law governs human conduct.[18] This research indicated the period of relative stagnation in the growth and development of international criminal law and justice during the Cold-War. This period ended in the 1990s "*which witnessed an astonishing rise in individual accountability for violations of international humanitarian and human rights law*".[19]

One is cautioned not to conclude from the relative successes of the ICTY and the ICTR, even by the mere creation of the ICC or the engagement of foreign and domestic courts (as was pointed out in Chapter 7) to believe that the world will be free from genocide and other atrocious crimes. Evidence from around the world simply does not bear out such a conclusion.[20] Yet, in comparison to the status of criminal justice as witnessed in this thesis at the turn of the previous century, history may record recent developments for an internal criminal justice order as substantial.[21]

Wise echoes these views as follows:

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17 2004: 121.

18 Akhavan 2001: 30: The author remarks as follows: "*The current prominence of accountability, and its emergence as a significant element of international relations, is a reflection of a desire for justice, as well as utilitarian objectives of post-conflict peace building and the long-term prevention of mass violence. Impunity is often a recipe for continued violence and instability*".

19 Anonymous 2001: 1952. According to the author this was as a result of (1) democracy: many states examined crimes committed by previous dictatorial regimes, (2) many wars and violent conflicts were unleashed around the world which created a greater need for accountability, and (3) there was a reduced tension amongst the permanent members of the United Nations Security Council.

20 Akhavan 2001: 31.

21 Detter 2000: 423 and further on the right of prosecution for war crimes. See also Anonymous: 2001: 1954. The authors point out as a positive development, the fact that so many national judicial systems have joined the movement toward greater accountability.

> "*The long-term process of transition to more inclusive global community is reflected in myriad developments in contemporary international law. That we are living through such a transitional epoch is commonplace in practically every discussion of the direction that contemporary international law is taking. The Rome Statute represents an especially significant moment in the process*".[22]

but cautions realism in that he opines that the Rome Statute "*embodies certain contradictions or paradoxes*". Thus, in the context of criminal law and what Wise terms as "*communal cohesion*", punishment in the context of the emerging criminal justice order and as embodied in the Rome Statute, more than anything else:

> "*...reaffirms and reinforces the world's collective beliefs about what constitutes right and wrong*".

It is this insight into the function and role of criminal law that is the most likely effect of the Rome Statute.[23] In essence, the Rome Statute must be regarded as a symbolic affirmation of the ties that hold the international community together. Therefore, although the Statute of Rome is only one of a number of developments in the:

> "*…contemporary movement towards a more inclusive global community, it is a particularly significant development because of the constitutive symbolic function of criminal law as a community-creating, community-maintaining device*".[24]

If the bulk of commentary on the impact of jurisprudence that has been generated by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda is considered, a positive picture emerges on the establishment of a credible international criminal justice order.

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22 2000: 261.

23 Wise 2000: 267.

24 Wise 2000: 268. The author opines that if it is considered that membership of the United Nations is 188, a significant portion of nations would have to ratify the Rome Statute in order for it to be said that a "*world community*" exists. If not, the Rome Statute would only be significant in that it represents a 'half-world' community. Thus, that a true "*world community"* does not exist yet.

The form that a future era of enforcement of international criminal justice will take is in all probability based on two models: the utilisation of the International Criminal Court, and the active participation of domestic courts on the basis of universal jurisdiction.[25]

4. Is opposition to the International Criminal Court an insurmountable obstacle to the future development of a credible international justice regime?

This thesis has indicated the vital importance of powerful states like the United States of America to be part of a credible International Criminal Court.[26] Does the non-participation or even active opposition of such states however imply that the further development of a credible international justice system is insurmountable? It is respectfully submitted that it does not.

There has been an increase in domestic prosecutions of international core crimes that has undoubtedly been stimulated by the work of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (as well as the establishment of the International Criminal Court).[27]

Despite the previous inaction of states to prosecute for core crimes so characteristic of the period subsequent to World War II, there has in the last decade of the previous century been an enormous increase in the number of prosecutions for core international crimes in domestic courts.[28] Through many of these advances, governments have become accustomed to the idea:

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25 Arbour 2001: 2.See also Anonymous 2001: 1954 and further.

26 Chapter 9.

27 Charney 2001: 120. The author states: "*After the termination of the Tokyo and Nuremberg Tribunals, domestic courts rarely attempted to prosecute Nazi fugitives from justice for international crimes they had committed during World War II. Still more rarely did domestic courts prosecute other persons who had committed international crimes subsequent to World War II. Until the establishment of the ICTY and the ICTR, opinion generally characterized prosecutions of international crimes merely as victors' vengeance as a historical anomaly*".

28 Charney 2001: 121: The author cites as examples such prosecutions in domestic courts, cases in Rwanda, South Africa, (undoubtedly this is not the case as far as

"…that international criminal law constitutes a real and operative body of law, which in turn has facilitated domestic prosecutions of persons accused of these crimes".[29]

Individual criminal liability been established in international criminal law, but at the same time it must be noted that, conversely, individuals themselves, are increasingly exerting their rights against sovereign states in various ways. Cases before the European Court of Human Rights, for example, illustrate this development.[30]

Implied in this development is also the fact that heads of state are no longer immune against prosecution for gross violations of human rights and humanitarian law as is currently also demonstrated by the handing over of former Liberian leader and war lord Charles Taylor by Nigeria where he sought asylum, to Liberia. He is to stand trial for charges of war crimes and crimes against humanity before the UN Special Court for Sierra Leone.[31]

What is also particularly significant in the Charles Taylor case is that the suit, seeking to end Taylor's asylum in Nigeria, was filed on behalf of two Nigerian citizens who suffered amputations at the hands of the Taylor backed Revolutionary United Front in Sierra Leone.[32] This legal effort was supported by a coalition of NGOs across West Africa, which advocated for Taylor to be prosecuted before the Special Court for Sierra Leone. In November 2005 a Nigerian Court supported the victim's right to have Taylor's asylum in Nigeria overturned. The ruling would have allowed the plaintiffs to invoke Nigerian

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South Africa is concerned which has witnessed hardly any prosecutions resulting from the work of its Truth and Reconciliation Commission) Spain's indictment of Pinochet, the extradition procedures of the latter in England as well as indictments in Belgium, France and Switzerland.

29 Charney 2001: 122.

30 See the cases of *McElhinney v Ireland,* application number 31253/96, *Al-Adsani v the United Kingdom,* application number 35763/97 and *Fogarthy v the United Kingdom* application number 37112/97. The cases may be accessed through http://www.echr.coe.int. Although these cases are not exclusively within the subject matter of international criminal law, they do however demonstrate that individuals are increasingly enforcing their rights against sovereign states in various ways.

31 Seehttp://news.bbc.co.uk/2/hi/africa/4856120.stm, 06/04/11 06/04/11http://news.bbc.co.uk/1/hi/world/africa/4857482.stm 06/04/11.

32 http://allafrica.com/stories/200604100260.html 06/04/11.

domestic law to bar asylum for war criminals in order to challenge Nigerian state power in its decision to grant asylum to Taylor in the first place. Hearings before the Nigerian court were pending at the time Taylor was handed over to Liberia.[33]

From this research it has become abundantly clear that traditional international law has developed substantially, particularly since the end of the Second World War. It has become clear that until fairly recently, state immunity, for example, has presented an almost insurmountable barrier for the effective enforcement of international human rights by national courts, even if these courts would otherwise have been willing to exercise jurisdiction.[34] This was because of notions of international law that had existed for centuries, which taught that a former or even serving head of a sovereign state could simply not be prosecuted before the courts of another state in order to be held accountable for gross violations of human rights in his/her own state. Rather, an alternative view of international law has emerged after World War II, that essentially demonstrates that the international community simply does not consist only of equal states, but of individuals, peoples, inter-governmental organisations, non-governmental organisations and corporations, which as international actors engaged in international discourse, have individual rights, such as the right not to be tortured.[35]

A modern view of international law goes a crucial step further to what has been exposed so far and shows that individual members of the international community should be able to enforce their most fundamental rights, even against states and state officials.[36] That was the legacy of the Nuremberg and Tokyo Military Tribunals even though it has been argued (and probably technically correctly so), that the legal basis on which individual accountability was established by those tribunals was unsound. But to illustrate that no immunity for crimes under international law is available to anyone, especially

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33 http://allafrica.com/stories/200604100260.html 06/04/11.
34 Byers 2000: 418.
35 Byers 2000: 418.
36 Byers 2000: 418.

before the International Criminal Court, these stipulations have now been encoded in the statutes of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the newly established International Criminal Court.[37]

Different scenarios may arise once the International Criminal Court becomes fully operative: there may be cases or circumstances in which states may very well prefer that a prosecution for an international core crime be undertaken by a distant and impartial International Criminal Court, because the matter is too dangerous or sensitive to handle domestically.[38] There may be cases where a state is unable for various reasons to prosecute domestically. There may also be cases that states prefer to handle domestically, including diplomatic negotiations between the states involved. In fact, article 17 of the International Criminal Court Statute, dealing with complementarity of jurisdictions, [39] makes it more likely that states would wish to retain jurisdiction over prosecutions that may be within that domestic court's jurisdiction. It is submitted that there is nothing sinister or wrong with such an attitude. Rather as a consequence of all this, and herein lies the answer to the question posed in this paragraph, is that generally states will feel impelled to try persons accused of such crimes and to pursue such cases in a *bona fide* way.[40] Thus it may respectfully be argued that with the necessary international vigilance with regard to the incidence of atrocities, a stage has been reached where a state, in order to retain its international credibility, will be under more "*gentle persuasion*" to act, than was perhaps the case prior to the developments described in this thesis. International awareness and vigilance is thus likely to play an important role in the further establishment of an international regime of justice and it is unlikely that opposition to the International Criminal Court will derail this process.

It is opportune to conclude with the words of Allott:

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37 Byers 2000: 419.
38 Charney 2001: 122.
39 Chapter 8.
40 Charney 2001: 122.

"*The idea of international society, the society of the whole human race and the society of all societies, takes its place at last, centuries late, within human self-consciousness, and international law finds its place at last, centuries late, within the self-constituting of international society; that is to say, as an essential part of the self-creating and self-perfecting of the human species*".[41]

[41] 1999:50.

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Summary

This study has investigated the emergence of an international criminal justice order from its inception to its current status. It has investigated the emergence of an international criminal justice order by referring to: (1) the early attempts by nations to control the waging of war; (2) the influence and impact of the Nuremberg and Tokyo International Criminal Tribunals; (3) the emergence and rooting of international human rights and humanitarian law in co-existence with international criminal law, particularly since the adoption of the 1949 Geneva Conventions; (4) the influence and impact of the international criminal *ad hoc* tribunals for the former Yugoslavia and Rwanda; (5) recent attempts by states to exercise universal jurisdiction such as in the *Pinochet* and *Congo* cases; (6) the establishment of the International Criminal Court and numerous aspects of international criminal law that have been established by the Rome Treaty creating the Court; (7) the obstacles that are faced by the court; (8) other transitional justice mechanisms in an ongoing attempt to provide accountability and redress where serious infringements of international human rights and humanitarian law have occurred; and (9) a South African perspective of the past and current status of international law in domestic law. It has established that although the sovereignty and equality of states remains a cornerstone of international law, inroads have been made into the doctrine of absolute state sovereignty to the extent that it is now universally recognised that certain crimes are so reprehensible in their nature, that they warrant prosecution wherever they are committed, no matter by whom they are committed.

It has further established that international criminal law and justice did not evolve overnight and most of its current status is ascribable to unfortunate and indescribable human suffering.

It has provided a historical perspective of the early attempts to regulate the waging of war, and showed the impact of the International Military Tribunal at Nuremberg and Tokyo, most significantly establishing individual accountability as opposed to only state accountability. The latter development led to an introduction, resurgence and development of human rights and particularly humanitarian law subsequent to World War II, to the extent that the destiny of international criminal law is unavoidably interwoven with the former two branches of international law.

It proceeded to record and demonstrate the impact on international law generally and international criminal law in particular, with the establishment of the ICTY and the ICTR. It has demonstrated that the establishment of these two *ad hoc* tribunals provided impetus to renewed calls for the establishment of a permanent International Criminal Court and has greatly contributed to the recording and further development of international criminal law. Lastly, it has provided much impetus for states to exercise universal jurisdiction over prosecution of core crimes. The latter impetus provided the background to a chapter in this work indicating positive steps by states to exercise universal jurisdiction.

It proceeded to provide the historical background for the eventual establishment of the International Criminal Court and concurrently demonstrated its impact on the development of an international order of justice. The research provided a brief analysis of transitional justice models in recent times, contributing to an analysis of what lessons may be learned from these attempts of various transitional societies.

It then proceeded to provide a South African perspective, particularly the evolution of the status of international law in South African domestic law. The thesis concluded that the need for a consistent international criminal justice order is validated and although the international community is continually shocked by ongoing atrocities around the globe, significant progress has been made in recent decades to extend the international rule of law.

Opsomming

Hierdie navorsing het die ontstaan van ‘n internasionale strafregsorde van vroeg tot sy huidige status nagespoor. Dit het die ontluiking van sodanige internasionale strafregsorde ondersoek deur te verwys na: (1) die vroeë pogings van state om oorlogsvoering te beheer/reguleer; (2) die invloed en uitwerking van die Nuremberg en Tokyo internasionale straftribunale; (3) die ontstaan en vestiging van internasionale mense en humanitêre reg in mede-bestaan met internasionale strafreg sedert veral die aanvaarding van die 1949 Geneefse Konvensies; (4) die invloed en uitwerking van die internasionale straf *ad hoc* tribunale vir die vorige Yugoslavia en die vir Rwanda; (5) onlangse pogings deur state om universele jurisdiksie uit te oefen soos in the *Pinochet* en *Congo v België* sake*;* (6) die ontstaan van die Internasionale Strafhof en die vele aspekte van internasionale strafreg wat beslag gekry het in die verdrag van Rome wat die hof gevestig het; (7) die huidige en toekomstige struikelblokke wat die laasgenoemde hof konfronteer; (8) ander oorgangs geregtigheidsmeganismes in ‘n voortgesette poging om verantwoording en vergoeding te verleen in gevalle waar ernstige inbreuke plaasgevind het op internasionale mense-en humanitêre reg; en het (9) ‘n Suid-Afrikaanse perspektief op die vorige en huidige status van internasionale reg in die Suid Afrikaanse reg verskaf. Die navorsing het aangetoon dat ten spyte daarvan dat die beginsel van staatssoewereiniteit ‘n hoeksteen bly van die internasionale reg, dit gekwalifiseer word deurdat dit universeel aanvaar word dat sekere misdade so afkeuringswaardig van aard is dat dit vervolging regverdig ongeag van persoon of plek.

Die navorsing het verder aangetoon dat die soeke na ‘n geloofwaardige internasionale strafreg en geregtigheidsstelsel oor eeue heen ontwikkel het. Die huidige inhoud daarvan is die ervaringsproduk ontleen uit tragiese en onbeskryflike menselyding.

Die navorsing het ‘n historiese perspektief verskaf van die vroeë pogings om oorlogsvoering te reguleer en het die uitwerking van die Internasionale Militêre Tribunale van Nuremberg en Tokyo aangetoon, veral die ingrypende vestiging van individuele aanspreeklikheid in plaas van blote staatsaanspreeklikheid in internasionale strafreg. Die laasgenoemde ontwikkeling het veral plaasgevind na afloop van die tweede Wêreldoorlog tot die mate dat die lot van internasionale strafreg huidig baie nou vervleg is met internasionale mense en humanitêre reg.

Die navorsing het voortgegaan om die ontwikkeling van internasionale reg, bepaald internasionale strafreg aan te toon met die totstandkoming van die Internasionale Straftribunaal vir die vorige Yugoslavië en die Internasionale Straftribunaal vir Rwanda. Dit het aangetoon dat die daarstelling van hierdie twee straftribunale grootliks die weg gebaan het vir die daarstelling van die Internasionale Strafhof, bygedra het tot die boekstawing van internasionale strafreg en laastens aansporing verleen het aan state om vervolging van oortreding van die sogenaamde “gruwelmisdade” in te stel. Die laasgenoemde het die agtergrond verskaf vir pogings deur state om universele jurisdiksie uit te oefen.

Die historiese agtergrond en die uiteindelike vestiging van die Internasionale Strafhof is geboekstaaf en in samehang daarmee, die ontwikkeling van ‘n internasionale strafregsorde. Die navorsing het ‘n kort analise van stelsels van oorgangsgeregtigheid gedoen met ‘n boekstawing van lesse wat daaruit geneem kan word.

Dit het hierna ‘n Suid-Afrikaanse perspektief verskaf, veral met betrekking tot die evolusie van die status van internasionale reg binne die Suid Afrikaanse reg. Die tesis het afgesluit met die gevolgtrekking dat daar ‘n behoefte is vir ‘n internasionale strafregsorde. Ten spyte van skokkende menseregte vergrype oor die wêreld heen, is aansienbare vordering die afgelope dekades tog gemaak met die uitbreiding van die internasionale regsoewereiniteit.

Key terms

Extradition

Extra-territorial jurisdiction

Immunity

International Criminal Court

International Criminal law

International justice

International Criminal Tribunal for the former Yugoslavia

International Criminal Tribunal for Rwanda

International Military Tribunal

International order of justice

Nuremberg trials

Prosecuting Pinochet

Sovereignty of States

Transitional justice mechanisms

Universal jurisdiction