Péter Pázmány Catholic University
Budapest, 2008

The International Criminal Court: Starting with Africa?

Alina Ioana Apreotesei

PhD Dissertation

Supervisor: Prof. Dr. Kovács Péter

CONTENTS

List of Abbreviations 5

Introduction 7

Chapter I: The International Criminal Court – from a Dream to Reality 12

- I. 1. The Beginning 12
- I. 2. Interbellum. The Role of Vespasian Pella 14
- I. 3. After the Second World War. The Military Tribunals 18
- I. 4. New attempts in establishing an international criminal court 21
- I. 5. The end of the Cold War. The *Ad Hoc* Tribunals 23
- I. 6. Preparing the Rome Conference 26
- I. 7. The International Criminal Court 27
- I. 8. Towards ending impunity 30

Chapter II: Elements of novelty and problematical issues in the Rome Statute 31

- II. 1. The Principle of Complementarity and the International Criminal Court 31
  - II.1. 1. Principle of complementarity – a new principle of law 31
  - II.1. 2. Concurrency v. complementarity 33
  - II.1. 3. Complementarity in the Rome Statute 37
  - II.1. 4. Problematical issues on complementarity 41
    - II.1. 4. a) Referral by a state-party 41
    - II.1. 4. b) Referral by the United Nations Security Council 43
    - II.1. 4. c) Prosecutor's *proprio motu* referral and the conditions of admissibility 44

II.1. 5. Precedents of (un)willingness or (in)ability to prosecute in international law 50
II.1. 5. a) The Nuremberg Trials 51
II.1. 5. b) The trial of Adolph Eichmann 52
II.1. 5. c) The trial of Klaus Barbie, Butcher of Lyons 53
II.1. 5. d) The Pinochet Trial 55
II.1. 5. e) Transitional justice in the former communist countries 57
II.1. 5. f) Russia's amnesty over the war criminals in Chechnya 60
II.1. 5. g) Milosevic's trial 61
II.1. 5. h) Karadzic's trial 63
II.1. 5. i) Saddam Hussein's trial 63

II. 2. The United States, Romania and the International Criminal Court 67
II.2. 1. The United States' policy towards the International Criminal Court: from support to opposition 67
II.2. 2. The United States' strategy against ICC 71
II.2. 2. a) "Article 16" Security Council Resolutions 72
II.2. 2. b) "Article 98" Agreements 74
II.2. 2. c) US legislation prohibiting foreign aid 78
II.2. 3. The European Union's responses. Romania between EU and US? 79

II. 3. Aggression as an Individual Crime. The Jurisdiction of the International Criminal Court 84
II.3. 1. From The Hague to Rome; 99 years of legal work trying to define aggression (1899-1998) 84
II.3. 2. From Rome to The Hague; Special Working Group on the Crime of Aggression (1998-2007) 92
II.3. 2. a) Proposals submitted by states 94

II.3. 2. b) The Coordinator's Paper 98
II.3. 2. c) Future work of the SWGCA 104
II.3. 3. Aggression as an individual crime. Solutions. 105
II.3. 3. a) Definition of the crime of aggression. 105
II.3. 3. b) Conditions under which the ICC can exercise jurisdiction over the crime of aggression 108
II.3. 3. c) Elements of the crime of aggression 116

II. 4. The Victim and the Witness within ICTY and ICC. A Comparative Perspective 118
II.4. 1. Victims v. Witnesses. Definitions 118
II.4. 2. The protective regime 120
II.4. 3. Participation in proceedings 127
II.4. 4. Reparation for victims 131
II.4. 5. Who is responsible towards the victims? 135

Chapter III: The International Criminal Court – an African Criminal Court? 139
III. 1. Democratic Republic of the Congo – Situations and Cases 139
III.1. 1. Introduction 139
III.1. 2. Political background 140
III.1. 3.The situation in the DRC. Accountability at national level 147
III.1. 4. Cases before the ICC 151
III.1. 4. a) *Prosecutor v. Thomas Lubanga Dyilo* 152
III.1. 4. b) Confirmation of charges 155
III.1. 4. c) *Prosecutor v. Germain Katanga* 166
III.1. 4. d) *Prosecutor v. Mathieu Ngudjolo Chui* 168
III.1. 4. e) *Prosecutor v. Bosco Ntaganda* 170

III. 2. The Situation in Darfur, the Sudan 172
III.2. 1. The Conflict in Darfur 172
III.2. 2. International responses 174
III.2. 3. The Commission of Inquiry's findings 176
III.2. 4. Legal responses 180

III. 3. The Situation in Central African Republic 191
III.3. 1. The conflict 191
III.3. 2. The ICC referral 193
III.3. 3. Crimes within the focus of the ICC 195

III. 4. The Situation in Uganda 202
III.4. 1. The conflict and the Lord's Resistance Army 202
III.4. 2. The International Criminal Court steps in 205
III.4. 3. Peace v. Justice? 207
III.4. 4. Possible solutions 211

Conclusions 217
Bibliography 226

List of Abbreviations

AI – Amnesty International

AMIS – African Union Mission in the Sudan

ASPA – American Service-members' Protection Act

AU – African Union

BONUCA – United Nations Peace-building Support Office

CAR – Central African Republic

CNDP - Congrès national pour la défense du people

DRC – Democratic Republic of the Congo

ECHR – European Court of Human Rights

ECOSOC – Economic and Social Council

EU – European Union

FIDH - Fédération Internationale des Droits de l'Homme

FNI - Front des Nationalistes et intégrationnistes (National Integrationist Front)

FPLC - Forces patriotiques pour la libération du Congo

FRPI - Force de résistance patriotique en Ituri (Patriotic Resistance Force in Ituri)

GA – General Assembly

HSM - Holy Spirit Mobile

ICC – International Criminal Court

ICJ – International Court of Justice

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the Former Yugoslavia

ILC – International Law Commission

ILO – International Labour Organization

ISAF – International Security Assistance Force

JEM - Justice and Equality Movement

LRA – Lord Resistance Army

MINURCA - United Nations Mission to Central African Republic

MINURCAT - United Nations Mission in the Central African Republic and Chad

MISAB - Inter-African Mission to Monitor the Implementation of the Bangui Agreements

MONUC - Mission de l'Organisation des Nations Unies au Congo, United Nations Organization Mission in the DRC

NATO – North Atlantic Treaty Organization

NRA - National Resistance Army

ODESSA - Organisation der ehemaligen SS-Angehörigen (Organization of Former Members of the SS)

OPCV - Office of Public Counsel for Victims

OTP – The Office of the Prosecutor of the International Criminal Court

PCIJ – Permanent Court of International Justice

PrepCom – Preparatory Committee

SC – Security Council

SCSL – Special Court for Sierra Leone

SLM/A - Sudan Liberation Movement/Army

SOFA – Status of Forces Agreement

SWGCA – Special Working Group on the Crime of Aggression

TRC - Truth and Reconciliation Commissions

UN – United Nations

UNAMID – United nations–African Union Mission in Darfur

UNHCR - United Nations High Commission for Refugees

UNLA - Ugandan National Liberation Army

UNWCC – United Nations War Crimes Commission

UNICEF – United Nations Children's Fund

UPC - Union of Congolese Patriots

UPDA - Uganda People's Defence Army

Introduction

After more decades of "travaux préparatoires", the International Criminal Court is a reality. It is not just a Court, but a system that international criminal justice has created, a system of interaction between states, civil society and international organizations.[1] The crimes under international law already existed but a new system was needed to apply to them. The process that started at Nuremberg continues to evolve.[2] Nuremberg was the first multinational criminal tribunal, while the ICTY and ICTR were the first ad hoc international criminal courts.[3] But the development of international criminal law (ICL), which "results from a myriad of small or great tragedies"[4], showed that a permanent international criminal court was strongly needed.

The international law is in a continuous diversification.[5] Human Rights Law, International Humanitarian Law, and International Criminal Law, are all branches of Public International Law. They all converge in protecting the individuals and it is ICC that brings them together. The International Criminal Court is a public international law tool to apply international criminal law in cases of human rights violations in time of both war and peace.

As it was said, "without the International Military Tribunal of Nuremberg, there would be no International Criminal Court."[6] The demand for international criminal justice started at Nuremberg, but it "blew up, as it were, in the 1990s"[7]. If

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[1] As stressed by Mrs. Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, with the occasion of the conference "Fighting Impunity in a Fragmented World – New Challenges for the International Criminal Court", European University Institute, Florence, 23-24 May 2008.

[2] See William A. Schabas, *International sentencing: From Leipzig (1923) to Arusha (1998)* or M. Cherif Bassiouni, *The Nuremberg Legacy,* in M. Cherif Bassiouni (Ed.), "International Criminal Law", 2nd Ed., Vol. III, *Enforcement*, Transnational Publishers Inc., Ardsley, New York, 1999.

[3] See T. Meron, "War Crimes Law Comes of Age. Essays", Oxford University Press, 1998 at 198-199.

[4] Antonio Cassese, "International Criminal Law", Oxford University Press, 2003, preface.

[5] See Géza Herczegh, *L'avenir de l'enseignement du droit international,* in Kovács Péter (Ed.), « Le droit international au tournant du millénaire – l'approche hongroise », Osiris, Budapest, 2000.

[6] Hans-Peter Kaul, Judge of the International Criminal Court and president of the Pre-Trial Division, *The International Criminal Court: Current Challenges and Perspectives,* in Washington University Global Studies Law Review, Vol. 6, 2007 at 580.

[7] A. Cassese, "International Law", 2nd Ed., Oxford University Press, 2005 at 453.

until then the very existence of international criminal law[8] was questionable, once the ICTY and ICTR were established, the ICL has become a rapidly developing part of the international law[9] and as the ICC is a reality, "we are now heading for the formation of a fully fledged body of law."[10]

ICC comes to apply this new, rudimentary, and hybrid branch of law[11], emerged from domestic criminal law, international law [12] and human rights law[13], that form a complementary whole[14] and whose common root lies in international humanitarian law.[15] This newly born field of law, and therefore ICC, responds to massive human rights violations by punishing the perpetrators of "the most serious crimes of concern to the international community as a whole".[16] Even if it is still in its "infancy"[17], the international criminal law is developing very quickly. As Prof. Bassiouni pointed out, when he started his academic work (about four decades ago), "the subject was largely regarded as esoteric". For many years he was the only one in the US legal education to teach a course on the subject. In 1999, 35 law schools offered a course or a seminar on the subject.[18] And that was before ICC came into force. I imagine the number is larger by now.

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[8] For the difference between international criminal law and criminal international law, see Grigore Ungureanu, "Drept International Penal. Curtea Penala Internationala", Omega Lux, Bucuresti, 2002 at 5-7.

[9] See Nico Keijzer preface for E. van Sliedregt, "The Criminal responsibility of Individuals for Violations of International Humanitarian Law", TMC Asser Press, The Hague, 2003.

[10] Cassese, "International Criminal Law", supra note 4 at 19.

[11] Ibid at 16-19.

[12] See Ilias Bantekas and Susan Nash, "International Criminal Law", 3rd Ed., Routledge-Cavendesh. London and New York, 2007.

[13] On the influence of human rights and humanitarian law on general international law, see Theodor Meron, "The Humanization of International Law", Martinus Nijhoff Publishers, Leiden, 2006. On the interaction between human rights and humanitarian law, see Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?,* in The European Journal of International Law, Vol. 19, No. 1, 2008 at 161-182.

[14] See M. Cherif Bassiouni (Ed.), preface to "International Criminal Law", 2nd Ed., Vol. III, *Enforcement*, Transnational Publishers Inc., Ardsley, New York, 1999.

[15] Gerhard Werle, "Principles of International Criminal Law", TMC Asser Press, The Hague, 2005 at 39.

[16] Preamble of the Rome Statute.

[17] Claire de Than and Edwin Shorts, preface to "International Criminal Law and Human Rights", London, Sweet and Maxwell, 2003.

[18] Bassiouni (Ed.), "International Criminal Law" supra note 14.

Since Nuremberg, especially in relation to crimes against humanity, genocide and war crimes, the focus has been on individual instead of state.[19] It has been suggested that ICC might be a vehicle for emancipatory transformation in the international order, a change in the practice of international politics, a change that might make the world a better place for people to live in.[20]

Indeed, if you take a look at the NGOs Reports concerning the situation in Africa, we can only hope that ICC would "put an end to impunity"[21] and restore peace and justice for victims. By 2006 the conflict in the Democratic Republic of the Congo (DRC) lead to 3,9 million deaths and 1,66 million internally displaced persons, while around 1,200 people continue to die every day from violence, disease or starvation. Furthermore, estimated 30,000 children were included in the armed groups constituting more than 40 per cent of forces.[22] In Central African Republic (CAR) more than 70,000 citizens have fled to neighboring countries and 200,000 people transformed into internally displaced persons. The number of deaths remains difficult to establish.[23] In Darfur, the Sudan, more than 90,000 people are believed to have died since 2003, as a direct consequence of the conflict and other 200,000 as an indirect one. Over 2,3 million people are internally displaced persons.[24] The situation is no better in Uganda, where UNICEF estimated that more than 32,000 children were abducted by the Lord Resistance Army (LRA) between 1986 and 2002. As of May 2007, up to 1,6 million people remain internally displaced[25] while tens of thousands have been killed, abducted, enslaved,

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[19] See Nico Keijzer, in "The Criminal responsibility of Individuals for Violations of International Humanitarian Law", supra note 9.

[20] See Lia Potec, *International Politics and the Promise of Emancipation: the Case of the International Criminal Court,* PhD thesis, Budapest, Central European University, Budapest College, 2006.

[21] Preamble of the Rome Statute.

[22] Amnesty International, *Children at War: Creating hope for their future,* AI Index: AFR 62/017/2006.

[23] Amnesty International, *Central African Republic: civilians in peril in the wild north,* AI Index: AFR 19/003/2007.

[24] Amnesty International, *Sudan: Displaced in Darfur: A generation of anger,* AI Index: AFR 54/001/2008.

[25] Amnesty International, *Uganda Doubly Traumatised. Lack of access to justice for female victims of sexual and gender-based violence in northern Uganda*, AI Index: AFR 59/005/2007.

and raped.[26] In contrast with these numbers, accountability of the national level remains almost inexistent.

As ICC is based on the principle of complementarity, acting only when a state is 'unable' or 'unwilling' to conduct proceedings or investigations, it already deals with the above mentioned situations. When I started my research on this topic, ICC was opening its third investigation. There was no person in custody and there were five warrants of arrest for the LRA leaders. Today[27], ICC deals with 4 situations, it has 4 persons in custody and from 13 warrants of arrest, among which 11 are active and one under request, 7 are still pending. Charges were confirmed against one person and two other are waiting for the confirmation of charges hearing. Ten more states have ratified the Statute and the Prosecutor is ready to issue a warrant of arrest for a President in office. However, ten years after the signature of the Rome Statute, the Court is still not ready to start its first trial.[28]

My thesis starts with a historical survey of the long way which led to the establishment of the ICC. As pointed out above, Nuremberg, Tokyo, ICTY and ICTR were important steps towards that direction. It continues then with a chapter concerning more dispositions in the Rome Statute characterized by novelty but also by problematic. Issues like principle of complementarity, participation of victims or the crime of aggression are taken into account. The United States' position (and due to the fact that I am Romanian, the Romanian policy) towards ICC is also analyzed mainly from a critical point of view concerning the inclusion of article 98 in the Rome Statute.

If chapter two is dedicated to what I call 'ICC in theory', the third chapter is about 'ICC in practice'. I called it symbolically 'The International Criminal Court –

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[26] Amnesty International, *Arrest Now! Uganda: Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, AI Index: AFR 59/008/2007.

[27] July 2008.

[28] *Prosecutor v. Thomas Lubanga Dyilo.* Even if ICC first trial was to begin on 23 June 2008, on 11 June 2008 the Trial Chamber I announced that the trial is postponed until a date which would be further announced. See ICC Press release, ICC-CPI-20080611-PR322-ENG, *The Trial in the case of Thomas Lubanga Dyilo will not start on 23 June 2008*, 11 June 2008, available at http://www.icc-cpi.int/press/pressreleases/379.html. See also ICC Press release, ICC-CPI-20080616-PR-324-ENG, *Trial Chamber imposes a stay on the proceedings of the case against Thomas Lubanga Dyilo,* 16 June 2008, available at http://www.icc-cpi.int/press/pressreleases/381.html.

an African Criminal Court?', as all the four situations the ICC is dealing with are in Africa. All the four situations are analyzed in details. They all follow the same pattern: the history of the conflict is presented, some comments on the trigger mechanism are made, then the measures which ICC took are also laid down, and in the end, the challenges that ICC faces are also presented. When the situation required it, some personal recommendations were made.

Article 121 paragraph 1 of the Rome Statute stipulates that the Statute may be amended after seven years from its entry into force. As the Review Conference in 2009 (or 2010) is close, the last part of my thesis is dedicated to some conclusions and recommendations for the Conference.

CHAPTER I

The International Criminal Court – from a Dream to Reality

I. 1. The Beginning

After more than one hundred years of legal work, the International Criminal Court (ICC) is finally a reality of the third millennium. The process was long, hard, with a lot of obstacles. Most of them were political or psychological, but finally the need of an international justice defeated all of them.

Searching for a history of the creation of the ICC, one may find more points of view. There are authors[29] who consider that the first precedent of an international criminal court was given by the trial of Peter von Hagenbach in 1474 for the crimes he committed while he governed Breisach. Being accused of not respecting the laws of God and of human beings, he was convicted to death and therefore, executed. There are authors[30] who remind of Gustave Moynier's initiative from 1872. He was among the ones who created the Red Cross Committee and he proposed an international criminal jurisdiction in order to punish those who did not respect the dispositions of the Geneva Convention from 1864, while the Franco-Prussian war took place. Moynier's proposal had no success because it was seen as a diminution of the state's sovereignty.

Most of the authors[31] start their historical survey with the First World War. It was then that a lot of atrocities had been committed, that the chemical

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[29] See e.g. Virginia Morris and Michal P. Scharf, "An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia" - Transnational Publishers: Irvington-on-Hudson, 1995, vol. 1, at 1 or Victor Ponta and Daniela Coman, "Curtea Penală Internațională. Consacrarea juridică a statutului primei instanțe penale permanente din istoria justiției internaționale" - Lumina Lex, Bucureşti, 2004, at 16.

[30] See e.g. Christopher Keith Hall, *The First Proposal for a Permanent International Criminal Court*, 322 International Review of the Red Cross, 1998, at 57.

[31] See e.g. A. Cassese, P. Gaeta, J.R.W.D. Jones, (Eds.), "The Rome Statute of the International Criminal Court. A Commentary" or Herman von Hebel , *An International Criminal Court - A*

weapons had been first used and a lot of civilians had died. The Peace Conference started in Versailles, on 25 January 1919 and ended by signing the Peace Treaty on 28 June 1919 which entered into force on 10 January 1920.

As far as I am concerned, I do believe that Gustave Moynnier had an important role in giving birth to the idea of international criminal jurisdiction. He proposed the creation of a tribunal which was to be formed by five members, two proposed by the belligerents and three by the neutrals. His idea did not succeed in 1872, neither a few years later when he proposed it again, this time to the Institute of National Law in Cambridge. Meanwhile, after the Geneva Convention in 1864, new steps were added to the history of International Criminal and Humanitarian Law, by the Hague Conventions from 1899 and 1907[32].

They contained innovative dispositions. For example, there were articles which mentioned that the civilian population had to be protected even in the time of war and the forth Hague Convention referred to a new crime, the "crime of war".

The Peace Treaty from Versailles contained three articles (227-229) concerning the creation of a special international court. This Court was supposed to try the German Kaiser, Wilhelm the Second who was accused of a "supreme offence against international morality and the sanctity of treaties". Unfortunately, the Court could not be established because The Netherlands, the country where the Kaiser was a refugee, did not agree to extradite him[33]. In Versailles, there was also set a Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties. Its members investigated more than 20,000 people and found 896 of them, guilty of committing war crimes. Germany did not cooperate and did not extradite the ones responsible for the war, so that they could be tried by the allies' jurisdiction. In the end, the list of criminals was reduced to a number of 45 persons who were to be tried by Germany. In reality, only 12 were incriminated

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Historical Perspective in "Reflections on the International Criminal Court", T.M.C. Asser Press, The Hague, 1999, at 15.

[32] See Yusuf Aksar, "Implementing International Humanitarian Law. From the Ad Hoc Tribunals to a Permanent International Criminal Court", Routledge, London, 2004, at 43-44.

[33] It is very interesting that The Netherlands hosts now the 'capital of justice'.

and just 6 of them were lightly sentenced[34]. Most of them managed to escape from prison and even worst, some became heroes[35].

The hope of international justice disappeared.

I. 2. Interbellum. The Role of Vespasian Pella

This period of time was dominated by the League of Nations and the activity of International Association of Penal Law, International Law Association and Inter-Parliamentary Union.

The League of Nations set up an Advisory Committee of Jurists, on 13 February 1920, which had to discuss the creation of a Permanent Court of International Justice (PCIJ). Some members took into consideration the creation of a High Court of International Justice, but others considered that the establishment of the High Court, which was to "try crimes against international public order and the universal law of nations", is not their concern. Even if they recommended to the Council of the League of Nations to take into consideration the possibility of creating such a High Court, the Council did not support the idea which was seen as "premature" for the society they lived in: "there is not yet any international penal law recognized by all nations"[36].

Some jurists, however, continued to discuss the subject. In 1925 the Inter-Parliamentary Union agreed that a permanent court should be created, and as a part of this institution should be a special chamber to try the "offences against public international order and the laws of nations". Another academic forum, the International Law Association, organized more meetings in order to discuss this matter. On the third conference in 1926, which took place in Wien, the members of

[34] See Herman von Hebel, in "Reflections on the International Criminal Court", supra note 311, second part, at 6.
[35] See Benjamin B. Ferencz, "An International Criminal Court. A Step Toward World Peace – A Documentary History and Analysis, Vol. I, Half a Century of Hope", Dobbs Ferry, NY: Oceana Publications, Inc., 1990 at 33.
[36] Ibid, note 4, at 36-38.

the Association concluded that the idea of establishing of such a court, is not only desirable, but also possible[37].

The International Association of Penal Law supported the idea, as well its president, Vespasian Pella (1897-1952), who was a great Romanian jurist and a pioneer of international criminal law. He studied at the "Faculté de Droit" of Paris, as well at the Faculty of Law from Iassy[38] and he had a teaching career in Iassy, Bucharest, The Hague, Paris and New York.

Vespasian Pella was not only a great jurist but also a well known diplomat. He served as a member of the Romanian National Constituent Assembly from 1922 to 1926, as well as the member of the Romanian Parliament from 1927 to 1928. He was also a member of Romania's delegation to the Assemblies of the League of Nations from 1925 to 1938. Mr. Pella had the rank of Minister Plenipotentiary to the Netherlands (1936-1939)[39], to the European and International Danube Commissions and to Switzerland (1943-1944).

Pella was also the Chairman of the Committee on Legal and Constitutional Questions of the Assembly of the League of Nations in 1938 and he served as "rapporteur" of the Diplomatic Conference for the Suppression of Counterfeiting in 1929 and of the Conference for the Suppression of Terrorism and for the Creation of an International Criminal Court in 1937.

As expert in international criminal law, he participated in many League of Nations bodies or even some of the United Nations. But maybe his most ardent work as a jurist was the one from the international organizations whose member was. He was a permanent member of the Interparliamentary Union, the International Bar Association, the American Society of International Law, the International Law Association and the Association of Penal Law. He became the President of the latter in 1946, position fulfilled until his death.

Professor Pella believed in the idea of international justice. He wanted an International Criminal Court and an International Crimes Code. He exposed his

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[37] Herman von Hebel, in "Reflections on the International Criminal Court", supra note 311, second part, at 17.

[38] I am proud to graduate from the same University, "Al. I. Cuza".

[39] See Ivan S. Kerno, *In memoriam: Vespasian V. Pella,* in The American Journal of International Law, vol. 46, no. 4 (Oct. 1952), at 709-10.

views and hopes in his works, mainly in "La criminalité collective des Etats et le droit pénal de l'avenir" (1925), "Plan d'un code répressif mondial" (1935) and "La guerre-crime et les criminels de guerre" (1946).

Finally, the results of his work were materialised in the draft statute of an International Criminal Court. The International Association of Penal Law approved the draft statute from 1928. A few years later, in 1935, in his quality of raporteur, Vespasian Pella was the author of an International Code which also included his earlier draft statute.

In 1934, the King Alexander of Yugoslavia and the French Minister of Foreign Affairs, Barthou, were assassinated.[40] As a consequence, France took the initiative in the League of Nations to create an International Terrorism Convention. The crimes within the Terrorism Convention were supposed to be under the jurisdiction of an International Criminal Court whose draft statute was already elaborated by the Romanian jurist. The Court was to be situated in The Hague and it was formed by five judges, all with a relevant experience in their own countries, members of the League of Nations. The statute contained 56 articles regarding the organization and the jurisdiction of the Court, the trial, the sentences and the way they were to be executed.

Vespasian Pella's dream was to create a permanent jurisdiction. He argued and defeated the ones who opposed to the creation of such an organ because of the expenses. He suggested that the Court should sit only when seized of an offence within its jurisdiction. At the beginning, the Professor thought that the Court should be a Chamber of the International Court of Justice, but in time he changed his opinion and fought for an independent organ. His considerations were first of all practical: "the setting up of a criminal chamber of the International Court of Justice would involve the revision of the Statute of that tribunal, which can only be done with great difficulty in any case and would be the more difficult if certain states

[40] See also Kovács Péter, *Le grand précédent: la Société des Nations et son action après l'attentat contre Alexandre, roi de Yougoslavie* in: Kovács (ed): « Terrorisme et droit international » / "Terrorisme and International Law" at 135-144. Also in: Journal of the History of International Law, Vol. 6, No. 1, 2004 at 65-77 (13).

were to persist in their attitudes of opposition to all ideas of an international criminal court"[41].

Professor Pella had in mind just one international organ. Some years later[42], the French representative in the Committee for the Progressive Development of International Law and its Codification proposed two such organs but the Romanian jurist believed that it was better to look for one single court.

In the Professor's opinion, the number of the judges serving the Court had to be large. The Convention from 1937 provided five judges and other five alternates. The number was small for a court to deal with acts of terrorism. Professor Pella proposed fifteen judges and eight alternates in his draft statute. Later, the draft statute of the Commission francaise du droit commun international provided eighteen judges who had to have strong knowledge of both criminal and international law. Their mandate was supposed to be for nine years and they were elected by the United Nations General Assembly and Security Council in the same way as Articles 4 to 12 of the Statute of the international Court of Justice prescribed[43].

The Court imagined by Pella had the seat in The Hague but he didn't exclude the possibility of its sitting elsewhere on occasion. Again, the Professor had in mind practical aspects, being easier for the Court to have its seat in the same place as the International Court of Justice: "...the choice of The Hague, besides permitting close relations between the judges of the two tribunals, would allow the assignment to the registry of the International Court of Justice of comparable functions in relation to the criminal court. This would be both a simple and an economical arrangement"[44].

Professor Pella strongly considered that the setting up of an international public prosecutor's department would contribute to the functioning of the Court[45]. Some functions of the department were also indicated in the Nuremberg and Tokyo

[41] Vespasian V. Pella, *Towards an International Criminal Court* in The American Journal of International Law, vol. 44, no. 1 (Jan. 1950), at 37-68.
[42] See U.N. Doc. A/AC.10/21, May 15, 1947.
[43] See the draft of the International Association of Penal Law, articles 4-6
[44] Pella, supra note 41 at 61.
[45] Vespasian V. Pella, "La criminalité collective des Etats" - Organisation d'un Ministere public international, 1925, at 287.

Charter. Considering the appeals, he believed that "there should be, it is thought, no right of appeal from the decisions of an international criminal court save by way of application for revision. Judgments should be communicated to the Security Council, the body charged with the duty of taking measures for the execution of sentences and measures of safeguard against states"[46].

The Court was to deal with the gravest crimes, therefore, the death penalty was also considered. Pella thought about the states which didn't have the capital penalty. The problem was to be solved by providing the maximum sentence of imprisonment. As recognition of Pella's work, most of his conceptions were incorporated in the text of international conventions. In fact, on 16 November 1937 both the Convention for the Prevention and Punishment of Terrorism and the Convention for the Creation of an International Criminal Court were adopted.

Unfortunately, the Conventions remained only on paper, simple documents. The Convention regarding the Terrorism was finally ratified only by a state, India, while, the Convention regarding the International Criminal Court, even if signed by 16 states, never got any ratification of all.

The causes of the two Conventions failure might be multiple. Maybe the states were not ready for such an international jurisdiction. Maybe they regarded it as a diminution of their sovereignty, maybe they were not ready for dealing with the new crime of terrorism or maybe it was the Second World War which did not permit to succeed. One fact is for sure: the Romanian jurist Vespasian Pella had a great role in rethinking the judicial system of that time. His draft statute and the code of crimes are very important documents for the history of international law.

I. 3. After the Second World War. The Military Tribunals

The war had taken a lot of human lives and horrible atrocities had been committed. The responsible ones had to be punished. The St. James Palace Declaration of 13 January 1942 was followed, on 20 October 1943, by the establishment of the United Nations War Crimes Commission (UNWCC) which

[46] Pella, supra note 41 at 64.

was to get information about the Nazi criminals of war. Only a few days later, on 1 November 1943, in the Declaration from Moscow was written that the Nazi criminals should be sent to the countries they committed the atrocities where they were supposed to be tried. The ones whose offences had "no particular geographical localization" were to be punished by a special tribunal. The decision of establishing an international tribunal was made at Yalta, in February 1945.

The Statute of the International Military Tribunal of Nuremberg was adopted in London, on 8 August 1945. The Tribunal consisted of four judges and four prosecutors. It was established "for the just and prompt trial and punishment of the major war criminals of the European Axis" and its jurisdiction was over the crimes against peace, war crimes and crimes against humanity. It was very interesting that if a person who committed a crime was a member of an organization, the Tribunal was competent to declare the whole organization criminal, and therefore, they could arrest everyone who was a member of that organization (E.g. SS, SA. OKW, SD, Gestapo). The Tribunal functioned between 20 November 1945 and 1 October 1946.

Even if criticized, the Nuremberg Tribunal was a step on the way to international justice. The most accuses concentrated on the fact that it was a tribunal of those who shared the victory in war, and another critique was based on the fact that did not guarantee at all the function of prevention, which is very important in the criminal law and that it represented an *ex post facto* law. Even so, its statute contained some dispositions which are valuable for the international law[47].

Article 6 incriminated the crimes against peace which were related to the crime of aggression, as it has been a crime under international penal law since the 1928 Kellogg-Briand Pact. The war crimes were mainly the ones from the forth Hague Convention from 1907 and the crimes against humanity were incriminated to protect the civilian population[48].

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[47] See the whole text of the Nuremberg Charter available at http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm.

[48] See Dominic Mcgoldrick, *Criminal Trials Before International Tribunals: Legality and Legitimacy,* in Dominic Mcgoldrick, Peter Rowe, Eric Donnelly (Eds.), "The Permanent

Article 7 contained a very important disposition. The official position of the defendant, no matter if head of state or an important person in government, did not spare from the criminal responsibility. Article 8 related to the persons who acted pursuant to a superior order. They were to be punished too, but the judges were to consider that aspect.

The Nuremberg Tribunal seemed to be a good solution for the moment. That was the reason it served as a model for the Tokyo Tribunal whose establishment was decided on 26 July 1945 by the Declaration of Potsdam. General MacArthur approved its charter[49] on 19 January 1946. This Tribunal related to the war in Far East and was supposed to try the Japanese war criminals. There where 11 judges who represented every country Japan was in war with, and there was a Chief Prosecutor from USA.

The Statute of this Tribunal followed mostly the Nuremberg model but it had also its own dispositions. For example, an organization could not be declared criminal and the sentence became effective by the General's disposition. The last day of work was 12 November 1948. A number of 28 persons were tried, 7 of them being sentenced to death[50].

The Tokyo Tribunal was even more criticized than the one from Nuremberg. It had been accused of not respecting the principle "nullum crimen sine lege" as they sentenced people for committing some facts which were not incriminated at the time they had been committed. However, the Military Tribunals had their importance in marking the road to international justice. They served for changing the judicial mentality and new crimes had been discovered contributing to the development of international criminal law.

International Criminal Court. Legal and Policy Issues", Hart Publishing, Portland, 2004 at 14-20 or William A. Schabas, "An Introduction to the International Criminal Court", second edition, Cambridge University Press, 2004, at 5-8.

[49] See the whole text of the Tokyo Charter available at http://www.yale.edu/lawweb/avalon/imtfech.htm.

[50] See also Mcgoldrick, supra note 48 at 20-21.

I. 4. New attempts in establishing an international criminal court

The period between 1946 and 1954 was dominated by the work of the United Nations. After the Second World War and the experience of the two Military Tribunals, it became clear that an International Criminal Court was needed. The jurists had no more to demonstrate the need of an ICC (in the way Vespasian Pella had to do it 20 years ago), but to work of its establishment. The question was no more "why?" but "how?"

The period after the military trials is characterized by three directions: the work on a definition of "aggression", the work on a "crimes code" and finally, the work on an international criminal court. By adopting more resolutions[51], the General Assembly established a Committee on the Progressive Development of International Law and its Codification which had to elaborate a "general codification of offences against the peace and security of mankind". A special attention was paid to the new crime of "genocide" and ECOSOC was asked to prepare a Convention on that crime.

The Committee met several times and again, the discussion about the possibility of creating an ICC appeared. They did not concentrate on establishing an ICC, but in elaborating a draft crimes code. ECOSOC managed to end its task and on 9 December 1948, and the General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide[52]. The next day the Universal Declaration of Human Rights was signed.

ECOSOC suggested in its work that an ICC was needed to try the crimes within the Convention on Genocide, but the General Assembly decided that the national systems could do that. Still, there were states who directly expressed their wish of establishing such an ICC. The Netherlands and Iran for example, insisted on the need to create an international criminal court and as a consequence, the

[51] GA 94(I), 95(I) and 96(I) Resolutions.
[52] GA 260 (III) (A) Resolution.

resolution 260 (III) (B) which requested the Committee to study the possibility of creating an ICC, was adopted.[53]

The Committee began its work on the Crimes Code and an ICC. One year later, it was asked to elaborate a definition of aggression[54]. Their members had different opinions about the establishing of an ICC, but finally, a majority concluded that it is possible to create such an international institution. The Committee elaborated also a draft Code of Offences but didn't manage to offer a definition for the aggression[55].

Another special committee was set to elaborate a convention on an ICC, on 12 December 1950[56]. A year later the seventeen expert committee offered a draft statute for such a court and the General Assembly referred it to States for observations. The states had controversial opinions and this was the reason the General Assembly created another committee[57] with the same task.

Meanwhile the committee which had to elaborate a Draft Code of Offences managed to offer one to the General Assembly, but because it contained no definition of aggression, its consideration was postponed[58] and a special committee was created to elaborate the definition of such crime[59]. Thus, again, two special committees were set up: one to elaborate a draft convention on an ICC and one to define aggression. Both were to report back in 1954 when the draft Code of Offences was also to be considered.

The Committees and the ILC[60] worked during the year of 1953 but still, in 1954 the result of their work was postponed by the General Assembly. The Code of Offences was postponed because there was no definition of aggression and the convention on an ICC was postponed on the same reason, as well as because there

[53] Herman von Hebel, in “Reflections on the International Criminal Court”*,* supra note 311, second part, at 24.
[54] GA 378 (V) (B) Resolution.
[55] The states didn't manage to offer one in 1998 either.
[56] GA 489 (V) Resolution.
[57] GA 687 (VII) Resolution from 5 December 1952.
[58] GA 599 (VI) Resolution from 31 January 1952.
[59] GA 688 (VII) Resolution from 20 December 1952.
[60] See William A. Schabas, “An Introduction to the International Criminal Court”, supra note 48, second part, at 8-10.

was no Code of Offences[61]. It was clear that the creation of an ICC was only the third step. The first was the definition of aggression and the second was the Code of Offences[62]

Another Committee to Define Aggression was created. Before even starting from the beginning, their activity was made almost impossible by the Cold War. Once again, the war triumphed over justice.

I. 5. The end of the Cold War. The *Ad Hoc* Tribunals

It took almost 20 years for the committee to offer a Definition of Aggression. The General Assembly adopted it by the resolution 3314 (XXIX), on 14 December 1974.

The Cold War was still at its very high and the work on an ICC was very difficult. Still, the General Assembly managed to adopt two very important conventions: the International Convention on Suppression and Punishment of the Crime of Apartheid[63] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[64]. Both conventions provided the possibility of establishing an ICC in order to try the ones who committed the crimes defined by the text of the conventions.

An *Ad Hoc* Working Group[65] was created to study again the possibility of establishing such an international tribunal. After 27 years (1954-1981), the International Law Commission was invited to resume its work on the Code of Crimes[66]. The draft code was firstly read after another 10 years, in 1991[67].

[61] GA 895 (IX) and 897 (IX) Resolutions from 4 December 1954 and 898 (IX) Resolution from 14 December 1954.
[62] It seems this step was missed in Rome in 1998.
[63] GA 3068 (XXVIII) Resolution from 1973.
[64] 10 December 1984.
[65] GA 12 (XXXVI) Resolution from 26 February 1980.
[66] GA 36/106 Resolution from 1981.
[67] UN Doc. A/46/10, para. 175.

Thus, the first two steps were made. There was a definition of aggression from 1974 and a draft code of crimes from 1991. The next step which had to be made was the establishing of the ICC.

The ILC was asked by the General Assembly[68] to discuss in its next session this issue. But the ILC was busy with the draft of Code of Crimes, and this was the reason the creation of the ICC was discussed only in 1992. After the majority of members of the Commission concluded that an ICC was needed, they requested to work on a draft statute of establishing such a court. The General Assembly approved their request[69], considering it a matter of priority.

After a history of almost 70 years, everything seemed to be on the right way. Finally, there was a definition of aggression, there was a draft code of crimes and they worked on a draft statute of the ICC. Unfortunately, the war was to win again.

During 1991 a conflict started on the territory of Yugoslavia. The conflict was very serious, a lot of atrocities had been committed, and the international peace was seriously threatened[70]. This was the reason the Security Council acted under Chapter VII of the UN Charter and decided to establish an ad hoc tribunal to punish the ones responsible for the war crimes. The situation was tensioned and the Security Council decided that there was no time until the Statute of the ICC would be ready. Besides that, a long time was needed for the states to ratify it. As it was a situation of crises which threatened the international peace and security, the solution of an *ad hoc* tribunal seemed more appropriate for the moment[71]. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by Resolution 808 of 19 February 1993[72]. It was unprecedented that a tribunal was created by a Security Council resolution. There were different opinions about the

[68] GA 44/39 Resolution, after Trinidad and Tobago asked the General Assembly to analyze the possibility of creation an ICC in order to punish the drug commerce.
[69] GA 47/33 Resolution from 25 November 1992.
[70] See Aksar, "Implementing International Humanitarian Law. From the Ad Hoc Tribunals to a Permanent International Criminal Court", supra note 32 at 8-14.
[71] See Dominic Mcgoldrick, supra note 48 at 22.
[72] For an updated statute of the ICTY see http://www.un.org/icty/legaldoc-e/index.htm.

Council's right to do that[73]. There were voices that argued the act of establishing an international tribunal was a political one and therefore, it had nothing to do with justice. But there were also opinions sympathizing with the Security Council's act, considering the crises situation.

Its Statute provided concurrent jurisdiction to the national courts and the Tribunal, with the specification that the Tribunal had priority. The jurisdiction was limited in time and in space: over "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991". The crimes within the Statute were: the grave violations of the Geneva Convention of 1949 (article 2), the violations of the laws of customs of war (article 3), genocide (article 4) and crimes against humanity (article 5).

During the year of 1994, a new government was created in Rwanda and a cruel conflict started[74]. Thousands of Tutsi civilians were killed. The Security Council acted again under the Chapter VII of the UN Charter and established a new *ad hoc* tribunal, the International Criminal Tribunal for Rwanda (ICTR)[75]. It was established on the same considerations as the ICTY and its jurisdiction was also limited in time and space[76]. Its seat was decided to be in Arusha. Its jurisdiction was concurrent with the national one but it had primacy. The Tribunal for Rwanda was to try the crimes committed in 1994 on the Rwandan territory or on the neighbourhood by the Rwandan citizens.

The crimes within its jurisdiction were almost the same as in the one of ICTY but there were also, some innovations[77]. The ICTR was to try the ones responsible for the crime of genocide (article 2), crimes against humanity (article 3) and violations of article 3 common to the Geneva Conventions and of Additional

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[73] See Testimony by Professor Jeremy Rabkin, *The UN Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice?,* in William Driscoll, Joseph Zompetti, Suzette W. Zompetti (Eds.), "The International Criminal Court. Global Politics and Quest for Justice", International Debate Education Association, New York, 2004 at 73-80.
[74] See Aksar, supra note 32 at 14-16.
[75] SC 955 Resolution from 8 November 1994.
[76] See the whole text of the statute at http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf.
[77] See also William A. Schabas, supra note 48 at 11-13.

Protocol II (article 4). Its organization is almost the same as the one of ICTY and they even share the same Prosecutor[78] and Appeals Chamber.

Both *ad hoc* tribunals were the proper solution for that moment. They represented an innovative response to a crises situation. But they were not enough. Their first limit was given by the determinate jurisdiction in time and space. There was needed a permanent international criminal court with universal jurisdiction.

I. 6. Preparing the Rome Conference

Meanwhile, the ILC continued working on the draft statute of an ICC and in 1993 the General Assembly requested once again[79] to consider this issue as a matter of priority, aiming to finalize it in 1994. The ILC managed to elaborate a draft statute in time and recommended to the General Assembly to convene an International Conference for the states to debate the statute. The decision was still a difficult one. Instead of a Diplomatic Conference the General Assembly pointed another *Ad Hoc* Committee on the Establishment of an International Criminal Court[80] to study the situation.

The *Ad Hoc* Committee began its work and there were a lot of discussions regarding a Diplomatic Conference. Finally, they were planning to organize it in 1997 and they suggested that a Preparatory Committee (PrepCom) should be set up to prepare draft texts. The PrepCom took its mandate very seriously and it managed to deal with both the states which wanted for the Conference to be in 1997, and the ones who proposed the year 1998. They decided that they should meet several times in 1997 and 1998 before the Conference which General Assembly requested[81] to take place in Rome from 15 June till 17 July 1998. At the initiative of Adriaan Bos, who was the Chairman of the PrepCom[82], there was another meeting before Rome, which took place in Zutphen, the Netherlands. At that

[78] In the person of Carla del Ponte, as the situation in April 2006.
[79] GA 48/31 Resolution from 9 December 1993.
[80] GA 49/53 Resolution from 9 December 1994.
[81] GA 52/160 Resolution from 15 December 1997.
[82] Herman von Hebel, supra note 31, second part, at 35.

meeting they managed to leave behind the work of ILC and they provided an own draft statute which was analyzed at the Rome Conference.

The Diplomatic Conference on an International Criminal Court took place in Rome from 15 June to 17 July 1998 with the participation of 160 states. The Chairman of the Committee of the Whole was Philippe Kirsch[83], from Canada. The most discussed issues were those regarding the definition of crimes, the jurisdiction and the principle of complementarity.

There were a lot of different opinions and some states proposed a lot of amendments aiming to postpone the signing of the statute, but finally Norway introduced no action motions which were voted by the majority.

At 9 o'clock p.m. on 17 July the final vote of the statute began. It was not until 3 a.m. on 18 July[84] that the Conference was closed. The clock was formally stopped at 11.59. p.m. on 17 July in order to respect the time proposed for the Conference. The Statute was voted with 120 in favour, 7 against and 21 abstentions[85]. On the next day the Statute was opened for signature. As the article 126 required, the Statute began to produce effects on the first day after the sixty days from the sixtieth ratification. On the 11 April 2002, the sixtieth ratification was fulfilled,[86] and therefore, the Statute entered into force on 1 July 2002.

The dream of the Romanian jurist Vespasian Pella came true.

I. 7. The International Criminal Court

The creation of the ICC was a historic victory for human rights and international justice. Its noble goal is “to put an end to impunity” for the perpetrators of “the most serious crimes of concern to the international community

[83] Mr. Philippe Kirsch was elected as the first President of the ICC.
[84] Victor Ponta, Daniela Coman, supra note 29, second part, at 72.
[85] See also Jerry Fowler, *The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations* or Douglass Cassel, *The Rome Treaty for an International Criminal Court: A Flowed but Essential First Step,* in William Driscoll, Joseph Zompetti, Suzette W. Zompetti (Eds.), “The International Criminal Court. Global Politics and Quest for Justice”, International Debate Education Association, New York, 2004 at 131-39 and 110-22.
[86] See statement at http://ue.eu.int/Newsroom, 11 April 2002.

as a whole"[87]. The Court has international legal personality[88], as it is written in the 4th article of the Statute[89]. The jurisdiction of the Court is over the persons who commit the gravest crimes, as genocide, crimes against humanity, war crimes, and, once defined, aggression[90].

The Court can exercise its jurisdiction only over the crimes committed after its entrance into force[91] and only by respecting the principle of complementarity[92]. The definitions of the international crimes are comprised in the Statute[93] as well as in the Elements of Crimes[94], document which assists the Court in their interpretation and application[95], also the definition of aggression is not yet provided[96]. General principles of law as *nullum crimen sine lege*, *nulla poena sine lege*, *non-retroactivity rationae personae*, "individual criminal responsibility"[97], as well as other principles, such as "exclusion of jurisdiction over person under eighteen", "irrelevance of official capacity", "responsibility of commanders and other superiors", etc[98] must be respected by the first permanent international criminal court.

There are three trigger mechanisms which enable the jurisdiction of the ICC: a state-party to the Rome Statute[99] may refer a situation to the Court, the Prosecutor *propri motu* may ask the Pre-Trial chamber to authorize an investigation[100] and the

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87 See the whole text of the Rome Statute at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf.
88 To see an analyze of the legal personality of the international courts and tribunals, see Prof. Péter Kovács: Métamorphoses autour de la personnalité juridique et des sources dans le droit international, available on: http://www.jak.ppke.hu/tanszek/doktori/tananyag/nemz_kozjog/erreursmjil.doc.
89 "The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes".
90 Article 5 of the Rome Statute.
91 See also Bruce Broomhall, "International Justice and the International Criminal Court. Between Sovereignty and the Rule of Law", Oxford University Press, 2003 at 67-83.
92 See the chapter dedicated to the principle of complementarity in this dissertation.
93 Rome Statute Article 6, 7 and 8.
94 Available on http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements(e).html.
95 Rome Statute Article 9.
96 See the chapter dedicated to the crime of aggression in this dissertation.
97 Rome Statute Articles 22-25.
98 Rome Statute Articles 26-33.
99 Or any other state based on an ad-hoc agreement. See Rome Statute Article 12 (3).
100 Rome Statute Article 15.

UN Security Council can refer a situation to the ICC[101] if it considers it is the right way to maintain or restore international peace and security[102]. The latter trigger mechanism was the one of the most discussed topic[103] during the *travaux préparatoires* but in the end the states accepted it considering the special relation with the United Nations concluded in a Relationship Agreement[104] according to article 2 of the Rome Statute.

The four organs of the Court, the Presidency, the Chambers, the Office of the Prosecutor and the Registry[105] continuously cooperate in order to achieve their goal. The Presidency consists of three elected judges who are going to serve for three or six years, as they may be re-elected once. The judicial work of the Presidency is assured by the organizing the judicial activities of the Chambers and other own activities provided by the Statute. It organizes the plenary sessions of judges, constitutes the Pre-Trial Chambers and assigns them the situations referred to the Prosecutor. The Presidency approves forms of the participating of the victims in proceedings and forms of offering them reparations.

The Chambers consists of eighteen judges who assure that all the proceedings before the Court are objective, impartial, judicial and fair[106]. As the Court began its first pre-trial level, every Chamber has its own situations referred by the President. The Rome Statute gives the possibility of increasing the number of judges if some situations require it.

The Office of the Prosecutor acts independently as a separate organ of the Court being responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the ICC[107]. An important aspect of the

[101] See Dan Sarooschi, *The Peace and Justice Paradox: the International Criminal Court and the UN Security Council,* in Dominic Mcgoldrick, Peter Rowe, Eric Donnelly (Eds.), "The Permanent International Criminal Court. Legal and Policy Issues", Hart Publishing, Portland, 2004 at 95-120.
[102] Rome Statute Article 13 (b).
[103] States like India, Iraq and Lybia, vehemently opposed to SC referral. See Jerry Fowler, supra note 85 at 136 or *Statement of India's Vote on the Adoption of the Statute of the International Criminal Court,* in the same book, at 42-45.
[104] Available at http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf.
[105] See also William A. Schabas, supra note 48, second part, at 176-92.
[106] Rome Statute Article 39.
[107] Rome Statute Article 42.

prosecutorial discretion which guaranties an independent prosecutor is the possibility granted under article 15 to start an investigation *proprio motu*[108].

The forth organ of the Court, the Registry, deals with issues of defence, witness, victims, communications and security[109]. It prepares the Court's yearly budget submissions, issues policies and staff rules, ensures initialization of the courtrooms, concludes a range of contracts and implements procurement plan for the Court. As the ICC is the first international criminal court to ensure victims participation at every stage of legal proceedings[110], the Registry coordinates the activity of the Office of Public Counsel for Victims.

I. 8. Towards ending impunity

The road to Rome was long and difficult. It took more than 100 years for an ICC to become reality. The century marked also the progress and development of the humanity and its laws. The international criminal law and international humanitarian law are no longer unknown branches. The state is no longer the most important subject of law but the individual is. Putting on trial a national citizen by an international court is no longer seen as a diminution of the state sovereignty, but as an international recognition of the victims' rights. In six years, since the International Criminal Court started its activity, there are already more situations and cases to deal with. The Prosecutor issued twelve warrants of arrest and four persons are already in custody[111]. The first warrant of arrest for a President in office is also under request. It seems like the ICC is on its way to achieve its noble goal: "to put an end to impunity".

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[108] See Kai Ambos, *The Role of the Prosecutor of an International Criminal Court from a Comparative Perspective*, paper presented at the international workshop "Toward a procedural regime for the International Criminal Court", London 6-7 June 1997 or Peter J.P. Tak (Ed.), "Tasks and Powers of the Prosecution Services in the EU Member States", WLP, Nijmegen, 2004.
[109] Rome Statute Article 43.
[110] See the chapter dedicated to victims in this dissertation.
[111] See the chapter dedicated to situation and cases of the ICC in this dissertation.

CHAPTER II

Elements of novelty and problematical issues in the Rome Statute

II. 1. The Principle of Complementarity and the International Criminal Court

> "The States Parties to this Statute (…),
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes (…),
> Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions (…),
> Have agreed as follows…"[112]

II.1. 1. Principle of complementarity – a new principle of law

A new principle of law has been established in Rome: the principle of complementarity. This principle of law, which was unknown before the year 1998, even if contested by some participants to the Rome Conference[113], was accepted by 60 states[114] in less than 4 years and it was already put into practice in four situations by the mid of 2007[115].

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[112] The Preamble of the Rome Statute.

[113] France, the United Kingdom and the United States considered that ICC should not act as an appeals tribunal or engage in judicial review of national decisions. See Otto Triffterer (Ed).,"Commentary on the Rome Statute of the International Criminal Court", Nomos Verlagsegesellschaft Baden-Baden,1999, article 17, paragraph 12.

[114] On 11 April 2002 ten states ratified simultaneously the Rome Statute, bringing the number of 56 to 66 countries to accept ICC jurisdiction.

[115] Uganda referred the situation in December 2003 and the investigation was opened in July 2004. The Democratic Republic of the Congo referred the situation in April 2004 and the investigation was opened in June 2004. The situation in Central African Republic was referred to the Prosecutor in January 2005 and the investigation was opened in May 2007. The United Nations Security

The principle of complementarity is finding itself somewhere between the substantive and procedural international criminal law. It is not a part of *jus cogens* or of the fundamental principles of international law (as the sovereign equality of states, immunity and other limitations of sovereignty, non-intervention in the internal or external affairs of other states, prohibition of the threat or use of force, peaceful settlement of disputes, respect for human rights, self-determination of peoples)[116]. It is not a part of the fundamental principle of legality in international criminal law as *nullum crimen sine lege* or *nulla poena sine lege*[117] are, and yet, it is a principle of law on which the first permanent international criminal court is based on, a principle accepted by more than 100 states[118].

As genocide, war crimes, crimes against humanity and aggression are under the international law, "the most serious crimes of concern to the international community as a whole", they form the object of activity for the new branch of international criminal law. Their effective prosecution must be ensured by taking measures at the national level and, in case of failure, they form the jurisdiction of the first permanent international criminal court. This is basically, the principle of complementarity. States are given priority in exercising criminal jurisdiction over those responsible for international crimes, but in case of failure, the International Criminal Court takes over this task. Therefore, ICC is an instance of last resort.

The international criminal law protects human rights as well, by providing an answer to the failure of national mechanisms, when victims remain unprotected, especially if human rights violations are initiated by states themselves[119]. ICC comes to complement the lack of justice at the national level.

As it was said before, the principle of complementarity represents a new principle of law, which regulates the relationship between national and international criminal justice systems. The International Military Tribunal was based according to the Nuremberg Charter, on the principle of exclusivity, jurisdiction which was

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Council referred the situation in Darfur, the Sudan in March 2005 and the investigation was opened in June 2005. See the chapter concerning the cases and situations before ICC in this dissertation.

[116] Antonio Cassese, "International Law", Oxford University Press, New York, 2001 at 86-113.

[117] Gerhard Werle, "Principles of International Criminal Law", TMC Asser Press, The Hague, 2005 at 24.

[118] 108 states as the situation in July 2008.

[119] Werle, supra note117 at 40.

granted only to the countries of commission for other perpetrators[120]. The jurisdiction of the *ad hoc* tribunals, ICTY and ICTR is based on the principle of concurrency, international tribunals accepting the concurrent jurisdiction of national courts, but having primacy over those[121]. The Rome Statute came with the principle of complementarity, meaning that national courts are given priority to exercise their criminal jurisdiction over those responsible for international crimes, but in case of failure, ICC would exercise its jurisdiction. Therefore, international jurisdiction does not replace the national jurisdiction, but simply supplements it in case of failure. What failure really means is explicitly written in the Rome Statute, more exactly in the article 17. Failure is expressed by "unwillingness" or "inability" of a state to carry out the investigation or the prosecution. The International Criminal Court itself determines if a state is unable or unwilling to make justice[122].

II.1. 2. Concurrency v. complementarity

The principle of concurrency is comprised in the article 9 of the ICTY Statute[123]:

"The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991"

and article 8 of the ICTR Statute[124]:

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[120] Ibid at 68.
[121] See also "Essays on ICTY Procedure and Evidence. In Honour of Gabrielle Kirk McDonald", Richard May et al. (Eds.), Kluwer Law International, The Hague, 2001.
[122] This is the main difference between the principle of complementarity comprised in the Rome Statute and the one comprised in the Statute of the Special Court for Sierra Leone (SCSL). The second provides in article 1 paragraphs 2-3 that the Security Council may authorize at the proposal of any state, for the SCSL to exercise jurisdiction over persons if the sending state is unwilling or unable genuinely to carry out an investigation or prosecution. See the statute of SCSL available at http://www.sc-sl.org/Documents/scsl-statute.html. See also Florian Razesberger, "The International Criminal Court. The Principle of Complementarity", Peter Lang, Gemany, 2006 at 23.
[123] See John R.W.D. Jones, Steven Powles, "International Criminal Practice", Transnational Publishers, New York, 2003 at 367-68 or John R.W.D. Jones, "The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda", Transnational Publishers, New York, 1998 at 73.
[124] Ibid at 368-70.

"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 States, between 1 January 1994 and 31 December 1994".

Both statutes contain a second paragraph adding that the Tribunal has primacy over national courts:

"The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts[125] *to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence*[126] *of the International Tribunal*[127]*".*

The principle of complementarity is contained in the Preamble of the Rome Statute, in article 1, 12, 17, 18, 19 and their dispositions will be discussed in the next section concerning complementarity in the Rome Statute. A question that may arise is why a new principle of law, why not a principle of international law that was already put into practice?

In the case of the ad-hoc tribunals[128], the ongoing conflict and the animosity of the different ethnic and religious groups were the main reasons why the primacy of the Tribunal was stipulated. It was unlikely that the authorities would bring their own people in front of the courts of justice. If we analyze the four situations in front of the ICC, the Central African Republic, Uganda, the Democratic Republic of the Congo and Darfur, the Sudan, we may think that the principle of concurrency

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[125] See also André Nollkaemper, *Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY,* in "International Criminal Law Developments in the Case Law of the ICTY, Gideon Boas, William A. Schabas (Eds.), Martinus Nijhoff Publishers, Leiden, 2003 at 277-96.

[126] See also Virginia Morris, Michael Scharf, "The International Criminal Tribunal for Rwanda", Transnational Publishers, New York, 1998.

[127] See as an example, *Prosecutor v. Dusko Tadic A/K/A "Dule"* – Decision on the Defence Motion on Jurisdiction, B point, available at http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm.

[128] See also John E. Ackerman, Eugene O'Sullivan, "Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia. With Selected Materials from the International Criminal Tribunal for Rwanda", Kluwer Law International, The Hague, 2002.

would be better applied, considering the same reasons: on-going conflicts and animosity between different ethnic and religious groups or tribes.

But unlike the ad-hoc tribunals which were created for a specific conflict, ICC has jurisdiction over the most serious crimes which might be committed starting with the 1st of July, 2002, no matter if these crimes would have place in a context of a conflict, a crisis situation or in time of peace. It is true that there are more chances for the heinous crimes to be committed in time of conflict, but there is also the possibility for some of these crimes to be committed in time of peace, and then would be no reasons for the authorities not to hand over the criminals to their national courts of justice. In this latter example, if a crime is committed in time of peace it would be more fair for the national systems to be given a chance to make justice and only if they are not able or willing to defer the criminals to justice, it would be only then, that an international jurisdiction would have been taken into account.

The primacy of the ad-hoc tribunals is not automatic, though. The rules of evidence and procedure provide that the concurrent jurisdiction may lead to the prevalence of national courts if the Tribunals consider that the case may be tried more appropriately at the national level. In this regard, the ICTY rule11 bis[129] provides that:

"After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers, which solely and exclusively shall determine whether the case should be referred to the authorities of a State :

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case,

[129] ICTY Rules of Evidence and Procedure.

so that those authorities should forthwith refer the case to the appropriate court for trial within that State"[130].

ICTY has already made use of this rule in the case *Prosecutor v. Gojko Jankovic* and referred the case to the authorities of the State of Bosnia and Herzegovina[131].

However, the Rule 9 provides that at the request of the Prosecutor the Tribunal may use its primacy in three cases[132]:

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

One may take a close look to the ICTY Rule 9 (ii) and ICC[133] Rome Statute article 17 (2) which define unwillingness, and may discover the resemblance between the principle of concurrency and the principle of

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[130] See R.W.D. Jones, supra note 123, first part at 584-87. See also Steven D. Roper, Lilian A. Barria, "Designing Criminal Tribunals. Sovereignity and International Concerns in the Protection of Human Rights", Ashgate, Hampshire, 2006, at 72.
[131] *Prosecutor v. Gojko Jankovic,* Decision on referral of case under rule 11 bis, available at http://www.un.org/icty/stankovic/trialc/decision-e/050722.htm.
[132] See also R.W.D. Jones, supra note 123, first part at 377-78.
[133] See also Sascha Rolf Lüder, *The Legal Nature of the International Criminal Court and the Emergence of Supranational Elements in International Criminal Justice,* in IRRC March 2002, Vol. 84, No. 845, at 79-92.

complementarity[134]: which is primary for ICTY, is complementary for ICC, meaning that international jurisdiction shall be applied[135].

One may say that every time unwillingness or inability is determined, ICC has primacy in investigating and prosecuting the responsible for the gravest international crimes. The drafters of the Rome Statute found a clever solution proving dispositions which states would vote for, dispositions which would not breach the states sovereignty and at the same time would claim for the international jurisdiction. In other words they did not include the word "primacy" in the statute, infringing the sovereignty of the states, but they put "complementarity" whenever "unwillingness" or "inability" is determined, which practically means the same thing as "primacy" but expressed in a more proper manner.

II.1. 3. Complementarity in the Rome Statute

The principle of complementarity is expressed in the 10th paragraph of the Preamble of the Rome Statute, as well as in the first article of the Statute or in the Articles 17, 18 and 19. The dispositions of Articles 13, 14, 15 and 20 will be considered within the next section of this chapter:

"an International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions." [136]

The first article comes to confirm the disposition from the 10th paragraph of the Preamble:

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[134] See also Xavier Philippe, *The principle of universal jurisdiction and complementarity: how do the two principles intermesh?,* in IRRC, Vol. 88, No. 862, June 2006, at 375-98.

[135] See supra II.1.3. See also Erich Kussbach, "Nemzetközi büntetőjog", PPKE JAK, 1999 at 134 or Varga Réka, *A Római Statútum Jelentősége a Nemzetközi Jogban és a Nemzetkőzi Büntetőjogban,* in IAS II. 2006/1-2. at 95-8.

[136] See also Gerry Simpson, *Politics, Sovereignity, Remembrance,* in "The Permanent International Criminal Court. Legal and Policy Issues", Dominic McGoldrick, Peter Rowe, and Eric Donnelly (Eds.), Oxford and Portland Oregon, 2004, at 55 or Iain Cameron, *Jurisdiction and Admissibility Issues under the ICC Statute* in the same book at 86-89.

"Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions…"

Article 17 is referring to the issues of admissibility of a case[137]. Paragraph one of this article points out the situations when a case is inadmissible:

"Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

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

(d) The case is not of sufficient gravity to justify further action by the Court."

The last part of subparagraphs (a), (b) and (c) is very important considering the principle of complementarity. Therefore, if case is being investigated or prosecuted by a State which has jurisdiction over it, primacy is given to the national courts and the jurisdiction of the ICC is inadmissible. However, if the State is unwilling or unable genuinely to carry out the investigation or prosecution, ICC will come to complement the lack of justice at the national level, and its jurisdiction would become admissible. Primacy is also given to the national system of justice if a state started an investigation and decided not to prosecute the person concerned. The decisions of the national courts are therefore respected, but only if they do not result from unwillingness or inability of the State genuinely to prosecute. If a person has already been tried for the same crime ICC would have jurisdiction over, according to the *ne bis in idem* principle, the jurisdiction of the ICC would be inadmissible. ICC would have jurisdiction though, if

[137] See also Xavier Philippe, supra note 134

"the proceedings in the other court:

(a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice"[138].

Paragraph 2 of the article 17 explains what unwillingness means:

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

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(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 not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with the intent to bring the person concerned to justice."

Paragraph 3 of article 17 defines inability:

"In order to determine inability in a particular case, the Court shall 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".

[138] Article 20 paragraph 3 of the Rome Statute.

Analyzing the dispositions of article 17, we discover the criteria for determining weather a state in question has met the required standard for conducting criminal proceedings or not: ”unwilling” or “unable”, decision not to prosecute by state, double jeopardy, gravity of the case, “shielding the person”, unjustifiable delay, lack of impartiality, collapse or unavailability of national judicial system[139].

Article 18 also contains some dispositions concerning the principle of complementarity. If the Prosecutor starts an investigation, he or she will notify “all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned”[140]. If within one month from the notification, a State inform the Court that “it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5”, the Prosecutor, based on the principle of complementarity, may “defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation”.

In connection to this article there are the dispositions of article 19 paragraph 2 (b), which foresee that the state which has jurisdiction may challenge the admissibility of a case based on “the ground that it is investigating or prosecuting the case or has investigated or prosecuted”. This means that the state can ask for the application of the principle of complementarity.

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[139] For explanations see Sharon A. Williams, *Article 17. Issues of Admissibility,* in ”Commentary on the Rome Statute of the International Criminal Court”, Otto Triffterer (Ed), Nomos Verlagsegesellschaft Baden-Baden,1999, at 383-94 or John T. Holmes, “*Complementarity: national Courts versus the ICC”,* in “The Rome Statute of the International Criminal Court: a Commentary”*,* Antonio Cassese, Paola Gaeta, John R.W.D.Jones (Eds), Oxford University Press, New York, 2002, Chapter 18.1. at 667-87. See also Ádány Tamás Vince, *A joghatóság gyakorlásának előfeltételei a Nemzetközi Büntetőbíróságon,* Bánrévy Gábor-jubileum. 2004, at 13-23.

[140] Article 18 of the Rome Statute.

II.1. 4. Problematical issues on complementarity

The complementarity principle is the cornerstone of the Rome Statute[141]. It provides a balance between state sovereignty and an effective and credible ICC[142], but it also represents a compromise because without it, there would have been no agreement. As consequences of this compromise, there are more problematical aspects in my opinion, which I will discuss further.

Article 13 of the Rome Statute foresees the trigger mechanisms of the Court, providing that ICC shall exercise its jurisdiction if:

"(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15".

The problematical aspects will be analyzed considering each trigger mechanism.

II.1. 4. a) Referral by a state-party

According to article 14 paragraph 1 of the Rome Statute, "a State Party may refer to the Prosecutor a situation in which one or more crimes within the

[141] B. Swart/G.Sluiter, *The International Criminal Court and International Criminal Cooperation*, in H. von Hebel (Ed.), "Reflection on the International Criminal Court", T.M.C. Asser Press The Hague, 1999, at 91, 105.
[142] Otto Triffterer (Ed).,*Commentary on the Rome Statute of the International Criminal Court,* Nomos Verlagsgesellschaft Baden-Baden,1999, article 17, paragraph 20.

jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes".

In my opinion, the principle of complementaririty implies two aspects: a positive and a negative one. The positive aspect consists in the possibility of a state-party to refer its situation to the ICC, whenever it considers that it is unable to bring to justice the responsible for the gravest crimes. Article 14 takes into consideration the positive aspect of the principle of complementarity. The use of the verb "may", suggests once more time the right of the state to opt between prosecuting itself and referring the situation to the international jurisdiction. Therefore, the national jurisdiction is given priority over the international one.

The negative aspect of the principle of complementarity consists in the possibility of a state-party to withdraw its previous referral to the ICC. Unlike the ICTY Rule 11 bis, which provides that concurrent jurisdiction may lead to the prevalence of national courts if the Tribunals consider that the case may be tried more appropriately at the national level, such rule does not exist within ICC. In other words, once a trigger mechanism is pulled, there is nothing you can do. If a state-party referred a situation to the ICC based on the complementarity principle, and afterwards it turns out that it is able or willing to bring to justice the responsible or to find out another proper solution for its own situation, the state-party can not take the case back. It seems like the ICC complements the national courts but the national courts do not complement ICC.

This is a critical point for the Rome Statute. The base of the complementarity principle is the will of the states. They are given priority in prosecuting and if they can not exercise this priority, the situation becomes a matter of international jurisdiction. If afterwards, the states want to take the situation back, their will does not triumph anymore. The principle of complementarity provides only for the states' priority, not for their primacy in prosecuting. As I will argue in the chapter concerning the cases and the situations before ICC, the situation in Uganda is an example of not respecting the principle of complementarity in its negative aspect.

II.1. 4. b) Referral by the United Nations Security Council

Unlike the ad-hoc tribunals, which were created by UN SC Resolution, ICC is a treaty-based, independent court. A specific relation between ICC and the SC arises from article 13 (b) which provides the possibility for the SC to refer a situation to the Prosecutor of the ICC, if one or more crimes referred to in article 5 of the Rome Statute appears to have been committed. The SC referral born controversies among states[143], but the need for maintaining or restoring international peace[144] according to the Chapter VII of the UN Charter, triumphed and the states parties accepted this trigger mechanism.

A problematic aspect arises in connection with a non state party. If the Security Council refers to ICC a situation concerning a state which did not sign and ratify the Rome Statute, it violates that state's authority to make justice, that state's priority in bringing the responsible to justice, and furthermore, it violates the principle of complementarity. This particular aspect will be discussed in the chapter concerning the situation in Darfur, the Sudan.

One could argue that even if Sudan is not obliged under the principle of complementarity, it is binding under the principle of universal jurisdiction. The problem is that this latter principle offers only the authority to prosecute, not also the duty to prosecute[145]. Even if the Security Council power to refer a situation to the ICC is based on its role to assure international peace, when it comes to a situation concerning a non-state party to the Rome Statute, it still represents a

[143] See Report of the Preparatory Committee on the Establishment of an International Criminal Court, volume 1 (Proceedings of the Preparatory Committee during March-April and August 1996), G.A., 51st Sess., Supp. No.22, A/51/22, 1996 in "Statute of the ICC: a Documentary History", M. Cherif Bassiouni (Ed.), Transnational Publishers, Ardsley, New York, 1998, at 405, paragraphs 129-130. See also *Statement of India's Vote on the Adoption of the Statute of the International Criminal Court,* in William Driscoll, Joseph Zompetti, Suzette W. Zompetti (Eds.), "The International Criminal Court. Global Politics and Quest for Justice", International Debate Education Association, New York, 2004 at 42-45.

[144] See also Aurélio Viotti, *In search for symbiosis: the Security Council in the humanitarian domain,* in IRRC, Vol. 89, No. 865, March 2007, at 131-53.

[145] Werle, supra note117 at 63.

breach of the principle of complementarity, a violation of the state' right to bring its criminals before is own courts.

II.1. 4. c) Prosecutor's *proprio motu* referral and the conditions of admissibility

Article 15 paragraph 1 provides that "the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court". The Prosecutor must seek information which constitutes a reasonable basis for an investigation. He has to be sure that the conditions of admissibility set out in the article 17 are met: "unwillingness" or "inability" of the state to conduct investigations, decision not to prosecute by state, double jeopardy, gravity of the case, "shielding the person", unjustifiable delay, lack of impartiality, collapse or unavailability of national judicial system.

The term "genuinely" was put to both concepts of unwillingness and inability. The drafters of the Rome Statute also considered the concept of good faith but it was not accepted because it was considered narrower than genuineness[146]. Terms as "ineffective", "diligently" or "sufficient grounds" were also taken into consideration, but they were finally rejected, as they were too subjective.

The terms "unwillingness" and "inability" are explained in the statute in order to avoid the subjectivism[147]. First of all, a state is considered unwilling when "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 referred to in article 5"[148]. The term "shielding" is quite broad and it would be not easy for the Prosecutor of the ICC to

[146] John T. Holmes, *Complementarity: National Courts versus the ICC,* in Antonio Cassese, Paola Gaeta, John R.W.D.Jones (Eds), "The Rome Statute of the International Criminal Court: a Commentary"*,* Oxford University Press, New York, 2002, Chapter 18.1., at 674.
[147] A list of indicia of unwillingness or inability to genuinely carrying out proceedings is also provided in Annex 4 of the Informal Expert Paper for the Office of the Prosecutor of the International Criminal Court: "The principle of complementarity in practice", December 2003, available at http://www.icc-cpi.int/library/organs/otp/complementarity.pdf.
[148] Article 17, paragraph 2 (a).

prove that a state fulfills the letter of the Statute but not its spirit[149]. Secondly, there is unwillingness when "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"[150]. Article 17 does not specify what unjustified delay means. There have been some suggestions[151] that a comparison of the concerned case with the usual procedure of the state would be most relevant. Proceedings, which exceed the usual national practice, unexplained, may be considered unjustified delay. Thirdly, there is the case of unwillingness if "the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice"[152]. This criteria would be very hard to prove since it is based on a lot of subjectivism and it must be connected with the Rule 51 which provides: "in considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted"[153]. Another rule with respect to article 17 was proposed by the United States[154] but it was received with negativism as it contained more criteria for the Court to take into consideration when declaring a case admissible based on unwillingness or inability. Among these criteria there was the independence of the state's applicable justice system, including its court martial system, the state's past experience in genuinely investigating or prosecuting similar conduct, whether official or non-official, by its military personnel or citizens and

[149] Sharon A. Williams, *Article 17. Issues of Admissibility,* in "Commentary on the Rome Statute of the International Criminal Court", Otto Triffterer (Ed), Nomos Verlagsegesellschaft Baden-Baden,1999, paragraph 27, (a) "shielding the person", at 393.
[150] Article 17, paragraph 2 (b).
[151] Holmes, supra note 146 at 676.
[152] Article 17, paragraph 2 (c).
[153] ICC Rules of Evidence and Procedure, Rule 51.
[154] PCNICC/1999/WGRPE/45 (2 December 1999).

the state's communication in writing to the Office of the Prosecutor that the person concerned was acting in the course of his or her official duties.

A problem of this proposal was that the first two criteria related to a state's judicial system or process in general rather than relating to the way the state was addressing a specific case. Another problem was the distinction between official and non-official acts which was not considered by the Rome Statute, as a state must prosecute the crimes covered by the Statute no matter if they were committed in an official or non-official capacity[155]. Even if the US argued that the proposal referred both to unwillingness and inability, it was not taken into consideration, as many delegations argued that the proposal referred only to unwillingness and not to inability, also.

According to the Rome Statute, a state is unable to prosecute or to conduct proceedings when "due to a total or substantial collapse or unavailability of its national judicial system", it can not "obtain the accused or the necessary evidence and testimony" or it is "unable to carry out its proceedings"[156]. The American proposal was ineffective concerning inability because in case of total or substantial collapse or unavailability of a state's judicial system, it would not matter if that system functioned effectively in the past or that the state would be willing to act.

Unlike unwillingness which is based on more subjectivism, inability is more objective, being based on facts. Unwillingness and inability can go together or they can exclude each other. For example, if a state suffered a collapse of the institutions, including the judicial system, it might be willing to prosecute, but it is unable[157]. In some cases there could be crimes which are not punishable under national law. For example criminal or military codes may not comprise the using of child soldiers[158] or sexual offences prohibited as crimes against humanity and war

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[155] John T. Holmes, *Jurisdiction and Admissibility,* in Roy S. Lee (Ed.), The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence, Transnational Publishers, Inc. 2001 at 335.
[156] Article 17, paragraph 3.
[157] Holmes, supra note 146 at 677. The author gives Rwanda as an example. Other such situation is Somalia, see Mahnoush H. Arsanjani, *Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court,* in H. von Hebel (Ed.), "Reflection on the International Criminal Court", T.M.C. Asser Press The Hague, 1999, at 70.
[158] See Bruce Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law, Oxford University Press, New York, 2003 at 92.

crimes[159], which might lead to the qualification of that state as unwilling or unable to prosecute.

One may say that in the end the principle of complementarity manifests in two situations: if the ICC is the only court seized with the matter, the only condition for ICC to deal with the case is its gravity; if not, the national jurisdictions have primacy unless an element of unwillingness or inability is manifested[160].

The drafters of the Rome Statute tried to provide the most objective criteria in the process of admissibility of a case within ICC. But even if they used words as "genuine", which was seen as "the least objectionable word"[161], the fact that the Court itself is to consider if a state is unwilling or unable to prosecute, makes in my opinion, a jurisdiction of control from ICC[162]. The Court appears as an appellate body to decide if the domestic authorities are doing their job or not. This role can be seen also in article 20 of the Rome Statute which provides:

"No person who has been tried by another court shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

[159] Rape, sexual slavery, enforced prostitution.
[160] John R.W.D. Jones, Steven Powles, "International Criminal Practice", third edition, Oxford University press 2003, at 392, paragraph 5.108.
[161] Sharon Williams, supra note 149, at 392, paragraph 22(a) "unwilling or unable".
[162] Some authors call it "supervisory function", see e.g. J.K. Kleffner *Complementarity as a catalyst for compliance,* in Kleffner, J.K. and Kor, G. (Eds.), "Complementarity Views on Complementarity. Proceedings of the International Roundtable on the Complementarity Nature of the International Criminal Court", The Hague,.T.M.C. Asser Press 2006, at 82.

Once again, ICC appears as a quasi "appellate" body to review decisions at the national level. As China suggested[163], it would be preferable if the Security Council or the domestic courts had the capacity to decide that a case before ICC is admissible or not. But then, new discussion would arise: the Security Council is a political body and the domestic courts would not recognize their unwillingness or inability to prosecute. Maybe a solution would be to consider the domestic rules of criminal procedure. In most countries, when a conflict of competence arises, the common superior court is to decide which court is competent in the concerned case[164].

On the international level though, there is no common superior court. Therefore, when a conflict of competence arises between a national and an international court, the situation is delicate. ICC should not have automatic competence, because there would be a violation of the principle of complementarity. At the same time, ICC should not be the court to decide if a domestic court is unwilling or unable to bring to justice the criminals because it is the risk of being seen as a court of control. This is why another body or another court should hold this authority. The International Court of Justice is not the suitable court to decide in this matter, since it has jurisdiction over states and not over individuals or over the conflicts aroused between national and international courts. To establish a special court to have authority in cases of conflict of jurisdiction between domestic courts and ICC means time and money. One may think that the Security Council would be the proper organ to decide in this matter, even if it is a political body, on the same grounds that it is the organ to decide if an act of aggression occurred or to defer a situation to the ICC[165].

In the young literature concerning the ICC[166] there have been raised already some problematical issues which might arise from complementarity in practice. For example, taking into consideration the potential divergence of interests between the different categories of ICC beneficiaries, some questions which need to be

[163] Sharon Williams, supra note 149, paragraph 7, footnote 18.
[164] See e.g. article 43 of the Romanian Code of Criminal Procedure.
[165] With the reservation that in my opinion, the referral of a situation which concerns a non-state party represents a violation of the principle of complementarity.
[166] As it is a new institution in the field of international law.

answered would be: whose interest is the Court intended to serve? The one of the principally affected state? The victims' interest? The interest of the states parties to the Rome Statute[167]? It is most probably that the interests of victims would be retribution while the interests of the states parties would be deterrence. As ICC focuses only on the crimes of the most concern for the international community which are mainly leadership crimes, it might be expected for the ICC to try only the political leaders and not also the ones who have a lower role in committing the crimes. The latter's conviction would be expected by the victims of the crimes. How can ICC deal with the complementarity principle in this case?

A risk which exists when ICC exercises its sole active jurisdiction, where international prosecutions before the ICC are carried out in the absence of national jurisdiction, is for the Court to be satisfied with a small number of trials[168]. As the states' parties' interest would be deterrence, to ensure that this kind of crimes would not occur again, a few examples would be enough to make deterrence exemplary.[169] This would be contradictory to the will of the victims who would prefer a large number of trials.[170] In this case the prosecutorial policy would be that of a stratified concurrent jurisdiction approach to the distribution of defendants meaning that ICC would prosecute the leaders while the lower ranked defendants would be left to be prosecuted by the national jurisdiction. This form of application of the complementarity principle could lead to a failure in making justice. For instance, there have been examples in Rwanda, where many low-ranked defendants

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[167] See Madeline Morris, *Complementarity and Conflict :States, Victims and the ICC*, in Sarah B. Sewall, Carl Kaysen (Eds). "The United States and the International Criminal Court", American Academy of Arts and Science, 2000 at 196-208. The article can be found also in "International Crimes, Peace, and Human Rights: the Role of the International Criminal Court, Dinah Shelton (Ed.), Transnational Publishers, Ardsley-New York, 2000, at 177-201.
[168] Ibid at 198.
[169] There are authors who do not share such point of view: "It is a fact that possible accomplices will include everyone, from the head of state, through the generals and soldiers right down to the mayors and even a supervisor in a tea factory. We can hope that this wide net of accountability, covering not only people in positions of authority but also those simply aid and abet others, should serve to prevent crimes as people alter their conduct to avoid liability", Andrew Clapham, *Issues of complexity, complicity and complementarity: from the Nuremberg trials to the down of the new International Criminal Court,* in "From Nuremberg to The Hague. The Future of International Criminal Justice", Philippe Sands (Ed.), Cambridge University Press, 2003 at 67.
[170] Madeline Morris, supra note 167 at 201. The author is arguing that "applying deterrents as top, middle and lower levels of criminal hierarchies ultimately may be a more effective deterrence strategy than exclusive prosecution of those in leadership position".

have been sentenced to death in national courts, while leaders of the genocide have received lighter sentences after trials at ICTR[171].

Another problematic aspect of the principle of complementarity might arise when ICC, based on a *proprio motu* or a UNSC referral would start an investigation considering the concerned state unwilling or unable to prosecute, while the state would run a parallel investigation, as it would consider itself both willing and able to fulfill the process of justice. In this case, there have been some suggestions[172] for the ICC Prosecutor to negotiate with the national government on an ICC prosecutorial strategy and where negotiations fail, ICC would have to foster national proceedings if the state is willing or able to prosecute or, on the contrary, ICC would not have to foster the proceeding or to cooperate if the state lacks impartiality or willingness.

Another critically issue of complementarity which during the Rome Statute negotiations got channeled into admissibility[173] is that it might involve complex disputes between the ICC Prosecutor and one or more states[174]. As it was shown in the doctrine, this might lead to a complex and litigious jurisdictional matter that could nearly paralyze the Court[175]. The Court might not be allowed by governments or by the Security Council to indict, obtain custody of or judge the main perpetrators of the most serious crimes of concern to the international community as a hole[176].

II.1. 5. Precedents of (un)willingness or (in)ability to prosecute in international law

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[171] Ibid at 204, notes 35 and 36.

[172] Ibid at 205-206.

[173] Roger S. Clark, *The ICC Statute: Protecting the Sovereign Rights of Non-Parties,* in "International Crimes, Peace, and Human Rights: the Role of the International Criminal Court, Dinah Shelton (Ed.), Transnational Publishers, Ardsley-New York, 2000, at 216.

[174] See William A. Schabas, "An Introduction to the International Criminal Court" second Edition, Cambridge University Press, 2004 at 85.

[175] Louise Arbour, Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overeach,* in H. von Hebel (Ed.), "Reflection on the International Criminal Court", T.M.C. Asser Press The Hague, 1999, at 131.

[176] See Yves Beigbeder, Judging War Criminals. The Politics of International Justice, Palgrave, New York, 1999, at 199.

When it comes of prosecuting or punishing war criminals or perpetrators of crimes against humanity, the general impression among the specialists in law is unfortunately, characterized by the word "impunity"[177]. The Armenian genocide is not recognized by the Turkish governments and in spite of the end of communism in Russia, more Soviet leaders have enjoyed impunity[178]. The Khmer Rouge, the Chinese communists or the Indonesian leaders responsible for atrocities committed in their country were not sent to trial. More Nazi leaders found shelter in South America instead of ending in prison cells. Sometimes measures were taken, international trials took place, indictments were brought, but the indicted perpetrators were not arrested because they were considered heroes at the national level[179].

II.1. 5. a) The Nuremberg Trials

As we saw in the historical chapter of this book, Nuremberg started the fight against impunity. Unfortunately there were tried only the highest ranking perpetrators. There were only twenty-two[180] defendants in the dock[181], despite the fact that there were 3000 men who killed people on grounds of race, ethnicity, or religion. "The chief managers of genocide, the Gestapo chief, Heinrich Müller, and his deputy Adolf Eichmann, were missing from most lists of potential

[177] See e.g. ibid at 200 or Ruti G. Teitel, "Transitional Justice", Oxford University Press, New York, 2000 at 37 or Dinah L. Shelton, Introduction to "International Crimes, Peace and Human Rights: The Role of the International Criminal Court", in Dinah Shelton (Ed.), Transnational Publishers, Ardsley-New York, 2000, at ix-x. See also cases cited by M. Cherif Bassiouni, *Strengthening the Norms of International Humanitarian Law to Combat Impunity,* in "The Future of International Human Rights", Burns H. Weston, Stephan H. Marks (Eds.), 1999 at 245, 277-79. To see the philosophical issues in international sentencing, Ralph Henham, "Punishment and Process in International Criminal Trials", Ashgate Publishing Limited, England, 2005.
[178] Y. Beigbeder, supra note 176 at 200.
[179] Ibid at 201 note 1.
[180] See Richard Overy, *The Nuremberg Trials: international law in the making,* in Sands ed. "From Nuremberg to The Hague. The Future of International Criminal Justice", Cambridge University Press, 2003 at 12-14.
[181] There were 13 death sentences and long prison sentences for the others. See Madeline Morris, supra note167 at 6.

defenders"[182]. As Professor Benjamin Ferencz said, at Nuremberg they "aimed to do justice knowing" they "could not do perfect justice"[183].

II.1. 5. b) The trial of Adolph Eichmann

It was only after fifteen years that Adolph Eichmann was finally captured. Israel proved to be very willing to prosecute him if we consider the way he was turned to justice[184]. During the Second World War Eichmann was the person directly responsible for the execution of Hitler's orders concerning the murder of every single Jew in the territories of Europe which the Nazis occupied at that time[185].

After the war he flew the country. He chose South America because he knew it hosted underground Nazi operating organizations which would help former Gestapo officers to escape. He contacted one of these organizations, ODESSA which brought him to Rome and put him into connection with a Franciscan Father. This priest procured him a refugee passport in the name of Richard Klement. Soon he got an Argentine Visa and went to Buenos Aires where he described himself as stateless, a bachelor with a secondary education and knowledge of German and English. After a couple of months he obtained his Argentinean papers[186].

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[182] Ibid at 11.

[183] It was said that the trials imposed *ex post facto* punishment. Professor Benjamin Ferencz, former prosecutor at Nuremberg expressed his opinion on that: "The *ex post facto* principle is a principle of justice: that no one should be accused of an illegal act when the act was not known to be illegal at the time it was done. Who didn't know that it was illegal to murder a million innocent people, including hundred of thousands of women and children, helpless people, because of their color, their race or their religion? Who didn't know that such conduct was illegal? It was no *ex post facto*, but was putting into positive international law fundamental principles of humanity and of morality, and national law, and making them legally binding through international law", Benjamin Ferencz, *The Experience of Nuremberg,* in International Crimes, Peace and Human Rights: The Role of the International Criminal Court, Dinah Shelton (Ed.), Transnational Publishers, Ardsley-New York, 2000, at 6, 8-9.

[184] He was kidnapped in the suburbs of Buenos Aires.

[185] Lord Russell of Liverpool, The Trial of Adolf Eichmann, The Windmill Press, Kingswood, 1962, at xii.

[186] Mosche Pearlman, "The Capture and Trial of Adolf Einchmann", Simon and Schuster, New York, 1963, at 36-37.

It was only in 1960 they discovered the real identity of Richard Klement. Why did the Israelis choose to kidnap Eichmann and not to report the Argentinean authorities the real identity of Klement? Why did they choose to violate the Argentinean law and hand Eichmann to the Israelis justice system? Maybe they considered that only Israel could prosecute and try him for the millions of murders and for the extirpation of the Jewish cultural and spiritual centre of their people in Europe[187]. Or maybe they were afraid Argentina would not be willing to bring Eichmann to justice by granting him asylum or by shielding him from criminal responsibility, allowing "to spread the poison of his twisted soul to a new generation"[188].

As it was said, the crimes he was found guilty of (crimes against the Jewish people, crimes against humanity and war crimes[189]) were not crimes "under Israeli law alone". They were "grave offences against the law of nations (delicta juris gentium). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an international criminal court, the international law is in need of the judicial and legislative authorities of every country to give effect to its penal injunctions to try crimes under international law that are *universal*"[190].

Eight months after the trial started[191], Adolf Eichmann was sentenced to death on 15 December 1961[192].

II.1. 5. c) The trial of Klaus Barbie, Butcher of Lyons

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[187] Lord Russell, supra note 185 at xii.

[188] Mrs. Golda Meir, the Israeli Minister of Foreign Affairs at the hearing of Argentina's complaint with the occasion of the Security Council's meeting to consider the violation of the rights of sovereignty of the Argentine Republic resulting from the illicit and clandestine transfer of Adolf Eichmann from Argentine territory to the State of Israel.

[189] He was also found guilty for membership in hostile organizations.

[190] Judge Halevi, arguing that the jurisdiction of the Jerusalem court – challenged by Dr. Servatius – was supported not only by Israeli law but by international law. See Pearlman, supra note 186 at 563.

[191] See also Gideon Hausner, "Ítélet Jeruzsálemben. Az Eichmann – per története", Európa Könyvkiadó, Budapest, 1984.

[192] See his verdict available at http://www.ess.uwe.ac.uk/genocide/Eichmannz.htm#convict and his sentence available at http://www.ess.uwe.ac.uk/genocide/Eichmannza.htm. See also Beigbeder, supra note 176 at 560-643 or 271-306.

Another Nazi leader who found shelter in South America was Klaus Barbie, called the Butcher of Lyons[193], as he was the head of Gestapo of Lyon. He was put in trial only twenty-seven years after Eichmann was sentenced to death. What were the reasons a war criminal enjoyed freedom for forty years? Was it the unwillingness or inability of a particular state to prosecute and try him or were the political interests who kept him away from the process of justice?

Following the St. James Palace Declaration, Churchill and Roosevelt agreed that the Allies should set up a United Nations Commission on Atrocities which would investigate and collect the evidence of German war crimes[194]. Barbie was the target number three of the "Operation Selection Board" to arrest fifty-seven Nazis[195]. He managed to escape and afterwards he was invited to become an agent of the US Army Counter Intelligence Corps (CIC)[196]. The US proved willingness but unfortunately, not to prosecute Barbie, but to use him as an anti-communist agent in Bolivia[197]

Four years later he escaped from Europe with the help of a "Rat Line"[198] which put him in connection with a Croatian priest, Krunosla Draganovic[199]. From Italy he went to Argentina and finally to Bolivia where he took the name of Klaus Altmann[200]. If one can argue that in the case of Adolf Eichmann, the Argentinean government knew nothing about his true identity, this was not the case of Bolivia and Klaus Barbie. The Butcher of Lyons worked for the Bolivian oppressive leader, Hugo Banzer, whom he served by torturing and executing his enemies. He even served as an officer in the Bolivian secret police for a few years[201].

The Bolivian authorities not only were not willing to prosecute Barbie at that time, but they were also not willing to apply the *aut dedere, aut judicare*

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[193] See Tom Bower, "Klaus Barbie. Butcher of Lyons", Michael Joseph, London, 1984 at 51-64.
[194] Ibid at 114.
[195] Ibid at 128.
[196] Ibid at 123-124.
[197] Ibid at 129.
[198] Ibid at 175-197. A rat line was also ODESSA, the organization which helped Eichmann in his escaping.
[199] Ibid at 176. One may observe the resembling between the escape of Klaus Barbie and the one of Adolf Eichmann.
[200] Ibid at 183.
[201] http://members.aol.com/voyl/barbie/Barbie.htm.

principle – prosecute or extradite. The requests of Germany and France to Barbie's extradition remained without result[202]. France even had sentenced him to death *in absentia* twice for his crimes against the Resistance under France's Statute of Limitations. The French request for extradition was rejected on the grounds that there was no extradition treaty between France and Bolivia, that Barbie was a Bolivian citizen and that the Bolivian penal code did not recognize war crimes[203]. It seemed like the universality of the war crimes which judge Halevi from the Eichmann trial called *delicta juris gentium* was not applied in the Bolivian case.

It was only in 1983, after the changing of the government in Bolivia, that Barbie was sent to France. What seemed to be an extradition to Germany was in fact an expulsion to France[204]. His trial started in May 1987 in Lyon. In less than two month he was sentenced to life imprisonment for crimes against humanity[205]. He died in prison four years later. He enjoyed forty years of impunity to end in prison four years as a perpetrator of crimes against humanity. The loss for international justice would have been even grater if he would have not been put to trial at all.

II.1. 5. d) The Pinochet Trial

The capture of General Pinochet was another victory for international law. From 1973 until 1990 he ruled Chile with terror, torturing tens of thousands of people. He appointed himself president of a military junta, Supreme Chief of the Nation and President of the Republic. The Chilean dictator was involved in the Operation Condor, a campaign of political repression aiming to deter all left wing influence and to kill political opponents. After losing the presidential election in 1989, Pinochet remained Commander-in-Chief of the Army and was sworn as senator for life which granted him immunity from prosecution.

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[202] See Bower, supra note 193 at 18, 209.
[203] Ibid at 209.
[204] Ibid at 222-224. See also Klaus ALTMANN (Barbie) c/FRANCE DECISION of 4 July 1984, European Court of Human Rights, Application 10689/83.
[205] See http://news.bbc.co.uk/onthisday/hi/dates/stories/july/3/newsid_2492000/2492285.stm.

Legal challenges began in 1998 when Pinochet was in London for health reasons and he was arrested on the principle of universal jurisdiction. It was for the first time in the history of international law when a dictator was arrested on such grounds. The dictator was arrested on a Spanish provisional warrant for the murder in Chile of Spanish citizens while he was president. Five days later he was served with another warrant of arrest for torture, murder, illegal detention and forced disappearances. The detention of Pinochet in a foreign country for crimes against humanity committed in his own country was without precedent in international law. There was no warrant of arrest or an extradition request from Chile. There was no example of a former head of state, visiting another country, being held legally charged for crimes against humanity committed in his own country[206]. There was no kidnapping as in the Eichmann case, there was no expulsion as in the Klaus Barbie's case, but simply an unprecedented warrant of arrest.

The British House of Lords favored extradition to Spain on the base that sovereign immunity does not apply to dictators, to sovereigns who spread torture, but only to the ones who exercised legitimate state functions, and there was no such case there[207]. Because Britain's law did not incriminate extra-territorial torture until 1988, which led to the lack of 'double criminality' principle, there were only the crimes committed after this date that represented the base for Pinochet's extradition[208]. Despite the pressures which came from political leaders[209], the British authorities let the law take its course. Unfortunately, due to a brain damage caused by a stroke, Pinochet was declared unfit for trial and he was sent back home, in Chile.

In the absence of an international criminal court, the Spanish and British legal authorities proved to be willing and able to prosecute and try a perpetrator of crimes against humanity. For the first time sovereign immunity was not allowed to

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[206] See Geoffrey Robertson QC, "Crimes Against Humanity. The Struggle for Global Justice", Penguin Book, London, 2002, at 394-396.
[207] Ibid at 397.
[208] Ibid at 398.
[209] Lady Margaret Thatcher, the former British Prime Minister condemned the inhumanity of the police, disturbing the rest of a 'sick and frail old man'. Home Secretary Jack Straw was demanded to show compassion for an old man and respect for the sovereignty of Chile. See Ibid.

become sovereign impunity[210]. In the same time the decision of the House of Lords represented the first judgment rendered by a municipal court in which a former head of state of a foreign country has been held accountable for the acts he committed while he was in office[211].

In Chile there was not the willingness or unwillingness of the state to prosecute or try Pinochet, but rather the one of doctors and lawyers. There was a playing game concerning Pinochet's immunities, his state of health and his condition to stand trial. He was declared suffering of "dementia" by a doctor or of "light dementia" by another, than he lapsed back in a "vascular dementia" and finally he seemed to recover miraculously as his status of dementia was revoked in 2004[212]. In 2006 Pinochet was finally charged among other with 36 counts of kidnapping and 23 counts of torture. He died a few days later without being convicted for any of the terrible crimes he committed[213].

II.1. 5. e) Transitional justice in the former communist countries

The former communist countries found themselves in profound dilemmas concerning the system of justice due to the radical political changes: to punish or to amnesty? Who bears responsibility for the past[214]? People expected punishment and trials of ancient regimes but transitional practice show a small number of trials, due to a number of legal obstacles.

In Hungary for example, the principle of "non retroactivity" was shown as an impediment to willingness in prosecuting and trying persons responsible for treason or war crimes. The law concerning "the prosecutability of serious criminal offences committed between December 21, 1944 and May 2, 1990 and not

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[210] Ibid, at 399.
[211] See Andrea Bianchi, *Immunity versus Human Rights: the Pinochet Case,* EJIL, 1999, Vol.10, No.2, 237-277.
[212] See http://news.bbc.co.uk/2/hi/americas/2080500.stm.
[213] See also Philippe Sands, *After Pinochet: the role of national courts,* in "From Nuremberg to The Hague", (Ed.), Cambridge University Press, 2004, at 68-109 or John R.W.D. Jones, *Immunity and "Doubly Criminality": General Augusto Pinochet before the House of Lords,* in "International Law in the Post-Cold War World. Essays in memory of Li Haopei, Routledge, London, 2001 at 254-68.
[214] Ruti G. Teitel, "Transitional Justice", Oxford University Press, 2000, at 7, 27.

prosecuted for political reasons" was found unconstitutional[215] because it suffered from retroactivity: "the Law violates the requirement of constitutional criminal law that statutes of limitations[216]-…-must apply the Law in effect at the time of the commission of the offence except if during the running of a statute regulations more favorable to the defendant are introduced"[217].

Non – retroactivity principle[218] proved to be more like an obstacle in Hungary's ability to prosecute than one in its willingness to try the criminals as a follow-up law that limited prosecutable offences to war crimes[219] enabled the prosecutions to go forward based on an analogy to Nuremberg trials[220]. Some of the indictments are still contested. János Korbély, for example, a former captain who was indicted for commending shootings against a group of civilians who took over the building of Tata Police Department during the 1956 uprising, suited Hungary before the European Court of Human Rights (ECHR). In 2001 he was indicted by the Military Bench of the Budapest Regional Court for crimes against humanity under the Geneva Convention to five years imprisonment, sentence reduced by one eighth on account of an amnesty. After two years and two months of serving his sentence, Korbély was conditionally released. His complaint against Hungary is based on Article 6 (right to a fair trial within a reasonable time) and 7 (no punishment without law) of the European Convention on Human Rights, as he is arguing the acts he had been convicted of did not constitute a war crime at the time they were committed. The case is pending before the ECHR and it is expected for the Grand Chamber to issue a judgment until the end of 2008[221].

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[215] *Constitutional Court Decision on the Statute of Limitations*. No. 2086/A/1991/14 (March 5, 1992), in Neil J. Kritz (Ed.), "Transitional Justice. Volume III Laws, Rulings and Reports, United States Institute of Peace Press, Washington, 1995 at 629-40.

[216] See Judith Pataki, *Dealing with Hungarian Communists' Crimes,* in Neil J. Kritz (Ed.), "Transitional Justice. Volume II Countries Studies, United States Institute of Peace Press, Washington, 1995 at 647-52.

[217] Constitutional Court Decision, supra note 215, paragraph 4.

[218] See also Krisztina Morvai, *Retroactive Justice based on International Law: A Recent decision by the Hungarian constitutional Court,* in Neil J. Kritz (Ed.), "Transitional Justice". Volume II Countries Studies, United States Institute of Peace Press, Washington, 1995 at 661-62.

[219] See also Kovács Péter, *Hungarian Report* in The Yearbook of International Humanitarian Law, 2000, vol. 1.

[220] Teitel, supra note 214 at 38.

[221] See *Korbély v. Hungary,* ECHR, application no. 9174/02.

The situation is quite the same with the application in *K.-H.W. v. Germany.* The applicant brought Germany before the European Court of Human Rights on the grounds "that the act on account of which he had been prosecuted did not constitute an offence, at the time when it was committed, under national or international law"[222]. He was held accountable for killing an unarmed fugitive by sustained fire, while he was serving his military service. The European Court of Human Rights found that the applicant's conviction by the German courts did not breach Article 7 of the Convention. The concurring opinion of judge Loucaides deserves a special attention. He considered that "by associating himself as a border guard with the execution of the relevant murderous plan against civilians who attempted to escape from the GDR and by intentionally killing a fugitive, the applicant in this case became responsible for the commission of a crime against humanity. (…) The fact that the applicant's relevant conduct took place in 1972, i.e. about a year before the adoption of the UN Resolution 3074 (XXVIII), cannot reasonably result in the conduct in question not being considered a crime against humanity. (…) In the light of the above, I found that the act for which the applicant in this case was convicted was also a crime against humanity under the principles of customary international law"[223].

Another former communist country which proved to be willing to prosecute the Communist party leadership, was Romania. Genocide[224] charges were brought in military courts[225] against Nicolae and Elena Ceausescu[226] for attempting to put down the revolution in 1989. Romania proved to be too willing to try the dictator and his wife. The trial was criticized as lacking the rule of law[227]. They were tried,

[222] *K.-H.W. v. Germany*, ECHR, application no, 37201/97, Judgement of 22 March 2001, paragraph 3.
[223] *K.-H.W. v. Germany*, ECHR, application no, 37201/97, Judgement of 22 March 2001, *Concurring opinion of Judge Loucaides.*
[224] Some authors argue that genocide was not a proper charge. See e.g. Nestor Ratesh, "Romania: the Entangled Revolution, CSIS, Washington, 1991, at 78-79.
[225] Tribunalul Militar Extraordinar – The Extraordinary Military Tribunal, an extraordinary ad-hoc military tribunal created for Ceausescu's trial.
[226] Nicolae Ceausescu was the president of Romania from 1965 till 1989. See John Sweeney, "The Life and Evil Times of Nicolae Ceausescu", Hutchinson, London, 1991.
[227] Teitel, supra note 214, at 38.

convicted and executed in the same day[228] for genocide over 60,000 of people[229], subversion of state power by encouraging armed violence, destruction of state property and damages to important economic and cultural institutions, subversion of the national economy and attempting to flee Romania to use over $1 billion deposited in foreign banks[230].

Ceausescu's aids called terrorists, were never brought to justice and people began to doubt their very existence[231]. Only a few of them were convicted for their roles[232] in the revolution but some were released over a two year period, either on health grounds or as a result of free pardon[233].

II.1. 5. f) Russia's amnesty over the war criminals in Chechnya

The long Russian-Chechen conflict[234] was "the most bloody and sickening war" which devastated the planet[235]. The Russian aggression over Chechnya [236] devastated the capital Grozny leading to the fleeing of tens of thousands of refugees, to the death of thousands of elderly Russians[237] and of a quarter and fifth of the Chechen population[238].

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[228] The First Christmas Day, 25 December 1989.

[229] Which later proved to be 1104 from which 944 after 22 December, Stan Stoica, "Romania, 1989-2004, O istorie cronologica", Meronia, Bucuresti, 2004, at 19.

[230] When the Romanian population's nourishment was the daily limited number of bred(s) and soy salami.

[231] See Matei Calinescu, Vladimir Tismaneanu, *The 1989 Revolution and Romania's Future,* in "Romania After Tyranny ", Daniel N. Nelson (Ed.), Westview Press, Colorado, 1992 at 15, note 12.

[232] See Adrian Dascalu, *Romania Jails Eight for 1989 Timisoara Uprising Massacre,* Reuters, 9 December 1991.

[233] Teitel, supra note 214, at 48, 60.

[234] See Tracey C. German, "Russia's Chechen War", Routledge Curzon, New York, 2003 or John B. Dunlop, "Russia Confronts Chechnya. Roots of a Separatist Conflict, Cambridge University Press, 1998, "Russia and Chechnia: the Permanent Crisis. Essays on Russo-Chechen Relations, Ben Fowkes (Ed.), Macmillan Press, London, 1998, Carlotta Gall, Thomas de Waal, "Chechnya. A Small Victorious War", Pan Original, London, 1997.

[235] André Glucksmann, *If Putin has an Ally, it is Basaev,* The Chechen Society Newspaper, 13, 4 July 2005.

[236] Roman Khalilov, *Main Causes of the present Russian Aggression,* 12, December 1999, available at http://www.amina.com/article/main_causeswar.html.

[237] Robert Seely, "Russo-Chechen Conflict, 1800-2000. A deadly Embrace", Franck Cass publishers, London, 2001, at 1.

[238] Ibid at 122.

Instead of punishing the war criminals, the Russian government made use of the amnesty clause in Article 6(5) of the 1977 Geneva Protocol II[239]: "at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, weather they are interned or detained". In this case the government used the institution of amnesty in order to grant impunity to perpetrators of humanitarian law violations who moreover belonged to the governmental forces[240].

Russia's unwillingness to prosecute the war criminals was criticized by the Parliamentary Assembly of the Council of Europe: "the Assembly believes that any continuing unwillingness or inability of the prosecuting authorities to investigate crimes committed by federal servicemen against the civilian population and to bring those guilty to court, will lead to a lack of accountability and a resulting climate of impunity which foster human rights violations and impedes a political settlement of the conflict"[241].

Even if the Council of Europe found the Russian Federation "to be violating some of her most important obligations under both the European Convention on Human Rights and international humanitarian law, as well as the commitments she entered into upon accession to the Council of Europe"[242], none of the forty states in the Council was willing to bring Russia before the European Court of Human Rights over violations in Chechnya[243]. The only measure taken against Russia was the suspension from the Council in 2000-2001[244].

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[239] For the commentary see Sylvie S. Junod in Sandoz, Swinarski, Zimmerman (Eds.), "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC Nijhof, Geneva, 1987, at 1402.

[240] See Péter Kovács, *Authority and Weakness of the 1977 Geneva Protocol II in the Light of the Conflict in Chechnya,* in International Peacekeeping, Vol. 6, Nos. 4-6, July-December 2000, at 137-44.

[241] Resolution 1227 (2000) *Conflict in the Chechen Republic: recent developments* (follow up to Recommendations 1444 (2000) and 1456 (2000)) of the Parliamentary Assembly, Article 9.

[242] Recommendation 1444 (2000) of the Parliamentary Assembly of the Council of Europe, (PACE), 27 January 2000, in International Peacekeeping, Vol. 6, Nos. 4-6, July-December 2000, at 274-75.

[243] Interview with Lord Russel Johnston, then President of the PACE, in *Le Monde*, 6 February 2001.

[244] See John Russell, "Chechnya – Russia's 'War on Terror'", BASEES/Routledge Series on Russian and East European Studies, 2007.

II.1. 5. g) Milosevic's trial

One of the most recent trials which were supposed to make history in international law, was Milosevic's trial. The former president of Serbia and later the president of Federal Republic of Yugoslavia was arrested in Serbia on 1 April 2001 and transferred to The Hague at the end of June the same year. He was the first state president to be tried for genocide[245]. He was arrested in Serbia and he was convinced that he would be tried by the national authorities[246].

Milosevic did not recognize the jurisdiction of the ICTY[247], the tribunal which was established to avoid the political unwillingness of the post war national courts to prosecute war crimes in accordance with the international legal standards[248]. Having a leading role[249] in the conflict in the Former Yugoslavia[250], Milosevic was charged with genocide; complicity in genocide; deportation; murder; persecutions on political, racial or religious grounds; inhumane acts/forcible transfer; extermination; imprisonment; torture; wilful killing; unlawful confinement; wilfully causing great suffering; unlawful deportation or transfer; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; cruel treatment; plunder of public or private property; attacks on civilians; destruction or wilful damage done to historic monuments and institutions dedicated to education or religion; unlawful attacks on civilian objects[251].

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[245] Adam LeBor, "Milosevic. A Biography", Bloomsbury, London 2002, at 318.
[246] Ibid at 316.
[247] 'Milosevic challenges the legality of the UN tribunal', Online NewsHour, 13 Feb. 2002, available at http://www.pbs.org/newshour/updates/february02/milosevic_2-13.html.
[248] See also Ivo Josipovic, *Responsibility for War Crimes before National courts in Croatia,* in IRRC, Volume 88, No. 861, March 2006 at 145-68.
[249] See also Robert Thomas, "Serbia under Milosevic. Politics in the 1990s" Hurst and Company, London, 1999.
[250] See also Gregory Kent, "Framing War and Genocide. British policy and news media reaction to the war in Bosnia", Hampton Press, USA, 2006.
[251] See Slobodan Milosevic, ICTY Case information sheet, available at http://www.un.org/icty/cases-e/cis/smilosevic/cis-slobodanmilosevic.pdf. See also John R.W.D. Jones, Steven Powles, "International Criminal Practice", Oxford, 2003, at 1074 index Milosevic.

As a consequence of his decease, the trial was closed on 14 March 2006[252]. Another war criminal died without being sentenced[253].

II. 1. 5. h) Karadzic's trial

After more than thirteen years at large, Radovan Karadzic, President of Republika Srpska in Bosnia and Herzegovina during the war in the Former Yugoslavia, was finally arrested by the Serb authorities on 21 July 2008 and transferred to The Hague on 30 July. Karadzic is charged with genocide, crimes against humanity and war crimes, crimes he committed with the purpose of securing control of areas of Bosnia and Herzegovina which had been proclaimed part of the "Serbian Republic" and significantly reducing its non-Serb population.[254] He is also indicted with the genocide committed against close to 8,000 Bosnian Muslim men and boys in Srebrenica in 1995.[255] Seven other persons involved in the genocide in Srebrenica, were recently sentenced by the Court of Bosnia and Herzegovina.[256]

Even if it took more than thirteen years, Karadzic's arrest represents a victory for the international justice. However, there were some rumors that justice was traded for politics, as Serbia wants to join the European Union and Karadzic's arrest represents its passport for that. If the Tribunal will grant Karadzic the right of defending himself, his trial is expected to last for a couple of years, time which the

[252] See Order terminating the proceedings, in *Prosecutor v. Milosevic,* Case No. IT-02-54-T, Trial Chamber 14 March 2006.
[253] See e.g. Fred Hiatt, Washington Post, "Who is a war criminal?", August 30, 2001, http://www.pbs.org/newshour/bb/europe/yugoslavia/july-dec01/criminal_8-30.html.
[254] Statement of the Office of the Prosecutor on the Arrest of Radovan Karadzic, 21 July 2008, available at http://www.un.org/icty/latest-e/pressindex.htm.
[255] See the full text of the indictment against Radovan Karadzic, available at http://www.un.org/icty/indictment/english/kar-ai000428e.htm.
[256] See Court of Bosnia and Herzegovina, Press Release, 29 July 2008, available at http://www.sudbih.gov.ba/?id=959&jezik=e.

Tribunal doesn't really have, as it was supposed to end its activity until 2010, and Ratko Mladic, another fugitive war criminal is on its list.

II.1. 5. i) Saddam Hussein's trial

Another example of willingness to prosecute the responsible for committing atrocities is Saddam Hussein's trial. The Iraqi president[257] was charged among other with ethnic cleansing campaign against Kurds[258] and invasion of Kuwait[259]. After the terrorist attacks from 11 September 2001 in the United States[260], the latter authorized the invasion of Iraq[261]. The conflict[262] is more controversial as it is still on-going. One may say that since the Iraqi Special Tribunal[263] was established by the United States and its allies[264], it was more the United States' willingness to prosecute Saddam than the one of Iraq. The Tribunal was established by the Coalition Provisional Authority[265] and its jurisdiction was not recognized by Saddam[266].

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[257] See Efraim Karsh, Inari Rautsi, "Saddam Hussein. A Political Biography", The Free Press, New York, 1991.

[258] See John Bulloch, Harvey Morris, "Saddam's War. The origins of the Kuwait Conflict and the International Response", Faber and Faber, London, 1991.

[259] BBC News, *Charges facing Saddam Hussein,* 1 July 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3320293.stm.

[260] See on-line information at http://www.11-sept.org. See also Dominic McGoldrick, *The Legal and Political Significance of a Permanent International Criminal Court,* in "The Permanent International Criminal Court. Legal and Policy Issues", Dominic McGoldrick, Peter Rowe, Eric Donnelly (Eds.), Oxford and Portland Oregon, 2004, at 474-76.

[261] Alex Roberto Hybel, Justin Matthew Kaufman, "The Bush Administrations and Saddam Hussein. Deciding on Conflict", Palgrave, New York 2006, at 2.

[262] Knut Dormann, Laurent Colassis, *International Humanitarian Law in the Iraq Conflict,* in German Yearbook of International Law 47 (2004), at 293–342 available at http://www.icrc.org.

[263] Its Statute is available at http://www.cpa-iraq.org/human_rights/Statute.htm.

[264] Michael A. Newton, *The Iraqi High Criminal Court: Controversy and Contributions,* in IRRC, Vol. 88, No. 862, June 2006, at 399-425. For a comparison with other tribunals, see Robin Geib, Noemie Bulinckx, *International and Internationalized Criminal Tribunals: a Synopsis,* in IRRC, Vol. 88, No. 861, March 2006 at 49-63.

[265] See Louis-Philippe F. Rouillard, "Precise of the Laws of Armed Conflicts", iUnivers, Lincoln, 2004 at 285.

[266] See Newton, supra note 264 at 405. See also Saddam's application no. 23276/04 at ECHR. He argued that the Coalition States (Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom) represented *de facto* power in Iraq, and therefore he fell within their jurisdiction. The Court though did not consider there was any jurisdictional link between the applicant and the respondent States or that the applicant was capable of falling within the jurisdiction of those States, within the meaning of Article 1 of the Convention.

Even so, on 5 November 2006, Hussein was found guilty[267] of willful killing, forcible deportation and torture and was sentenced to two terms of ten years imprisonment and death by hanging[268]. Saddam Hussein was executed on 30 December 2006.

As some concluding remarks, we may say that the principle of complementarity was an innovative solution to make at least 60 states to sign and ratify the Rome Statute in order for the first International Criminal Court to come into being. The most important merits of the principle of complementarity worth to be mentioned: it represents respect for traditional sovereignty; it recognizes that national courts will be often the best to deal with international crimes, taking into consideration the availability of proofs and the costs; it recognizes that the criminal jurisdiction should be spread over the world and not centralized in the Hague; it encourages the states to develop an apply their national criminal justice system; it allows more states to become parties to the Rome Statute[269].

Even if it presents some problematical aspects, which I laid down in this paper, mainly arising from the fact that the Court is given too much discretion to declare cases admissible, this principle has been admitted by more than 100 states by the end of 2007[270]. This does not mean that the number of cases that reach the Court should represent a measure of its efficiency. "On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national

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The application was declared inadmissible. http://www.echr.coe.int/Eng/Press/2006/March/HUSSEIN%20ADMISSIBILITY%20DECISION.htm.

[267] M. Cherif Bassiouni, Michael Wahid Hanna, *The Iraqi High Criminal Court: a Statutory Analysis,* in 39 CASE W. RES. J. INT'L L, available at http://www.isisc.org/public/Bassiouni_Hanna_IHCCFinal.pdf.

[268] See Martin Asser, *Opening Salvoes of Saddam Trial*, available at http://news.bbc.co.uk/2/hi/middle_east/4356754.stm .

[269] Philippe Sands, *After Pinochet: the role of national courts,* in "From Nuremberg to the Hague. The Future of International Criminal Justice", Philippe Sands (Ed.), Cambridge University Press, 2003 at 75-76.

[270] 110 States as the situation in July 2008.

institutions, would be a major success"[271], in other words "if complementarity works properly, then the ICC will have no cases"[272].

Unfortunately, as we will see in the next section of this dissertation, the complementary regime contained in the Rome Statute was not enough for big powers as the United States to accept the jurisdiction of the International Criminal Court.

[271] Statement by Luis Moreno-Ocampo, June 16, 2003, Ceremony for the Solemn Undertaking of the Chief Prosecutor, in Informal Expert Paper for the Office of the Prosecutor of the International Criminal Court: "The principle of complementarity in practice", ICC-OTP, 2003.
[272] Iain Cameron, *Jurisdiction and Admisibility Issues under the ICC Statute* in "The Permanent International Criminal Court. Legal and Policy Issues", Dominic McGoldrick et al (Eds.), Oxford and Portland Oregon, 2004, at 86.

II. 2. The United States, Romania and the International Criminal Court

> "Internal conflicts dominate the landscape of armed struggle, and impunity too often shields the perpetrators of the most heinous crimes against their own people and others. As the most powerful nation committed to the rule of law, we have a responsibility to confront these assaults on human kind"[273].

II.2. 1. The United States' policy towards the International Criminal Court: from support to opposition

Although the US expressed support for the establishment of a permanent international criminal court on many occasions, in 1998 in Rome, the United States voted against the Statute of the International Criminal Court. US had an important role in creating the ad-hoc tribunals and in supporting them diplomatically and financially, or in providing civilian personnel, military assistance and intelligence information[274]. This fact was generally considered as a natural step in establishing a permanent international criminal court[275]. Such a Court was considered to be more

[273] Hon. David J. Scheffer, *Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations,* US Senate, July 23, 1998. Mr. Scheffer, US Ambassador-At-Large For War Crimes, served as head of the American delegation at the Rome Conference.
[274] See Dominic McGoldrick, *Political and Legal Responses to the ICC,* in Dominic McGoldrick, Peter Rowe and Eric Donnelly (Eds.), "The permanent International Criminal Court. Legal and Policy Issues", Hart Publishing 2004, Portland 2004, 389-452, at 400.
[275] See Marten Zwanenburg, *The Statute for an International Criminal Court and the United States: Peace without Justice?*, in 12 Leiden Journal of International Law 1-7, 1999 at 1-7.

quickly available for investigations and prosecutions[276] and more efficient financially[277].

The United States played an important role in the Rome Conference preparatory meetings[278]. They managed to include in the Statute dispositions concerning an improved regime of complementarity, a special role for the UN Security Council or sovereign protection of national security information[279], and yet, they were not pleased with the draft that emerged at the Rome Conference. Consequently, the United States voted against the Rome Statute. Their arguments which will be analyzed further can be categorized as follows: jurisdiction, substantive law, procedural due process and constitutional objections, prosecutorial abuse, deterrence[280].

The US very first fear was that its peacekeepers would be tried for political instead of legal reasons[281] or that its military personnel could be tried for taking part in the anti-terrorism campaign following 11 September attacks[282], as they believe national courts could be more effective when it comes to crimes of terrorism[283]. On the other hand, the US national law does not include many of the crimes in the Rome Statute[284], fact that could qualify US as unwilling or unable to prosecute[285] according to the Rome Statute article 17. They pleaded for a ten year opt-out for crimes against humanity and war crimes, period considered long enough for the states to assess the effectiveness and impartiality of the Court before

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[276] Hon. David J. Scheffer*, Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations,* US Senate, July 23, 1998, in William Driscoll, Joseph Zompetti and Suzette W. Zompeti (Eds.), "The International Criminal Court. Global politics and the Quest for Justice", International Debate Education Association, New York, 2004, at 143.
[277] The UN spent about USD 25 million per year with the ad-hoc tribunals. For more details, see David P. Forsythe, *International Criminal Courts: a Political View,* in Netherlands Quarterly of Human Rights Vol. 13/1, 1997, 5-19 at 12.
[278] See the chapter concerning the historical survey in this dissertation.
[279] For a list of the objectives achieved in the statute by the US, see Scheffer, supra note 276 at 143-44.
[280] See Mariano-Florentino Cuéllar, *The international Criminal Court and the Political Economy of Antitreaty Discourse,* Stanford Public Law and Theory Working Papers Series, Research Paper No.51, March 2003.
[281] For a contra argument see Zwanenburg, supra note 275.
[282] McGoldrick, supra note 274 at 401.
[283] Scheffer, supra note 276 at 147.
[284] See Eszter Kirs, *Reflection of the European Union to the US Bilateral Immunity Agreements,* in Miskolc Journal of International Law, Vol. 1 (2004), No.1, 19-24, at 20.
[285] See the chapter dedicated to the principle of complementarity in this dissertation.

considering weather to accept its jurisdiction or not. They proposed three options which states could have at the end of the ten year period: accept automatic jurisdiction of the ICC, cease to be a party or seek an amendment to the treaty extending its opt-out possibility. Therefore, they could not accept the seven year opt-out for war crimes which finally found place in the Rome Statute, as they considered the solution inappropriate: "a country willing to commit war crimes could join the treaty and opt-out of war crimes jurisdiction for seven years, while a non-party state could deploy its soldiers abroad and be vulnerable to assertions of jurisdiction"[286].

Considering their status as a superpower, the US wanted an ICC controlled by SC[287]. They did not agree with the possibility of ICC to exercise its jurisdiction over the states non-parties, except the situation when the SC would refer such a situation acting under the UN Charter. Therefore, US did not accept territory and nationality as bases of jurisdiction for non-states parties, even if US itself exercises sometimes jurisdiction over non-nationals when the state party of nationality is not a party to the relevant treaty[288]. Currently ICC can exercise its jurisdiction if the state of territory where the crime was committed or the state of nationality of the perpetrator of the crime is a party to the Rome Statute or it accepted its jurisdiction on an ad-hoc agreement. Furthermore, US proposed an amendment to the text requiring that if the states concerned are not states parties to the Statute, in that case, at least the consent of the state of nationality of the perpetrator should be obtained. This would have given the US the veto it wanted for its personnel and officials[289]. The proposal could not be voted though, so the US had another reason not to accept the Rome Statute, as they imagined the following scenario: "since most atrocities are committed internally and most internal conflicts are between warring parties of the same nationality, the worst offenders of international humanitarian law can choose never to join the treaty and be fully insulated from its

[286] Scheffer, supra note 276 at 146.
[287] McGoldrick, supra note 274 at 402.
[288] Ibid at 404 or Cristopher C. Joyner and Cristopher C. Posteraro, *The United States and the International Criminal Court: Rethinking the Struggle Between National Interests and International Justice,* in Criminal Law Forum 10, 1999, 359-85, at 369.
[289] Ibid at 405.

reach absent a Security Council referral. Yet, multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the Court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty"[290]. The US concern is therefore well founded if we consider the American military presence in 110 from 192 members of the UN or the fact that in 2003 there were 400,000 US troops stationed overseas[291].

Reactions to the US arguments[292] followed immediately. Human Rights Watch argued that the Rome Statute does not bind non-states parties and does not impose upon them any novel obligations under international law. Instead, it permits the ICC to exercise its jurisdiction over the nationals of non-states parties if there is a reasonable basis to believe they have committed the most serious international crimes. All nations are already obliged to punish anyone who commits genocide, war crimes or crimes against humanity. US is a party to more treaties that provide universal jurisdiction for these crimes and they exercised its jurisdiction over foreigners without the consent of their state of nationality. Besides, the United States extradites and surrenders its own citizens all the time to be tried by foreign courts that are not subject to the US Constitution or its Bill of Rights[293].

The US feared also from an independent prosecutor, who would not be accountable to anyone. Instead of the *proprio motu* possibility for the ICC Prosecutor to start an investigation, US would have wanted a prosecutor controlled not by the Pre-Trial Chamber, but by the SC. They expressed their concern that "it will encourage overwhelming the Court with complaints and risk diversion of its resources, as well as embroil the Court in controversy, political decision-making, and confusion"[294]. The critique ignores though the role of the Court and of the

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[290] Scheffer, supra note 276 at 144-45.
[291] McGoldrick, supra note 274 at 402-03.
[292] See also William S. Shepard, *Restraining Gulliver: American Exceptionalism and the International Criminal Court,* in Mediterranean Quarterly, Winter 2000, at 55-74.
[293] See Richard Dicker, *Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations,* 23 July 1998, in William Driscoll, Joseph Zompetti and Suzette W. Zompeti (Eds.), "The International Criminal Court. Global politics and the Quest for Justice", International Debate Education Association, New York, 2004, at 123-24.
[294] Scheffer, supra note 276 at 146.

Assembly of States Parties to remove the judges or the Prosecutor[295], as well as the principle of complementarity, which practically limits the role of the Prosecutor[296].

Another reason why the US did not accept the Rome Statute was the treatment of the crime of aggression. They wanted to ensure the link between the crime of aggression and the prior determination of the SC that a state had committed aggression. The seven year period until the amendment of the Statute did not guarantee them the "vital linkage"[297].

Even if US did not agree with the provisions of the Rome Statute, the Clinton administration signed the treaty on 31 December 2000 hoping that by this action they would be in a "position to influence the evolution of the Court"[298]. The Bush administration not only that followed Clinton's suggestion not to ratify the Statute, but they even unsigned the statute, revoking the signature on 6 May 2002[299] on the main ground that ICC "undermines the role of the United Nations Security Council in maintaining international peace and security"[300].

II.2. 2. The United States' strategy against ICC

After the Rome Conference, US adopted a hostile attitude towards ICC, making sure that "every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable

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[295] See also Cuéllar, supra note 280 at 14.

[296] See also Jason Ralph, *International society, the International Criminal Court and American foreign policy,* in Review of International Studies, (2005), 31, 27-44 at 40.

[297] It seems like in this regard the US had no reason to fear as the work of the Special Working Group on the Crime of Aggression follows this direct linkage. See the chapter dedicated to the crime of aggression in this dissertation.

[298] William Jefferson Clinton, the then President of the US, *Statement with the occasion of signature of the International Criminal Court Treaty,* 31 December 2000, in William Driscoll, Joseph Zompetti and Suzette W. Zompeti (Eds.), "The International Criminal Court. Global politics and the Quest for Justice", International Debate Education Association, New York, 2004, at 150.

[299] See also Scott Turner, *The Dilemma of Double Standards in US Human rights Policy,* in Peace and Change, Vol. 28, No.4, October 2003, 524-54, at 543.

[300] Marc Grossman, Under Secretary for Political Affairs, US Department of State, *Remarks to the Center for Strategic and International Studies,* 6 May 2002, in William Driscoll, Joseph Zompetti and Suzette W. Zompeti (Eds.), "The International Criminal Court. Global politics and the Quest for Justice", International Debate Education Association, New York, 2004, at 151-52.

International Criminal Court"[301]. They adopted a more folded strategy: SC immunity, US agreements with host states and US legislation prohibiting foreign aid[302].

II.2. 2. a) "Article 16" Security Council Resolutions

The base for the American tactic already existed in article 16 of the Rome Statute which reads as follows:

"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".

As the Rome Statute entered into force on July the 1st, 2002, US had to ensure their citizens immunity against the newly created ICC, so they determined the Security Council to act under Chapter VII of the UN Charter and to request the Court, based on article 16[303] to abstain from proceedings in case of American citizens.

The result was the adoption of the ambiguous[304] resolution 1422 of 12 July 2002 which requests the ICC to defer potential prosecutions of peacekeepers from non-states parties[305] for a 12 month period. In this regard, the SC:

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[301] George Bush, the than President of the United States, cited from John R. Bolton, *Remarks to the Federalist Society,* 14 November 2002, in William Driscoll, Joseph Zompetti and Suzette W. Zompeti (Eds.), "The International Criminal Court. Global politics and the Quest for Justice", International Debate Education Association, New York, 2004, at 161. Ironically, this is the essence of the principle of complementarity.

[302] See also McGoldrick, supra note 274 at 416.

[303] See also Dan Sarooschi, *The Peace and Justice Paradox: The International Criminal Court and the Security Council,* in Dominic McGoldrick, Peter Rowe and Eric Donnelly (Eds.), "The permanent International Criminal Court. Legal and Policy Issues", Hart Publishing 2004, Portland 2004, at 115-20.

[304] See Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002),* in 14 EJIL 85 (2003).

[305] See also N. Jain, *A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court,* in European Journal of International Law, 16 (2), 2005 at 239-54.

"1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;

"2. Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary"[306].

The resolution was much contested from the beginning[307]. It is known that the Security Council can act under Chapter VII of the UN only "with respect to threats to the peace, breaches of the peace, and acts of aggression"[308]. That was not the case with the entrance into force of the Rome Statute. ICC comes to "to put an end to impunity for the perpetrators" of "the most serious crimes of concern to the international community as a whole" and not to menace the international peace[309].

The resolution ensured the American's peacekeepers immunity from the jurisdiction of the ICC for at least one year. It permitted to pass other resolutions extending the peacekeeping missions in Bosnia and Herzegovina[310] and increasing the number of troops in Congo[311]. After one year, as paragraph 2 of the 1422 resolution prescribed, a new resolution was issued, renewing the peacekeepers' exemption from the ICC jurisdiction for another year[312]. The peacekeepers' immunity was also granted in the SC Resolution 1497 (2003) authorizing the

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306 SC Res. 1422 (2002), available at http://www.un.org/News/Press/docs/2002/sc7450.doc.htm.

307 See Bryan MacPherson, *Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings,* ASIL Insight, July 2002, available at http://www.asil.org/insights/insigh89.htm. See also UNSC 4568th meeting, 10 July 2002 available at http://www.un.org/Docs/pv4568e.pdf and UNSC 4772nd meeting, 12 June 2003, available at http://www.iccnow.org/documents/UNSCpv1422debate12June03.pdf. For details concerning the international organizations and public critics, see McGoldrick, supra note 274 at 421.

308 See the Chapter VII of the UN Charter, available at http://www.un.org/aboutun/charter/.

309 See Stahn, supra note 304 at 3.

310 SC Res. 1423 (2002) and 1491 (2003), available at http://www.un.org/News/Press/docs/2003/sc7814.doc.htm.

311 SC Res. 1445 (2002) available at http://www.un.org/News/Press/docs/2002/sc7583.doc.htm.

312 SC Res. 1487 (2003) available at http://daccessdds.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement.

establishment of a Multinational Force in Liberia to support the implementation of a cease fire agreement:

"Decides that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State"[313].

In an interesting way, the following resolution 1509 (2003) concerning the situation in Liberia, does not provide for such an immunity[314]. In fact, it seems like SC Resolution 1422 set only a dangerous precedent in international law, not an irreversible one[315] as the US withdraw the resolution in 2004 because of an insufficient number of votes in the SC[316]. They relied on the other plans of their strategy: bilateral agreements and prohibiting foreign aid legislation.

II.2. 2. b) "Article 98" Agreements

The day that Resolution 1422 passed, US started its campaign to conclude agreements[317] with countries that were parties to the Rome Statute or with non-states parties, in order to ensure that the US personnel and nationals are not to be

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[313] SC Res. 1497 (2003) available at http://daccessdds.un.org/doc/UNDOC/GEN/N03/449/48/PDF/N0344948.pdf?OpenElement.

[314] SC. Res. 1509 (2003), available at http://daccessdds.un.org/doc/UNDOC/GEN/N03/525/70/PDF/N0352570.pdf?OpenElement.

[315] Carsten Stahn ends his article, supra note 304, with his thought that "SC Resolution 1422 (2002) certainly sets a dangerous, but not an irreversible, precedent in international law".

[316] See Frederic L. Kirgis, *US Drops Plan to Exempt G.I.'s from UN Court,* ASIL Insight, July 2004, available at http://www.asil.org/insights/insigh139.htm last visited January 2008. See also Coalition for the International Criminal Court, USA and the ICC, available at http://www.iccnow.org/?mod=usaicc.

[317] See also J. P. Cerone, *Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals,* in European Journal of International Law, 18, 2007 at 277-315.

detained, arrested or sent to the ICC[318]. The bilateral agreements are called "Article 98" agreements, as they are based on article 98 from the Rome Statute which reads as follows:

"The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

The agreements are standard and they start by identifying the category of persons they protect: "current or former Government officials, employees (including contractors), or military personnel or nationals of one Party"[319]. The agreements further provide that "persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party, a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court". Furthermore, the parties convene that in case one Party wants to surrender a person included in the protected category or transfer that

[318] McGoldrick, supra note 274 at 423-24.
[319] Ibid at 425. See also *Agreement between the Government of the United States of America and the Government of the Republic of Uzbekistan Regarding the Surrender of Persons to the International Criminal Court,* in William Driscoll, Joseph Zompetti and Suzette W. Zompeti (Eds.), "The International Criminal Court. Global politics and the Quest for Justice", International Debate Education Association, New York, 2004, at 279-80.

person to the International Criminal Court, it has to have the other Party's consent first.[320]

Many governments, NGO and other international law experts argue that the US is misusing Article 98 of the Rome Statute, because these agreements go beyond its scope, which intended to address conflicts with existing international agreements and was not intended to place any one country's citizens, military or employees above the reach of international law[321].

Previously to the Rome Statute, there were states which were engaged in some existing agreements, such as Status of Forces Agreements (SOFAs), which obliged them to return home the nationals of another country (the 'sending state') when a crime had allegedly been committed. Article 98(2) was written to avoid any potential discrepancies that may result from these existing agreements and the provision of the Statute. The drafters also had in mind the principle of complementarity, because it gives the 'sending state' priority to pursue an investigation in case of genocide, war crimes, or crimes against humanity, if these crimes are committed by its nationals[322].

Thus it was not the drafters' intention to offer an escape for the states which are non states-parties to the Rome Statute, by allowing them to sign new agreements with nations which accepted the jurisdiction of the ICC. Some legal experts concluded that US bilateral agreements are inconsistent with the international law because they are contrary to the intention of the Rome Statute's drafters[323]. Article 98 was not intended to allow agreements that would not offer the possibility of a trial by the ICC when the 'sending state' did not exercise jurisdiction over its own nationals.

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[320] See also J. Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements,* in American Political Science Review, 101 (3), 2007, at 573-89.

[321] Coalition for the International Criminal Court (CICC), 'US Bilateral Immunity Agreements or So-Called 'Article 98' Agreements', Questions and Answers, http://www.iccnow.org/documents/FS-BIAs_Q&A_current.pdf.

[322] See also Harmen Van Der Wilt, *Bilateral Agreements between the United States and States Parties to the Rome Statute: Are They Compatible with the Object and Purpose of the Statute?,* in LJIL, 18 (2005), at 93-111.

[323] McGoldrick, supra note 274 at 423.

Despite these arguments, at the end of December 2006, 102 agreements were reached. Less than 40% have been ratified by the Parliament or signed as an executive agreement. Forty-six states parties to the Rome Statute signed such an agreement and 22 are already in force. Fifty-six states parties did not sign a bilateral agreement. Among them 24 lost financial aid from United States in 2005. Fifty-four other states have publicly refused to sign[324].

Romania was the first state to sign such an agreement with the US. Its decision brought a lot of critics, since Romania was a state-party to the Rome Statute[325] and a candidate to the European Union. But Romania was also "desperate to join NATO"[326] and the moment was appropriate. The same month the agreement was signed, Romania received the first US installment of substantial financial assistance for disaster aid[327].

At that moment, Romania did not consider that the agreement was contrary to the Rome Statute, but rather aligned to the American interpretation of the article 98:

"By signing this bilateral agreement with the United States, Romania has shown that she understands our position, and the fact that we are not seeking to weaken the ICC or to undermine the integrity of international peacekeeping operations. [...] These agreements are consistent with the Rome Statute of the International Criminal Court and will help to provide the safeguards we seek to protect Americans from surrender to the ICC"[328].

"Romania cannot refer the American citizens committing crimes on our territory to the ICC. The text of the agreement signed by Romania and the US does

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[324] Coalition for the International Criminal Court, http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf.

[325] Romania became a state-party to the Rome Statute by ratifying the Law No. 111 from March 13, 2002, published two weeks later in the Romanian Official Journal, no. 211.

[326] McGoldrick, supra note 274 at 427. See also Ian Fisher, *Romania Pins Hope for NATO Seat on US Friendship,* New York Times, 23 October 2002.

[327] McGoldrick, ibid.

[328] Press Release, Philip T. Reeker, Deputy Spokesman, Washington DC, August 1, 2002, http://www.state.gov/r/pa/prs/ps/2002/12393.htm. See also John R. Bolton, *Remarks at the Foreign Ministry, Bucharest, Romania,* in William Driscoll, Joseph Zompetti and Suzette W. Zompeti (Eds.), "The International Criminal Court. Global politics and the Quest for Justice", International Debate Education Association, New York, 2004, at 158-60.

not mention impunity. USA already expressed their intention to try these persons, so there is no impunity"[329].

To date the agreement between Romania and the US regarding the immunity of the American citizens towards the ICC has no legal effect, as it was not ratified yet. The Romanian Constitution foresees in article 11 (2) that only "treaties ratified by Parliament, according to the law, are part of national law"[330].

II.2. 2. c) US legislation prohibiting foreign aid

Another part of the US strategy was to pass legislation which prohibits foreign aid. The American Service-members' Protection Act (ASPA), the federal law which amends the National Defense Authorization Act, was passed in August 2002. The amendment authorizes the President to "all means necessary" to free US citizens and allies from ICC custody. The law also contains provisions concerning the barring military assistance from most states that ratified the Rome Statute, unless the President waives this requirement. The provisions are not binding to states that agreed on "Article 98" treaties[331]. The opponents called the amendment "the Hague Invasion Act"[332] as it would authorize US to invade The Netherlands to release a US citizen in custody at the ICC[333].

Two years later, the US Congress adopted the Nethercutt Amendment as part of the US Foreign Appropriations Bill. The so called Nethercutt Amendment cut aid from the Economic Support Fund to all states parties to the Rome Statute that have not signed an "Article 98" agreement. In 2006 US tried to reverse the negative

[329] Ion Diaconu, Secretary General in the Ministry of Foreign Affaires, Media coverage of the "ICC-Implementation in Central and Eastern Europe" Conference, Bucharest, 9-11 May 2003, http://www.icls.de/projekte/Presscoverage.doc.
[330] Constitution of Romania, article 11, "International law and national law", http://www.cdep.ro/pls/dic/site.page?id=339&idl=2.
[331] See der Wilt, supra note 322 at 94.
[332] See Coalition for the International Criminal Court, http://www.iccnow.org/?mod=usaicc. See also Global Policy Forum, http://www.globalpolicy.org/intljustice/icc/2001/0621usbl.htm.
[333] McGoldrick, supra note274 at 435.

effects of its campaign by removing such restrictions to 14 states parties to the Rome Statute which did not enter into bilateral agreements[334].

II.2. 3. The European Union's responses. Romania between EU and US?

Immediately after Romania signed the bilateral agreement, the EU Council was invited to adopt a set of principles "to serve as guidelines for Member States when considering the necessity and scope of possible agreements or arrangements in responding to the United States' proposal"[335].

The guidelines recommend *inter alia* that any agreement should include appropriate operative provisions ensuring that persons who commit crimes falling within the jurisdiction of the Court do not enjoy impunity. They refer both to the existing agreements and to the newly proposed ones. The guidelines warn the states that "entering into US agreements – as presently drafted – would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties"[336].

The guidelines are consistent with the principle of complementarity, providing that the national states should have priority in investigating and prosecuting the ones responsible for the gravest crimes: "Such provisions should ensure appropriate investigation and – where there is sufficient evidence - prosecution by national jurisdictions concerning persons requested by the ICC". The EU suggests that any agreement should cover only persons who are not nationals of an ICC state-party and that the dispositions of article 98 (1) which

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[334] See CICC, *Developments on US Bilateral Immunity Agreements. US removes military training sanctions from BIA campaign and issues economic aid waivers to some ICC member states,* available at http://www.iccnow.org/documents/CICCFS-UpdateWaivers_11Dec06_final.pdf.
[335] Council of the European Union, Annex "Draft Council Conclusions on the ICC", September 30, 2002, http://www.amicc.org/docs/EC9_30_02.pdf.
[336] Council of the European Union, Annex "EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court", September 30, 2002, http://www.amicc.org/docs/EC9_30_02.pdf.

ensure diplomatic or state immunity under international law, or article 98(2), should be taken into account.

The guidelines also foresee that surrender as referred to in article 98 can not include transit as referred into article 89 (3), which applies to the transportation through its territory of a person being surrendered to the Court by another State[337]. The bilateral agreements could be convened for a specific period of time, containing a so-called 'sunset clause' which could be a "termination or a revision clause, limiting the period in which the arrangement is in force." The last EU guideline refers to the ratification of these agreements, which "would have to be given in accordance with the constitutional procedures of each individual state."

The European Parliament Resolution on the ICC[338] calls for the non-ratification of such agreement, the Member States being asked "to refrain from adopting any agreement which undermines the effective implementation of the Rome Statute; considers in consequence that ratifying such an agreement is incompatible with membership of the EU"[339]. Referring back, it is worth mentioning, that Romania postponed the ratification of the bilateral agreement hoping that an accord between the EU and US will be reached. An agreement in this regard could be reached if the US would reconsider its position concerning ICC. An article written by Jess Bravin in the Wall Street Journal[340] is encouraging, saying that the US is "quietly beginning to accept the International Criminal Court"

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[337] "a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain: i) A description of the person being transported; ii) A brief statement of the facts of the case and their legal characterization; and iii) The warrant for arrest and surrender;

c) A person being transported shall be detained in custody during the period of transit;

d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time."

[338] P5_TA-PROV(2002)0449. See http://www.derechos.org/nizkor/icc/ep26sep.html.

[339] Ibid, paragraph no 5.

[340] JESS BRAVIN: US Warms to Hague Tribunal. *Wall Street Journal,* June 14, 2006, http://online.wsj.com/google_login.html?url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB115024503087679549.html%3Fmod%3Dgooglenews_wsj.

and that the "US officials concede they can't delegitimize a Court that now counts 100 member countries, including such allies as Australia, Britain and Canada." Accepting the Statute as it is, would represent a tacit defeat for the US, as David J. Scheffer, the head of the American delegation at the Rome Conference, expressed his hope in 1998, after the American negative vote that the "other governments will recognize the benefits of potential American participation in the Rome treaty and correct the flawed provisions"[341] and not vice versa.

The Common Position and the Action Plan are the fundamental reference documents for EU policy towards the ICC. They promote the recognition and ratification of the Rome Statute which means "respect for international humanitarian law and human rights", and in this way the states are "contributing to freedom, security, justice and the rule of law as well as contributing to the preservation of peace and the strengthening of international security, in accordance with the purposes and principles of the Charter of the United Nations"[342].

Romania aligned with the Common Position at that time as the paragraph 14 of the document or the article 9 (2) required[343] and engaged in sustaining ICC and in "raising the issue of the widest possible ratification, acceptance, approval or accession to the Statute and the implementation of the Statute in negotiations or political dialogues with third States, groups of States or relevant regional organizations, whenever appropriate."[344] One can wonder how this disposition works in reality, how can Romania, during its 'negotiations or political dialogues' to campaign for the ratification of the Statute by the third countries, when itself engaged into an Immunity Bilateral Agreement, which is argued to be contrary to the scope of the Rome Statute?

Following the Common Position, the European Union adopted the Action Plan which is focused on coordination of the European activities, universality and integrity of the Rome Statute and on independence and effective functioning of the

[341] Scheffer, supra note 276 at 147.
[342] Article 1of Council Common Position 2003/444/CFSP on International Criminal Court, June 16, 2003. See http://consilium.europa.eu/uedocs/cmsUpload/l_15020030618en00670069.pdf.
[343] "The European Union considers the application of this Common Position by the acceding countries and the alignment with it by the associated countries Romania, Bulgaria and Turkey and by the EFTA countries important in order to maximize its impact".
[344] Council Common Position, article 2.

ICC.[345] Among other concrete measures the Action Plan sets up EU and national focal points for the ICC. The European Union focal point has an important role in "ensuring effective co-ordination and consistency of information, and in adequately preparing programs and activities of the Union in the implementation of the Common Position"[346]. The National Focal Points are responsible for the implementation of the Common Position. In Romania the duty to report on the implementation of the Common Position at the national level, is to the Ministry of Foreign Affairs after the consultation with the Ministry of Justice.

By signing both the US Bilateral Agreement and the Rome Statute, Romania is in a difficult situation. Article 5 of the EU Common Position foresees that the Member States should follow the developments concerning the obligation to cooperate with the Court in concordance with the Rome Statute. How would Romania fulfill its obligation to cooperate under the Part 9 of the Statute[347] if the perpetrators would be American citizens? Article 98 could not be applied as the Bilateral Agreement is not in force yet, so, practically as a state-party to the Rome Statute, Romania would have to give course to its obligations under this act, which is Romanian law. But what if Romania ratifies the US Immunity Agreement and the Court asks to cooperate by providing some information about an American citizen? Romania would have the obligation not to surrender the perpetrator to the Court, under the Bilateral Agreement, but to provide the Court the information which would incriminate the American citizen. It is hard to imagine how this would work in practice. It would be very interesting to see what Romania will do next. Will it ratify the bilateral act which would lead to inconsistence with the EU policy concerning ICC? If not, for how long will the US tolerate it?

Somehow, it is admirable how the US protects its people. The paradox is that it tries to protect them from a Court whose goal is to make the world better by

[345] Action Plan to Follow up on the Common Position on the International Criminal Court, http://www.consilium.europa.eu/uedocs/cmsUpload/ICC48EN.pdf.
[346] Ibid, page 2.
[347] Rome Statute, Articles 86-102, "International Cooperation and Judicial Assistance".

combating immunity for the most serious international crimes[348]. Their legal arguments are widely thought to be weak[349] as no legal argument can compete with the ones arising from the principle of complementarity. No American citizen would be prosecuted by the ICC unless the US is either unwilling or unable to bring him to justice. One may doubt that US would not be willing or able to try the perpetrators of the most heinous crimes: genocide, war crimes, crimes against humanity and aggression. Since the US is "the most powerful nation committed to the rule of law", there is no doubt, the responsible would be brought to justice, so the US has nothing to fear of. To date more than one hundred states expressed their belief that the Rome Statute provides all necessary safeguards against the use of the Court for politically motivated purposes as it meets the highest standards of competence, fairness, due process and international justice[350]. As the UK Foreign Secretary, Jack Straw, stated, there is no need for the US to be excessively hostile to the ICC[351].

As far as Romania is concerned, by ratifying the Rome Statute, she engaged in fighting against impunity. As a member of the European Union, Romania has to align to the Union's policy towards the ICC. 'Article 98' Agreement signed with the United States, even if criticized has a legal ground but, as the situation stands, it has no legal effect. It will be very interesting to follow the Romanian position after the European Union reaches an agreement with the United States. Romania will be caught in the middle and only the politics and diplomacy will help her go throughout the situation.

[348] See also Press release, Council of the European Union September 30, 2002, in William Driscoll, Joseph Zompetti and Suzette W. Zompeti (Eds.), "The International Criminal Court. Global politics and the Quest for Justice", International Debate Education Association, New York, 2004, at 188.

[349] Bruce Broomhall, "International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law", Oxford University Press, 2003, at 165.

[350] Rome Statute, supra note 347.

[351] See McGoldrick, supra note 274 at 408. Ironically, UK negotiated a Military-Technical Agreement on behalf of 19 countries with peacekeepers in Afghanistan, providing that members of the International Security Assistance Force, including British, French and German soldiers "may not be surrendered to, or otherwise transferred to, the custody of an international or any other entity or state without the express consent of the contributing nation", see page 430.

II.3 Aggression as an Individual Crime.
The Jurisdiction of the International Criminal Court

II.3. 1. From The Hague to Rome; 99 years of legal work trying to define aggression (1899-1998).

As pointed out, one of the reasons the United States was unhappy with the Rome Statute was that states could not agree on the definition of aggression, especially that there have been many years since the states have worked on the topic. The first steps in trying to bring some limitations to the freedom of war, in the international law, were taken in the two Hague Peace Conferences of 1899 and 1907[352]. Article 2 of the 'Pacific Settlement of International Disputes' provided that:

'*in case of serious disagreement or conflict, before an appeal to arms, the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers*[353]*'*.

The Covenant of the League of Nations prohibited member states from going to war in some circumstances, but not in all. The states were allowed to resort to war in cases where specified means of peaceful settlement failed. Article 10 of the Covenant[354] foresaw that:

'the Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled'.

[352] See Y. Dinstein, 'War, Aggression and Self-Defence', third edition, 2004, at 74.
[353] For the full text of the Convention see The Avalon Project at Yale Law School, available at http://www.yale.edu/lawweb/avalon/lawofwar/hague01.htm#art41.
[354] Available at http://www.yale.edu/lawweb/avalon/leagcov.htm#art10.

Shortly after the Covenant entered into force the Geneva Protocol on the Pacific Settlement of International Disputes[355] was signed, but it was never ratified. The effort of making war illegal is very important for the history of international law, though. Article 2 of the Protocol provided that:

'The signatory States undertake to make every effort in their power to secure the introduction into the Covenant of amendments on the lines of the provisions contained in the following articles.

They agree that, as between themselves, these provisions shall be binding as from the coming into force of the present Protocol and that, so far as they are concerned, the Assembly and the Council of the League of Nations shall thenceforth have power to exercise all the rights and perform all the duties conferred upon them by the Protocol'.

A few years later, the General Treaty for Renunciation of War as an Instrument of National Policy, known as the Kellogg-Briand Pact, was signed in Paris in 1928. The treaty made war illegal:

'The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means'[356].

Even if the Pact brought some criticism to the international legal literature[357], it was a very important legal instrument which had a significant role in punishing the ones responsible for the atrocities committed in the Second World War.

After this sad moment in the history of mankind, the States decided it was time to end impunity. At the Conference in San Francisco in 1945, it was adopted the Charter of the United Nations which required that:

'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

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[355] Available at http://net.lib.byu.edu/~rdh7/wwi/1918p/pacific.html.

[356] Article 2 of the Kellogg-Briand Pact, available at http://net.lib.byu.edu/~rdh7/wwi/1918p/kellogg-briand.html.

[357] See Dinstein supra note 352 at 80.

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'[358].

Thus, the UN Charter prohibits the use of inter-states force. There is no term of 'war' in the article 2 (4), but 'international relations' and we can not find 'armed force' but only 'force' in the same paragraph[359]. Maybe these terms are missing because the states had learnt from the Covenant of the League of Nations which created problems of interpretation because of these terms[360].

Anyway, the Charter obligates the states parties to a dispute, if they fail to settle the matter by peaceful means, to refer it to the Security Council[361]. Thus, unlike the Covenant of the League of Nations[362] which allowed states to go to war if they couldn't settle the dispute by peaceful meanings, the UN Charter provides in this case that a referral should be made to the Security Council. The armed force is permitted only in self-defense until the Security Council takes the proper measures:

'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'[363].

All these documents, as well as the other[364], consecrated the general prohibition of the use of inter-states force or the one of refraining from the threat or use of force, as some well known general principles of public international law[365].

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[358] For the whole text of the UN Charter, see http://www.un.org/aboutun/charter/.
[359] The expression 'armed force' is present in some other articles of the Charter, namely 41 and 46.
[360] See John F. Murphy, 'Force and Arms' in '*The United Nations and International Law',* C.C. Joyner ed., 1997 at 101.
[361] UN Charter article 37 para. 1.
[362] The Convenant, supra note 354.
[363] UN Charter article 51.
[364] See e.g. Helsinki Final Act, available at http://www.hri.org/docs/Helsinki75.html#H4.2.
[365] See e.g. C. Andronovici, „Drept international public", Ed. Graphix, Iasi 1996, at 93 or Gy. Haraszti, Herczegh G., and Nagy K. „Nemzetközi Jog" Tankönyvkiadó, Budapest 1979, at 88.

Therefore, we had the legal provisions which incriminated aggression in general. Although everyone knew that aggression was the gravest crime, no one was punished for committing it until the Nuremberg Trial. For the first time, it was admitted that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'[366]. Under article 6 (a) of the Charter of the International Military Tribunal, planning, initiating or waging a war of aggression represented a crime against peace and entailed individual criminal responsibility:

'...The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;[367]*.*

Officials were found guilty of planning and waging aggressive war[368]:

"*War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but effect the whole world. 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*[369]"

The definitions of crimes provided by the Military Tribunal's Charter, became the 'foundation stones'[370] for the Control Council Law No.10 and the Charter of the International Military Tribunal for the Far East. Article II of the Control Council for Germany No.10 provided that:

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[366] International Military Tribunal (*Nuremberg* Trial), Judgement (1946), 1 I.M.T. at 223. This well known dictum is based on a passage from Lord Wright, 'War Crimes under International Law', 62 L.Q.R. 40, 47 (1946). See Y. Dinstein, supra note 352 at 109, note 23.
[367] See Charter of The International Military Tribunal, available at http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm, last visited January 31, 2007.
[368] For a detailed list of persons convicted see PCNICC/2002/WGCA/L.1/Add.1, January 18, 2002, tables 5-9, at 31-98.
[369] The Judgement at 186.
[370] B. Ferencz, '*Enabling the International Criminal Court to Punish Aggression',* Washington Studies Law Review, vol. 6, No. 3, 2007, available at http://www.benferencz.org/artis.html.

'Each of the following acts is recognized as a crime:

(a) Crimes against peace: Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'[371].

Article 5 of the Tokyo Tribunal adopted the same definition of aggression as in the Nuremberg Charter, adding only a clarification, that the war of aggression could be 'declared' or 'undeclared':

'The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;'[372].

After Nuremberg and Tokyo, in 1950 the International Law Commission formulated the Nuremberg Principles:

'The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(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)'[373].

In 1954 the ILC proposed a Draft Code of Offences against the Peace and Security of Mankind. Article 2[374] characterized as an offence any act of aggression:

'The following acts are offences against the peace and security of mankind:

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[371] See PCNICC/2000//WGCA/INF/1, 27 June 2000 at 2.
[372] Ibid at 1.
[373] Ibid at 6.
[374] Report of the International Law Commission, 6th session, 1954, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_3_1954.pdf.

(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(2) Any threat by the authorities of a State to resort to an act of aggression against another state'.

Unfortunately, the Cold War made the legal work on defining aggression or adopting an International Criminal Code, practically impossible. As Prof. B. Ferencz said, 'nations were so busy committing or contemplating aggression that they had no time, or desire, to define the crime'[375].

After a few years, in 1970, the General Assembly adopted the Declaration on Principles of International Law Concerning Friendly relations and Co-operation among States in accordance with the Charter of the United Nations[376]. There, after enunciating the principle that 'states shall refrain in the international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations', the Resolution contains a paragraph regarding the crime of aggression:

'a war of aggression constitutes a crime against peace, for which there is responsibility under international law'.

But the real definition of aggression on which the General Assembly reached a consensus, is that contained in the Resolution 3314 from 1974[377]. The definition relates to aggression in a generic way and it refers to the aggression as an act of state, not as an individual crime:

'Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition'[378].

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[375] Ferencz, supra note 370, article on line, I A (2) Para. 3.

[376] General Assembly Resolution 2625 (XXV), available at http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement.

[377] General Assembly Resolution 3314 available at http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement.

[378] Ibid article 1.

The Resolution contains 7 articles. After the aggression is defined, there is a list of illustrations of acts of aggression. These acts have to be sufficiently grave for the Security Council to appreciate them as acts of aggression. The list is not exhaustive, the same body having the possibility of determining that other acts can be considered aggression. Therefore the Security Council had the most important role of all: to determine that an act of aggression had been committed or not. No judicial organ was taken into consideration. Neither the International Court of Justice, nor an International Criminal Court, as the general Assembly asked for in 1946 when requested an International Criminal Code.

The Security Council had the competence of determining that an act of aggression was committed or not, based on article 39 of the United Nations Charter:

'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'[379].

As Professor B. Ferencz showed[380], the Charter itself contained some elements of ambiguity because it prohibited states to use force but also provided an 'inherent right' of self-defense against an armed attack. On the other hand, the definition of aggression was not binding the powerful Members of the Security Council, as they could retain the last word in determining that an act of aggression occurred or not.

Finally, the international legal order had a definition of aggression as an act of state, but since the 'crimes against international law are committed by men, not by abstract entities', a definition of aggression as an individual crime was strongly needed.

After years of work the ILC proposed the final text of the Draft Code of Offences against the Peace and Security of Mankind, in 1996. Article 16 of this

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[379] UN Charter article 39.
[380] Ferencz, supra note 370, article on line, I A (2) Para. 12.

Code contained the definition of the crime of aggression committed by an individual:

'An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression'[381].

The definition is very clear. First, aggression as an act of state has to be committed. Then, the individual who commits the crime has to be a leader or an organizer and has to be active in committing the crime, either by participating or ordering, planning, preparing, initiating or waging it. Therefore the committing of an act of aggression by a state is a pre-condition for the attribution of the criminal responsibility to an individual. But who has the competence to establish that an act of aggression committed by a state had occurred? We might say almost automatically that, based on the GA Res. 3314 and article 39 of the UN Charter, the Security Council is the only body entitled to do that. Though, the commentary of the ILC[382] doesn't refer to the Security Council, but to the 'proper court':

'...the competent court[383] *may have to consider two closely related issues, namely, whether the conduct of the State constitutes a violation of Article 2, paragraph 4, of the Charter and whether such conduct constitutes a sufficiently serious violation of an international obligation to qualify as aggression entailing individual criminal responsibility'.*

Therefore, after years of discussions, there was a two-fold definition of aggression: the act of state and the individual crime. What happened in Rome, why didn't the states agree on the definition of the supreme crime and on the conditions under which the future International Criminal Court would exercise its jurisdiction?

It seemed that the big powers did not want to vote for something that might turn against them, against their military or humanitarian intervention. The European Union and other 30 countries vehemently argued for the inclusion of aggression among the crimes within the jurisdiction of the ICC.

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[381] For a commentary of this article see PCNICC/2000//WGCA/INF/1, 27 June 2000 at 6-8.
[382] Ibid at 7.
[383] Underline added.

Finally, a compromise was achieved which unfortunately lead to a crime without punishment. Article 5 of the Rome Statute included aggression, genocide, crimes against humanity and war crimes as the gravest crimes under international law. It was also stipulated that ICC would exercise its jurisdiction over the crime of aggression only after new provisions were adopted:

'1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in concordance with articles 121 and 123 defining the crime and settling out the conditions under which The Court shall exercise jurisdiction with respect to this crime. Such a provision should be consistent with the relevant provisions of the Charter of the United Nations'[384].

The exercising of the ICC jurisdiction over the crime of aggression was postponed until 2009 (2010), when a new Conference would take place and new amendments of the Rome Statute are allowed. The new provisions have to be voted by 7/8 of the States Parties[385].

II.3. 2. From Rome to The Hague; Special Working Group on the Crime of Aggression (1998-2007).

The drafters of the Rome Statute preferred to wait for at least 7 years than accept the definition of aggression proposed by Pella many years ago.

Pella had a special conception about the prevention and the definition of aggression. In order to study this crime, to be able to give a proper definition, he

[384] Article 5 of the Rome Statute.

[385] Article 121 (6) and article 123 of the Rome Statute.

proposed the sociological method. We can not understand a crime, we can not prevent it if we don't know its causes and its effects[386]. If we understand the causes of the aggression, then we can search for the proper methods of preventing them. Professor Pella's conception was built on two points of view: prevention and punishment[387]. Studying the crime of aggression, preventing and punishing it, can be done not only by the criminal law specialists but also by the ones of the international public law, since this last branch pays a special attention to international peace. One way of preventing the aggression, proposed by Professor Pella, was for the states to collaborate for a more peaceful world, for a better one. The collaboration should regard more domains, as the intellectual economical or political one. The role of international organizations was also seen as a very important part by the great jurist.

But the full collaboration of the states is a myth. There will always be some states which will oppose to an idea and will make its realization impossible. We saw it at the Rome Conference when the USA opposed the Rome Statute. Happily the Court became into being without the American support. But aggression is the supreme crime and its punishment depends on the states collaboration.

That is why in August 1999 the Preparatory Commission for the ICC agreed on setting up of a group which would work on the crime of aggression[388]. After the Court became a reality, the Assembly of States Parties decided to create a Special Working Group on the Crime of Aggression which was supposed to continue discussions on the definition, elements and jurisdictional conditions of the supreme crime[389].

These tasks were very difficult from the very beginning. A lot of questions were taken into account[390]: should the definition of aggression be generic or

[386] "Réprimer le mal sans essayer de comprendre l'enchinement des causes et des effets qui on conduit á ce mal, cela revient á naviguer sans boussoule sur l'infini de l'océan", V.V. Pella "La criminalité collective des Etats" - Organisation d'un Ministere public international, 1925, p.12

[387] Grigore Geamanu, "La conception de V.V. Pella de la prévention et de la définition des crimes contre la paix", in Revue Roumaine de Sciences Sociales - Sciences Juridiques, 12, 2, at 188.

[388] Proceedings of the Preparatory Commission at its Second Session (26 July–13 August 1999), PCNICC/1999/L.4/Rev.1 (1999), at Para. 8.

[389] PCNICC/2002/WGCA/L.2/Rev.1.

[390] See SWGCA Discussion Paper no. 2 and 3 (2005) ICC-ASP/4/32, Annexes II.C and II.D.

specific? If specific, should the acts be those from the list contained in Resolution 3314/1974? How should the aggression be described as an act of state in the context of the ICC Statute? Should the act of aggression be qualified, as e.g. 'manifest' or 'flagrant'? Should attempt of aggression also be included in the text? Should ICC exercise its jurisdiction only after another organ predetermined that an act of aggression occurred? If yes, which one should that organ be? The Security Council, ICJ, the General Assembly?

II.3. 2. a) Proposals submitted by states

Germany was among the countries which supported the establishment of the ICC and the punishment of the crime of aggression. Even before the SWGCA was established, Germany proposed the definition of aggression within the Working Group on Definitions and Elements of Crime[391]. Not punishing aggression would be a 'regression' behind Nuremberg Charter and all other documents that incriminated aggression, as well as 'a refusal to draw an appropriate conclusion from recent history'[392].

In 1997 Germany offered a definition which covered only 'the obvious and indisputable cases' of aggression, focused on the fact which was thought to be 'the very essence' of this crime, namely 'the armed attack on the territorial integrity of another state without justification':

'1) For the purpose of the present Statute, the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing political or military action of a state:

a) initiating or

b) carrying out

an armed attack directed by a state against the territorial integrity or political independence of another state when this armed attack was undertaken in manifest contravention of the Charter of the United Nations and resulted in the effective

[391] See A/AC.249/1997/WG.1/DP.20, 11 December 1997, Preparatory Committee on the Establishment of an International Criminal Court, Proposal by Germany.

[392] Ibid at 5.

occupation by the armed forces of the attacking state or in the annexation by the use of force of the territory of another state or part thereof.

2) Where an act under paragraph (1) has been committed, the

a) planning

b) preparing or

c) ordering

thereof by an individual who is in the position of exercising control or capable of directing political or military action of a state shall also constitute a crime of aggression'.

A year later, in 1998, Germany proposed the same definition but it made some specifications regarding the relationship of the Security Council and ICC. The word 'manifest' was put into brackets and the words 'contravention of the Charter of the United Nations' were followed by the brackets specification 'as determined by the Security Council'. The final part of the paragraph one was also modified but the essence remained the same[393].

In 1999 Germany proposed an improved definition which was the combination of the first two. Thus, the beginning of the first paragraph was modified and it made unnecessary the brackets: 'For the purpose of the present Statute and subject to a determination of the Security Council referred to in article 10, paragraph 2, regarding the act of a state, the crime of aggression means...'(continues with the definition from 1997 and finishes with the variant from 1998)[394]. In 2002 Germany maintained its definition and continued 'to be flexible with regard to the issue of an appropriate definition for the crime of aggression'[395].

Therefore, Germany proposed a definition of aggression as a leadership crime, focused on the armed attack on the territorial integrity of another state without justification and depending on the sine qua non condition of the Security Council's predetermination of aggression as an act of state.

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[393] Ibid at 10.
[394] Ibid at 24.
[395] See PCNICC/2000/WGCA/DP.4 at 8.

The Arabic Countries[396] proposed an interesting definition in Rome. It contains more elements in paragraph 1 than the German definition:

'*For the purpose of the present Statute, the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing political/ military actions in his State, against another State, or to deprive other people of their rights to self-determination, freedom and independence, in contravention of the Charter of the United Nations, by resorting to armed force to threaten to violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those peoples*'[397].

Paragraph 2 contains the actus reus, the acts of aggression which include 'invasion or armed attack', 'bombardment', 'blockade' or 'armed bands'[398]. A year later, in 1999, the Arabic countries proposed the same definition with a specification concerning the acts of aggression which should be punished either they were preceded of a declaration of war or not: 'acts constituting aggression include the following, weather preceded by a declaration of war or not'[399].

The Russian Federation proposed a very brief definition in 1999:

'For the purpose of the present Statute and subject to a prior determination of the Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating, carrying out a war of aggression'[400].

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[396] Namely: Bahrain, Iraq, Lebanon, the Libyan Arab Jamahiriya, Oman, the Sudan, the Syrian Republic and Yemen.
[397] A/AC.249/1997/WG.1/DP.20 at 12.
[398] Ibid at 19.
[399] Ibid at 21.
[400] Ibid at 23.

Therefore, the Russians propose a simple definition. There have to be a Security Council's predetermination of an act of aggression and that act has to lead to a war of aggression.

Bosnia and Herzegovina, New Zeeland and Romania preferred to make distinction between aggression as an individual crime and aggression as an act of state:

'1. *A person commits the crime of aggression who, being in a position to exercise control to over or direct the political or military action of a State, intentionally and knowingly orders or participates actively in the planning, preparation, initiation or waging of aggression committed by that State.*

2. For the purposes of exercise of jurisdiction by the Court over the crime of aggression under the Statute, aggression committed by a State means the use of armed force to attack the territorial integrity or political independence of another State in violation of the Charter of the United Nations'[401].

The same countries provided a proposal regarding also the conditions under which ICC should exercise jurisdiction over the crime of aggression. The proposal[402] foresees solutions for every way the Court can be seized. The first condition is for an act of aggression as an act of state to occur and to be predetermined by the proper organ. The proposal establishes a kind of hierarchy between the organs entitled to pronounce that an act of aggression has been committed or not by a specific state. Firstly, this right is entitled to the Security Council. This organ can seize the Court in accordance with the article 13 (b) of the Rome Statute, with a specific situation after determining that an act of aggression took place. The Prosecutor can also start an investigation, *proprio motu*, or at the request of a state party. In both cases, a predetermination of the existence of aggression has to be done, or if it doesn't exist, the Prosecutor shall inform the SC about the situation. The proposal offers a solution for the case the SC doesn't take

[401] See PCNICC/2001/WGCA/DP.2 at 1.
[402] See PCNICC/2001/WGCA/DP.1 and PCNICC/2001/WGCA/DP.2/Add.1.

action. So, the second place on the hierarchy of the organs entitled to act concerning aggression as an act of state is the General Assembly. But in the present proposal the General Assembly doesn't have the power of determining the existence of aggression, but only to request the ICJ for an advisory opinion in the situation. The third organ which can give an advisory opinion is therefore ICJ, and it can also give a judgment which is binding for the parties. In this latter case, if ICJ establishes that aggression took place, ICC should start its investigation[403].

While some states were busy working on the definition of the supreme crime or on the conditions of ICC jurisdiction, some other states were concerned about the elements of this crime. Samoa made a proposal in this regard[404]. The proposal explains the mental and material elements: intent, knowledge, circumstances, conduct and consequences. First aggression as an act of state must occur and a United Nations organ has to make that determination. Then, the perpetrator has to know that the actions amount to a war of aggression and he has to have a special quality which enables him to control, order or actively participate in the war of aggression.

All these proposals were taken into consideration by the SWGCA and they lead to the Coordinator paper which shall be discussed below.

II.3. 2. b) The Coordinator's Paper

During the meeting of the Working Group on the Crime of Aggression held from 1 to12 July 2002 in New York, the Coordinator advanced a discussion paper regarding the definition of the crime, the conditions for the exercise of jurisdiction and the elements of crime[405]. The paper makes the distinction between the aggression as an individual crime and aggression as an act of state as shown in the proposal submitted by Bosnia and Herzegovina, Romania and New Zeeland. Unlike this proposal, the definition offered by the Coordinator does not contain the material element of 'waging', but the one of 'execution' and it foresees that the act

[403] For a commentary of the proposal see PCNICC/2001/WGCA/DP.2/Add.1.
[404] See PCNICC/2002/WGCA/DP.2.
[405] See PCNICC/2002/WGCA/RT.1/Rev.2.

of aggression must amount at a specific gravity and must represent a 'flagrant' violation of the Charter of the United Nations:

'For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

Option 1: Add "such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof".

Option 2: Add "and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof".

Option 3: Neither of the above.'

Aggression as an act of state represents any of the actions enumerated in the 3314/1974 Res.:

'For the purpose of paragraph 1, "act of aggression" means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned,

Option 1: Add "in accordance with paragraphs 4 and 5".

Option 2: Add "subject to a prior determination by the Security Council of the United Nations".'

Therefore, we have to deal with an act of aggression listed in the 3314/1974 Res., this act has to be of a specific gravity, the act has to be determined by another organ than ICC and the perpetrator has to be effectively involved in the acts which

lead to aggression. The definition is based both on the Nuremberg Charter and the 3314/1974 Res[406].

The proposal continues with the conditions of jurisdiction which are very similar to the ones proposed by the three states enumerated above. Of course there are some other options[407]. Thus, if there is the case of starting an investigation, the Prosecutor has to check first if the Security Council was aware of that situation and if it took some action. If the answer is negative, the Prosecutor has to inform the SC which has to make a decision in a limited timeframe, from 6 to 12 months. If no action is taken, there are more proposals: the Prosecutor may proceed with the case[408], shall dismiss the case[409] or ask for a General Assembly recommendation. If there is no recommendation, the Court may proceed with the case[410]. There are some other proposals, too. The GA or the SC, with the vote of nine members can seek an advisory opinion from the ICJ and in case of ICJ finds that an act of aggression occurred, the Court may proceed[411], or in case of ICJ gives a judgment in concordance with Chapter II of its Statute and find a state guilty of an act of aggression, then the ICC Prosecutor can start the investigation[412].

Paragraph 3 of the Coordinator's paper developed a lot of discussion:

'The provisions of articles 25, paragraph 3, 28 and 33 of the Statute do not apply to the crime of aggression'.

Article 25 paragraph 3 contains dispositions regarding the individual participation[413] while article 28 refers to the responsibility of commanders and other superiors[414].

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[406] To see some arguments for either of these two documents serving as a guide for defining aggression in the context of ICC, see J.M.Jiang, '*What in the World is the Crime of Aggression* and Who in the World is to Say', working paper at 16.
[407] Coordinator's paper, supra note 405 at 2.
[408] Ibid par. 4 option 1.
[409] Ibid option 2.
[410] Ibid option 3.
[411] Ibid option 4.
[412] Ibid option 5.
[413] In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or

Article 33 is about the superior orders and prescription of law[415]. Why wouldn't apply these three articles to the crime of aggression? Maybe because at that time they thought of it as a special crime and its complexity would make these dispositions not applicable.

As the SWGCA analyzed further the Coordinator's proposal, the approach to this certain paragraph divided states in two groups. The states which wanted for the article 25 paragraph 3 not to apply to the crime of aggression, developed the

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otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
(ii) Be made in the knowledge of the intention of the group to commit the crime;

[414] In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[415] 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
(a) The person was under a legal obligation to obey orders of the Government or the superior in question;
(b) The person did not know that the order was unlawful; and
(c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

‘monistic approach’ and the states which were for the application of this disposition to the supreme crime developed the ‘differentiated approach’[416].

They called it the monistic approach because it does not distinguish between the commission of the crime and ordering or aiding (in) such commission. The description of the individual’s conduct includes a description of the different forms of participation which would otherwise be addressed in article 25, paragraph 3, of the Rome Statute. Under the differentiated approach, the definition of the crime is treated in the same manner as the other crimes under the jurisdiction of the Court, namely it is focused on the conduct of the principal perpetrator, and the other forms of participation are addressed by article 25, paragraph 3, of the Statute[417].

Aggression is a leadership crime and for this reason the supporters of the differentiated approach tried to take into consideration the leadership character during the discussions which took place at Princeton 2005 Intersessional. The work of the participants focused on these two directions, bringing arguments pro and contra. The differentiated approach encountered some problems when defining the ‘conduct’[418] of the perpetrator (which verb is the best: ‘participates’, ‘engages’, ‘directs’?), or when suggesting to omit the ‘planning and preparation’ expression in the definition of the crime. The monistic approach itself has merits and flaws, also. It is very simple but it presents a ‘potential risk of excluding a group of perpetrators’[419].

The difference between these two approaches represented one of the main features of the revised Coordinator’s paper. The new proposal was made by the Chairman with the occasion of the resumed fifth session of the Assembly of States Parties[420].

The Chairman’s proposal revises only the first part of the Coordinator’s paper, namely the one regarding the definition of aggression and the conditions of exercising the jurisdiction. The elements of crime remained the ones from the part

[416] See ICC-ASP/4/32 Annex II.B. at 2.
[417] See ICC-ASP/5/SWGCA/Inf. 1 at 15 par. 84.
[418] Supra note 416 at 3.
[419] Princeton 2005 Report paragraph 22.
[420] Which took place in New York, 29 January-1 February 2007.

II of the Coordinator's document, as it was not the subject of discussions during the Princeton meetings[421].

Unlike the Coordinator's paper which proposed only one definition of the crime of aggression with more options, the Chairman's proposal contains two variants of defining aggression, as a result of the monistic and differentiated approach[422].

The variant (a) reflects the latter direction:

1. 'For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person (leads) (directs) (organizes and/or directs) (engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack'

The variant (b) reflects the monistic approach and is almost identical with the definition from the Coordinator's paper:

1. 'For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person orders or participates actively in the planning, preparation, initiation or execution of an act of aggression/armed attack'.

The difference is the alternation of an act of aggression with an armed attack, which suggests that these actions are not identical per se, but their gravity is equal. Both variants continue in the same way:

'[which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations] [such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof]'.

The proposal also contains a paragraph 2 concerning aggression as an act of state as contained in the 3314/1974 Res:

421 ICC-ASP/5/SWGCA/2 at 2 par. 7.
422 Ibid at 3.

'For the purpose of paragraph 1, "act of aggression" means an act referred to in [articles 1 and 3 of] United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974'.

This paragraph is almost identical with the one contained in the Coordinator's paper, only the last mention 'which is determined to have been committed by the State concerned', being eliminated.

Regarding the condition of exercising the ICC jurisdiction, there are a few differences between the paper from 2002 and the one from 2007. Thus, the new proposal doesn't foresee the Security Council's option of asking an advisory opinion from ICJ[423].

Practically, the Chairman's proposal follows the same format as the Coordinator's paper but it contains some changes which reflect the progress made by the SWGCA.

II.3. 2. c) Future work of the SWGCA

As the Rome Statute foresees, the Review Conference will be held in 2009. The aim of the SWGCA is to provide a definition of the crime of aggression at that Conference. The members of the group seem to be very confident in achieving this goal. Thus, after the fifth resumed session of the Assembly of States parties, the Chairman expressed his feeling that there is a chance of success[424].

In order to enable the SWGCA to accomplish its work, at least ten days of exclusive meeting time for the group is scheduled between 2006 and 2008. The meetings will be extended in case the Review Conference will take place a year later, in 2010[425].

[423] See Coordinator's paper, supra note 405 variant (b).
[424] See M. Turner, 'UN panel close to framing a law on state aggression' in *Financial Times*, February 6 2007, available at http://www.ft.com/cms/s/339fd7aa-b586-11db-a5a5-0000779e2340.html.
[425] See ICC-ASP/5/SWGCA/1 at 2-3 par. III.

II.3. 3. Aggression as an individual crime. Solutions.

Defining a crime it is maybe even harder than pronouncing a judgment in a case concerning that crime. A judgment directly affects only the persons involved in that particular case, but the definition of a crime affects all the potential perpetrators of that crime and their victims.

II.3. 3. a) Definition of the crime of aggression.

The main subjects of international law are the states. An individual, who acts in his official capacity, acts on behalf of his state. If he intentionally or knowingly violates the dispositions of the Charter of the United Nations regarding the international peace and security, the responsibility of his state as well as his individual criminal responsibility should be engaged. In my opinion, an act of aggression and a crime of aggression are concepts which can not be separated. We can not have an act of aggression without having a crime of aggression, as the crime is committed by 'men and not by abstract entities'. In the same way, there can not be a crime of aggression without an act of aggression. In the latter case it might be another crime, of course, but not the supreme crime.

This is the reason that the two definitions depend on each other. First, an act of aggression has to occur. Only after that the criminal responsibility of the person who acted on behalf of his state will be engaged.

During the meetings of the SWGCA the question of what kind of definition is appropriate has been raised: the generic or the specific one? The generic definition is the one which does not include a list of acts of aggression, while a specific one contain such a list. A generic definition is preferred as it can not be imagined all the ways the act of aggression would occur[426]. The specific definition will be more consistent with the definitions of the other crimes in the statute, but

[426] See also I.K. Müller-Schieke, '*Defining the Crime of Aggression under the Statute of the International Criminal Court'* in 14 LJIL 409-430 (2001).

this argument does not stand necessarily for a better definition. A third variant, which I believe it would be more appropriate, is to combine the two approaches, providing a general chapeau and a non exhaustive list of specific acts[427].

Defining aggression represents not only the concern of the SWGCA, but also the one of academics, practitioners or law students. The topic offers the chance of vehement discussions and articles[428]. Prof. B. Ferencz offered a definition back in 2001 which referred to the aggression as an act of state as contained in the 3314/1974 Res adding that particular attention is drawn to the reaffirmations contained therein of "the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity," and that "the territory of a State shall not be violated by being the object even temporarily of military occupation taken by another State in contravention of the charter". Furthermore, "any annexation by the use of force of the territory of another state or part thereof" may qualify as an act of aggression. Nothing can prejudice the above rights, particularly of "peoples under colonial and racist regimes or other forms of alien domination"[429].

A definition of the crime of aggression is also offered by I.K. Müller-Schieke:

'For the purpose of the present Statute, the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or directing the political or military action of a state: (a) planning; (b) preparing; (c) initiating; or (d) carrying out an armed attack of that state directed against the territorial integrity or political independence of another state in violation of the Charter of the United Nations'[430].

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[427] ICC-ASP/5/SWGCA/Inf. 1 at 5 par. 10.

[428] See e.g. the discussion between Prof M. Cohn (Thomas Jefferson School of Law) and A. D'Amato (Northwestern Law School) available on http://jurist.law.pitt.edu/forum/forumnew18.HTM. There, Prof. Cohn proposes the following definition for the aggression as an act of state: 'Aggression is any invasion, attack, bombardment or use of any weapons by the armed force of the State A against the territory of State B, which is neither authorized by the Security Council of the United Nations, nor done to repel a danger of imminent attack of the borders of the State A by State B'.

[429] B. Ferencz '*Deterring Aggression By Law - A Compromise Proposal*' January 11, 2001, available at http://www.benferencz.org/arts/44.html.

[430] I.Müler – Schieke, supra note 426 at 428.

Aggression is a leadership crime par excellence. Who the leader is, though, it is not entirely agreed. Most of the opinions are for recognizing only the persons who are in a position of exercising control or directing the political or military action of a state, as the leaders, while some others consider that aggression can be committed by other persons, too[431].

My definition of the crime of aggression would read as follows:

'*An individual who, being in a position effectively to exercise control over or to direct the political or military action of a State, plans, prepares, initiates or executes an act of aggression shall be responsible for the crime of aggression.*

For the purpose of paragraph 1, "act of aggression" means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974'.

By punishing the one who plans, prepares, initiates or executes an act of aggression, the definition I propose does not exclude the leader who might not be conducting himself these actions, but rather would order or lead the planning, preparation, initiating or the execution of an act of aggression, since the article 25 paragraph 3 would apply to the supreme crime, too.

In this regard, the disposition which refers to the definition of aggression must be corroborated with article 25 paragraph 3 (b) which foresees that a person should be responsible if 'orders, solicits or induces the commission of such a crime which in fact occurs or is attempted'. Therefore, both the leader who effectively plans, prepares, initiates or executes an act of aggression, as well as the leader who orders, solicits or induces the planning, preparation, initiation or execution of an act of aggression, shall be responsible for committing the crime of aggression.

[431] See e.g. K.J. Heller, '*Retreat from Nuremberg: the Leadership Requirement in the Special Working Group's Definition of Aggression'* , 2006 or R.S. Clark, '*Rethinking Aggression as a Crime and Reformulating its Elements: The Final Work – Product of the Preparatory Commission for the International Criminal Court'*, in 15 LJIL (859-890), 2002.

II.3. 3. b) Conditions under which the ICC can exercise jurisdiction over the crime of aggression

Unlike the other three categories of crimes within the jurisdiction of ICC, which can be put under investigation without any predetermination of another organ, the crime of aggression is special in this regard. There is a *sine qua non* condition which requires that an act of aggression has been committed. Who is the organ that has the right to make such a determination is still a subject of debate in international law: the Security Council? The General Assembly? ICJ? ICC itself?

ICC deals with crimes committed by individuals, not with acts committed by states. This is the reason it can not establish that an act of aggression occurred. If we analyze the problem from this point of view, it seams logical that the ICJ should be the one to deal with this aspect. ICJ has jurisdiction over the states' acts and thus it should be the proper organ to pronounce a decision in this regard.

The problem with ICJ is that it gives advisory opinions which are not binding the states. These opinions have to be requested by the UN General Assembly, Security Council, etc, so another organ is also involved[432]. On the other hand, the opinions are not compulsory for the states. But the judgments are. ICJ can bring a judgment which is obligatory for the states involved. It was said that even if it seemed a good solution, waiting for ICJ to pronounce a decision would take too much time, would be expansive and the victims wouldn't have the time and the power to wait for an answer from ICJ[433].

The situation would be easier if a state, victim of aggression would seize ICJ with this matter. In this case ICJ would be clearly the most appropriate organ to pronounce a solution. But how often had the ICJ determined that an aggressive state act occurred?

The most cited case is *the Nicaragua Case*[434]. In its 1986 decision the Court rejected 'the justification of collective self-defence maintained by the United States

[432] See also D.D.Ntanda Nsereko, '*Aggression under the Rome Statute of the International criminal Court'* in Nordic Journal of International Law 71, 2002 at 520.
[433] See B. Ferencz, supra note 370, article on line, II B Para. 4.
[434] http://www.icj-cij.org/icjwww/icases/inus/inus_isummaries/inus_isummary_19860627.htm.

of America in connection with the military and paramilitary activities in and against Nicaragua' and decided that 'the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State'. At the same time, 'the United States of America, by certain attacks on Nicaraguan territory in 1983-1984 [...] has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State'.

The United States was also found guilty of violating the sovereignty of Nicaragua, of breaching the obligation not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce.

There is nowhere the word 'aggression' in the judgment. It is true that at some point in the body of the decision the term 'armed attack' is present, but still, no *expressis verbis* 'act of aggression'. Only by analogy it may be said that aggression occurred: USA was found guilty of breaching its obligations under customary international law and paragraph 195 foresees that the 'Definition of Aggression' in General Assembly Resolution 3314 'may be taken to reflect customary international law' on what constitutes an armed attack[435].

Another case where ICJ omitted to make use of the words 'act of aggression' is the *Armed Activities on the Territory of the Congo (Congo v. Uganda) case.* The dispute concerned "acts of armed aggression perpetrated by Uganda on the territory of the Democratic Republic of the Congo" [436]. Congo requested the Court to adjudge and declare "that the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic,

[435] See also M. S. Stein, '*The Security Council, the International Criminal Court and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?'* in IND. INT'L & COMP. L. REV, vol. 16:1 at 20.

[436] See *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Summary of the Judgment of 19 December 2005, Para. 2, available at http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm.

economic and financial support to irregular forces having operated there, has violated [...] the principle of non-use of force in international relations, including the prohibition of aggression[437]".

As an answer to this request the Court found that "that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention"[438]. But what happened to 'aggression'? The words contained in Congo's request, "including the prohibition of aggression" were simply replaced with the words "and the principle of non-intervention".

Why would ICJ avoid using the term 'aggression'? Why would not recognize that an act of aggression occurred if it is based on facts? Why would not pronounce loudly something that every jurist could read under the rows?

Considering these facts, even if ICJ is the legal organ who has jurisdiction over the acts committed by states, maybe it is not the most appropriate organ to determine that an act of aggression occurred, after all. For ICC to exercise its jurisdiction over the persons who commit the crime of aggression, it needs a clear, free pass, a decision which clearly says that an act of aggression has been committed, not a decision which needs interpretation. Therefore, the organ which theoretically, in my opinion is the best one to determine the existence of an aggressive state act, practically proves to fail in this regard[439].

Another organ which might predetermine the existence of aggression is the United Nations Security Council. This is the most controversial proposal since the SC is a political organ, not a judicial one. The question is if the politics is more powerful than the judiciary when it comes to international peace and security. Back in 1946 the states invested the SC with 'primary responsibility for the maintenance

[437] Underline added.
[438] *Congo v. Uganda,* supra note 436 par. 345. Underline added.
[439] My opinion should not be taken as a general indictment against ICJ.

of international peace and security'[440]. Article 39 of the Charter clearly foresees that 'the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression'.

Therefore, to me it is very clear that the SC is the organ which by the existing law should predetermine that an act of aggression occurred. This is how the states felt after the two World Wars. Maybe the reality has changed by now, and if indeed, states feel like another organ should be invested with this role, then they should ask for the amendment of the UN Charter. Article 108 of the Charter provides that: 'Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council'. Unfortunately, as one can imagine, this is not something that can happen in reality. The conclusion is that, until further provisions, SC is the one who can decide if an act of aggression took place or not. The question on which the SWGCA should focus, should not be 'who?', but 'what happens if it fails to'?

The answer seems to come up quickly: the 'Uniting for Peace' Resolution or in other words, General Assembly. Back in 1950 the GA voted the 377 Resolution which provided:

'... if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security[441].'

[440] See UN Charter, article 24 par. 1.
[441] GA Resolution 377 (a), (1950). Available at http://www.vbs-ddps.ch/internet/groupgst/de/home/peace/kriegsv0/kvrkurz/iusad/uniting.

The Resolution applied in the case of the Korean War. China helped North Korea to invade South Korea and the question was weather the decision of the Security Council was valid, as the Soviet Union protested and was not there to vote[442]. Therefore if the SC fails to act[443], there is always the GA who can act for maintaining the international peace. The SC has indeed, primacy in taking measures for assuring peace and security, but its role is not exclusive[444]: 'such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security[445].'

But what exactly can the GA do? The resolution foresees that it 'shall consider the matter immediately with a view to making appropriate recommendations'. But to make a recommendation does not mean to determine that an act of aggression has been committed or not, although in 1950 the GA had authorized economic sanctions against China because it engaged itself in aggression against Korea.

How should the GA act? Should it ask ICJ for an advisory opinion or should it just authorize ICC to start its investigation? But as Prof. Benjamin Ferencz noted 'the General Assembly is not a judicial body and may be even more politically oriented than the Security Council. There is not much advantage in jumping from the frying pan into the fire[446].'

Turning back to the SC, it would be at least unethical not to act so, my assumption being that the SC will act somehow to restore international peace. The question is, if its actions authorize ICC to start its trial, in other words if the SC determines that an 'act of aggression' had occurred or prefers to use some other words, more generally, which unfortunately would not allow the Court to proceed as e.g. 'breach of the peace', 'threat against international peace' or 'acted in self-defence or humanitarian intervention'. The latter expression seems to be very

[442] See also B. Ferencz supra note370, article on line, II B Para. 1 or I.K. Müller- Schieke, supra note 426 at 424.
[443] By failure meaning the lack of unanimity of the permanent members.
[444] See also M. S. Stein, supra note 435 at 5-18 or D.D.Ntanda Nsereko, supra note 432 at 511.
[445] GA Res. 377/1950.
[446] Ferencz, supra note 370, article on-line II B Para. 2.

problematic and also, very actual[447]. From a different point of view, why couldn't the same organ, which can authorize the use of armed force, determine that a state made use of this kind of force without having its permission?

The SC still continues to remain the proper organ to maintain the international peace and to take measures when the situation requires it, including the case of aggression. Even if it is a political organ, not a juridical one, the SC created, as measures for restoring peace, two ad-hoc Tribunals and together with the government of Sierra Leone, one mixed Tribunal. Even if at that moment some criticized that fact, the Tribunals are working and their decisions contribute to the system of international justice. Considering these arguments, it must be no doubt that the SC will authorize the ICC to proceed with its investigation, if there will be the case. In fact, the SC already works together with the ICC, based on the 'Negotiated Relationship Agreement between the International Criminal Court and the United Nations'[448]. More than that, based on article 13 (b) of the Rome Statute[449] the Prosecutor of ICC started an investigation in Darfur (Sudan), as the SC passed the 1593/2005 Resolution[450], and consequently to the 1688 (2006) Resolution[451], the former Liberian president was transferred to the Hague, where could beneficiate of the facilities made available by the ICC.

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[447] Supra note 428. There Prof. Cohn vehemently argues against the US "humanitarian intervention" in Iraq which might be in her opinion even "aggression in disguise". Prof. A. R. Brotóns in his working paper '*Aggression, Crime of Aggression, Crime without Punishment',* 2005 at 10 also qualifies the intervention in Iraq as aggression: "The most recent and obvious aggression was carried out against Iraq by the United States together with the United Kingdom and a 'coalition of willing nations'."

[448] 'Negotiated Relationship Agreement between the International Criminal Court and the United Nations' available at http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf.

[449] 'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: [...] (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.

[450] S/Res/1593 (2005) available at http://www.iccnow.org/documents/SC1593.31March05.pdf.

[451] S/Res/1688 (2006) available at http://www.womenwarpeace.org/liberia/docs/res1688.pdf.

While some remain still skeptical about the role of the SC, a political entity, “to determine the docket of an independent court”[452], other’s opinion is that “you cannot separate the legal from the political here”[453].

The debate on which organ is more appropriate to predetermine the existence of an act of aggression should not block ICC from making justice for victims. Some alternatives ways to achieve justice have been suggested[454]. Prof. Benjamin Ferencz recalls that it would be not necessary to seize ICC if the national systems would be willing and able to provide a fair trial. But still, if ICC is seized with the matter, there are two alternative ways for the Court to exercise its jurisdiction: ‘public reports by ICC Prosecutor’ and ‘prosecute for other crimes in addition to the crime of aggression’. The first solution seems very appropriate. The Prosecutor can start its investigation. If he finds that there is not sufficient evidence, then there is no case. If the Prosecutor based on the evidence considers that a trial should follow, then his Report should be made public. In the case that the SC was referred with the situation but no answer was provided, making public the Report should pressure the SC to act. If it does not act, the Prosecutor should go on with the case.

The second solution proposed by the expert in the crime of aggression, is that while waiting for an organ to predetermine the existence of an act of aggression, the prosecutor should proceed, if the case, on any or all of the other three related charges: genocide, crimes against humanity and war crimes.

Prof. M. Stein is among the ones who believe that when it comes to the supreme crime, the SC power should be increased: ‘in matters concerning the crime of aggression, the ICC will be completely subordinate to the Security Council as a body, though the ICC will not be subordinate to the veto of any one permanent member’[455]. Stein also proposes a political compromise. In his opinion ‘the ICC would be able to proceed in aggression cases, without Security Council approval,

[452] Richard Dicker, Human Rights Watch, cited in M. Turner, *’UN panel close to framing a law on state aggression’*, supra note 424.
[453] Christian Wenaweser, Liechtenstein's UN ambassador and the chair of the SWGCA cited by M. Turner, ibid.
[454] See B. Ferencz, supra note 370 article on line II C.
[455] Stein, supra note 435 at 32.

but only up to the point where charges against an accused are confirmed under Article 61 of the ICC Statute. After confirmation of the charges, further proceedings would require approval of the Security Council, subject to veto by the permanent members. [...]Individuals accused of the crime of aggression would not be subject to arrest without the Security Council approval, but the ICC would be able to proceed to confirmation of charges in the absence of the accused[456]. Steiner proposes a way of how the Court could exercise its jurisdiction, which is rather realistic than idealistic.

The latter would be in his conception, 'an independent procedure, one in which the Security Council is not asked to determine aggression in the context of an ICC case, and in which a prosecution cannot be thwarted by the veto of a single permanent member of the Security Council'[457].

As far as I am concerned I would go for a different approach, based on the three trigger mechanisms. My opinion is that the SC is the organ invested by the states to maintain and restore international peace. Therefore, it should be the proper organ to determine that an act of aggression occurred or not. When the Security Council refers a situation to the Prosecutor so that the Court can exercise its jurisdiction over the crime of aggression, it is understood that it first determined that an act of aggression was committed by a state.

When a state refers a situation to the Court, but priory it seized also the ICJ with the matter, it is only after ICJ brings its judgment that ICC should proceed. When the Prosecutor wants to start an investigation *proprio motu* or at the request of a state party which did not seize the ICJ, the Court has to be sure the SC takes the proper actions in order to determine that an act of aggression was committed by a state or not. If it doesn't act, the ICC Prosecutor should start his investigation.

My proposal regarding the conditions under which ICC could exercise its jurisdiction, would read as follows:

[456] Ibid at 34.
[457] Ibid at 35-36.

a) '*If a situation is referred to the Court by the Security Council, and therefore there is a determination as to the existence of an act of aggression by a state, the Court shall proceed with the case.*

b) If a situation is referred to the Court by a State-Party, the Prosecutor should first ascertain whether the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned. If such a finding exists the Court shall proceed with the case. If the Prosecutor finds that the International Court of Justice was not seized under Chapter II of its Statute

c) As well as when the Prosecutor proprio motu intends to proceed with an investigation, the Court should ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Prosecutor shall notify the Security Council of his intention so that the Security Council may take action, as appropriate.

Where the Security Council does not make a determination as to the existence of an act of aggression by a state, within six month from the Prosecutor's notification, the Court shall proceed with the case'.

II.3. 3. c) Elements of the crime of aggression

The Elements of the crime of aggression were not discussed at the meetings held in Princeton by the SWGCA. Back in 2002, the Coordinator provided the framework for the elements of the supreme crime, which were based on a proposal submitted by Samoa[458]. The elements of crime depend on what definition will be agreed for the crime of aggression. Anyway, it is sure that first an act of aggression, as contained in the 3314/1974 Resolution, has to occur. It remains to decide which organ shall determine the existence of such an act. Then, the perpetrator has to be in a position effectively to exercise control over or to direct the political or military

[458] PCNICC/2002/WGCA/DP.2.

action of the State concerned. The perpetrator has to act intentionally and knowing that the acts of the state represent acts of aggression.

It also has to be decided which kind of conduct has to follow the perpetrator: to be active in the planning, preparation or execution of the act of aggression, to execute himself these acts or to order them.

After more than one hundred years ICC became a reality. Unfortunately we live in a violent world, marked by conflicts and wars. We have the duty to punish the ones responsible for committing the gravest crimes: genocide, war crimes, crimes against humanity and aggression. But most of all, we have the duty to prevent these heinous crimes.

We can not prevent the crime of aggression if we do not know what it is. We can not prevent it, if we know what is it but we do not have the courage to say it loudly, to put it in a definition which will be recognized by the international law. Hopefully, in 2009 at the Review Conference in Rome a definition of the crime of aggression will be provided, and not just a definition to be accepted by states, but a proper definition for the supreme crime.

II. 4. The Victim and the Witness within ICTY and ICC
A Comparative Perspective

> "Punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs"[459].

And so it is. The drafters of the Rome Statute empowered the Court not only with issues of problematical material law, as in the case of the crime of aggression, but also with matters of procedural novelties, as the key role of the victims in the proceedings.

II.4. 1. Victims v. Witnesses. Definitions

In the history of international law, the victim was often seen as a witness. The ICC managed to change that fact and for the first time, the victim can participate in a criminal trial in his or her own name. The victim became more than a witness and the reparation regime is something completely new for an international court. Someone has to protect the victims, to offer them the possibility of participating in a trial in their own names in order to obtain compensation. But who are the victims under international law and how can they participate in a trial and most important, who is going to offer them compensation, who is responsible for that? The answers to these questions are taken into account next.

[459] Statement by Fiona McKay, representing Redress, on behalf of The Victims Rights Working Group, Rome Conference, 17 June 1998.

The United Nations offered the definition of the 'victims of crime', back in 1985, when adopting the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[460]:

"Victims means persons who, individually or collectively, have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

A person may be considered a victim, under this Declaration, regardless of weather the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term victim also includes, where appropriate, the immediate family or the dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization"

ICTY does not provide a specific definition for the victim. Being an UN organism, it was no need to define the victim separately as the definition can be found in the Resolution 40/34.

Unlike ICTY, ICC is an independent organism and that is why the victim had to be defined separately in Rule no. 85[461]:

"(a) Victims mean natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes."

[460] UN Doc. A/RES/40/34, 29 November 1985.

[461] ICC Rules of Procedure and Evidence, Rule 85, 'Definition of Victims'.

In a very large meaning, a witness is someone who has first-hand knowledge about a crime or dramatic event through their senses and can help certify important considerations to the crime or event.

So, there are differences between victims and witness. Sometime victims are not witnesses and sometimes the witnesses are not victims. Their interests may differ. It is true that most of the times the victims were called to participate in a trial as witnesses, but this reality has changed once the ICC was established. A lot of factors contributed to this, and among them a special help was provided by NGOs[462].

II.4. 2. The protective regime

Both statutes of ICC and ICTY offer a protective regime for the victims and witnesses. Their help can be considerable for finding the truth and making justice. Almost always those persons are very frightened and they don't have the courage or the will to come forward to help the justice system. They are victims and witnesses of the most horrible crimes, the gravest ones. War crimes, crimes against humanity, genocide, are crimes that you never forget and their effects are marking you for the rest of your life.

That is why the justice system has to encourage these people to come and help finding the truth and punishing the responsible for the gravest crimes. The Tribunals have to collaborate with the victims in order to accomplish their mission[463]. The provisions of the ICTY Statute and its Rules of Procedure and

[462] See e.g. Victims Rights Working Group, *Strategy Meeting on the Development of Structures and Procedures for Victims at the International Criminal Court*, 6-7 December 2002 or *Victim Participation at the International Criminal Court, Summary of Issues and Recommendations,* November 2003. See also Redress, *Ensuring the Effective Participation of Victims before the International Criminal Court, Comments and Recommendations Regarding Legal Representation for Victims*, May 2005.

[463] 'If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission', *Prosecutor v. Brdanin and Talic*, Motion for Protective Measures, case No. IT-99-36-PT, 10January 2000, para. 14.

Evidence dealing with victims[464] almost exclusively concern their protection because they are seen as part of a witness protection scheme and are not addressed as victims and such[465].

The statute of the ICTY foresees in the article 22 that protective measures shall be provided by the rules of procedure and evidence[466]. As an example of protective measures, the article refers to the conduct of in camera proceedings and the protection of the victim's identity. Indeed, the rules 34, 69 and 75 contain such dispositions.

Rule 34 foresees the settlement of a Victims and Witnesses Section[467] within the Registry. The Victims and Witnesses Unit is the organism which provides qualified personnel to support, counsel and protect the victims and the witnesses. As the rule 34[468] provides, a significant part of the personnel is formed by qualified women, as most of the persons in need are victims of rape and sexual assault, mainly women. This decision was made because the women victims are more open to discuss about such painfully subjects, as rape and sexual violence, with women and not with men.

Rule 69 offers the possibility for the victims and witnesses to stay anonymous[469] because they might be in danger. A lot of persons refuse to testify

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[464] See Theo van Boven, *The Position of the Victim in the Statute of the International Criminal Court,* in Herman von Hebel, Johan Lammers, Jolien Schukking (Eds.), "Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos", T.M.C. Asser Press, The Hague, 1999, at 80-81.

[465] See Pascale Chifflet, *The Role and Status of the Victim*, in G. Boas and W. Schabas (Eds.), "International Criminal Law Developments in the Case Law of the ICTY", Leiden: (2003), at 75-111.

[466] 'The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity'.

[467] The Section was transformed in an Unit.

[468] 'A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:
(i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and
(ii) provide counseling and support for them, in particular in cases of rape and sexual assault. (Amended 2 July 1999)
(B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women'.

[469] '(A) In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. (Amended 13 Dec 2001)

under their true identity because they are afraid of the consequences. Again, ICTY is dealing with the crimes committed by the most dangerous criminals, and the victims and witnesses know that, so they are afraid. But if the Tribunal offers them the guaranty of anonymity[470], the chances for them to come to testify are much more.

Rule 75 contains the other protective measures regarding the privacy of victims and witnesses, camera proceedings, closed sessions, closed circuit television, no harassment or intimidation when interrogating them[471].

(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section. (Amended 15 June 1995, amended 2 July 1999, amended 13 Dec 2001)

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defense'.

[470] Kevin R. Gray, *Evidence Before the ICC,* in Dominic McGoldrick, Peter Rowe, Eric Donnelly (Eds.), "The Permanent International Criminal Court. Legal and Policy Issues", Hart Publishing, Portland, 2004, at 304-09.

[471] '(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. (Amended 15 June 1995, amended 2 July 1999)

(B) A Chamber may hold an in camera proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as (Revised 12 Nov 1997): (a) expunging names and identifying information from the Tribunal's public records (Amended 1 Dec 2000 and 13 Dec 2000);

(b) non-disclosure to the public of any records identifying the victim;

(c) giving of testimony through image- or voice- altering devices or closed circuit television; and

(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75 (F). (Amended 12 Dec 2002)

(D) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

(E) When making an order under paragraph (A) above, a Judge or Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal. (Amended 12 July 2002)

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:

i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the 'second proceedings') unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but

We can see that ICTY ensures a protective regime for the victims and witnesses. This regime can also be seen not only in theory, but in practice, too. There is some jurisprudence by now which shows that the victims and witnesses who appeared before the ICTY, requested and beneficiated of protection.

Article 22 of the statute was invoked in the first trial before the Court[472]. As a result, the identity of six witnesses was protected from the public and the media. Four of them were victims of sexual assault and they requested further protective measures as the possibility of giving testimony by one-way closed circuit television[473]. These measures aimed to minimize the trauma of victims, because they were afraid of consequences. First, they were afraid of the social consequences they could suffer if the community they lived in discovered them as rape victims. Second the measures were taken to avoid the trauma of confronting and meeting the accused, the offender. As it have been said, it would be like raping them the second time[474]. In the indictment against *Dusan Tadic* and *Goran Borovnica* we can see

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(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.
(Amended 17 Nov 1999, amended 1 Dec 2000 and 13 Dec 2000, amended 13 Dec 2001, amended 12 July 2002)

(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:
(i) to any Chamber, however constituted, remaining seized of the first proceedings; or
(ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.
(Amended 12 July 2002)

(H) Before determining an application under paragraph (G)(ii) above, the Chamber seised of the second proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal. (Amended 12 July 2002, amended 12 Dec 2002)

(I) An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to 'a Judge of that Chamber'. (Amended 12 July 2002)'

[472] *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-PT, 10 August 1995, para. 27.

[473] Ibid at 39. See also separate opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-PT, 10 August 1995.

[474] 'Women who have been raped and have sought justice in the legal system commonly compare this experience to being raped the second time', *Prosecutor v. Tadic*, see Gray, supra note 470, para. 46.

starting with paragraph 4.1[475] that some victims' names are replaced with letters in order to keep the anonymity.

In the *Slobodan Milosevic* case[476] the Prosecutor filed a partly confidential and *ex parte* 'Prosecution's Motion for Leave to Amend the Witness List and Request Protective Measures for Sensitive Source Witnesses'[477]. The Motion's aim was to add 11 witnesses to its witness list for the Croatia and Bosnia part of the trial and remove 34 witnesses from that witness list. The Prosecution wanted also protective measures for witnesses who faced exceptionally serious risk to their safety and/or that of their families. They requested that eight of the additional witnesses to beneficiate of delayed disclosure, of a pseudonym as well as face and voice distortion, and one of the witnesses to testify with a pseudonym and in closed session. In this matter, the Trial Chamber ordered on 13 March 2003[478].

ICC has the advantage of being established after ICTY or ICTR[479], so, the experience of the Tribunals helped the Court in improving the system of justice[480].

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[475] "F" was taken to the Omarska camp as a prisoner in early June 1992. Sometime between early June and 3 August 1992, "F" was taken to the Separacija building at the entrance to the Omarska camp and placed in a room where Dusan TADIC subjected "F" to forcible sexual intercourse. (ICTY, Case No. IT-94-1-I, *Prosecutor v. Dusan Tadic* a/k/a 'Dule' Goran Borovnica, Indictment)
[476] *Prosecutor v. Milosevic*, Case No. IT-02-54-T.
[477] 5 February 2003
[478] '… (4) As to the protective measures sought, the witnesses identified in Annex A to the Motion as requesting protective measures shall be granted those measures specifically sought (pseudonyms, face and voice distortion and), and in respect of those witnesses
(a) disclosure of unredacted witness statements and related exhibits shall be made to the *amici curiae* not less than 30 days, and to the accused and his appointed associates not less than 10 days, before the witness is expected to testify;
(b) the accused and his appointed associates shall not disclose the witness statements and related exhibits to third parties except to the extent directly and specifically necessary for the preparation and presentation of the defence case (or, in the case of the *amici curiae*, the extent to which they are assisting the Trial Chamber), and
(c) the accused, his appointed associates and *amici curiae* shall obtain non-disclosure agreements from third parties (as provided by the Prosecution) as a precondition for release of the witness statements and related exhibits to them.
(5) The request for closed session testimony is rejected'.
(*Prosecutor v. Slobodan Milosevic*, Decision on Prosecution motion to amend witness list and for protective measures for sensitive source witnesses). See also *Prosecutor v. Blaskic*, case no. IT-95-14-T, 4 November 1996, para.24, 42, 43, 45; *Prosecutor v. Kolundzija*, IT-95-8-PT, 19 October 1999; *Prosecutor v. Furundzija*, IT-95-17/1-T, 11 June 1998; *Prosecutor v. Delalics*. IT-96-21-T, 25 September 1997; *Prosecutor v. Kunarac*, IT-96-23-T, 29 March 2000.
[479] See also FIDH, *Rapport de Situation. Entre Illusions et desillusions: les victims devant Le Tribunal Pénal International pour le Rwanda*, no. 343, Octobre 2002.
[480] For the victim's position in preparatory stages of the Rome Statute, see supra note 462.

Article 43 (6) foresees the establishment of a Victims and Witness Unit[481], also within the Registry, as in the case of ICTY. Article 68[482] of the Rome Statute contains the protective measures that the victims and witnesses can beneficiate from. The rules of procedure and evidence explain in detail how the Victims and Witness Unit will work (rules 16-19)[483] and also, provide some information regarding the protective measures (rules 87 and 88): camera proceedings, anonymity, electronic testimony, usability of means that enable the alteration of picture or voice, videoconferencing[484]. This is not an exhaustive list as some other measures can be ordered by a Chamber of the Court in order to prevent the release to the press or to the public of the identity or location of a victim, a witness or other

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[481] 'The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence'.

[482] '1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance as referred to in article 43, paragraph 6. 5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information

and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information'.

[483] See also T. Ingadottir, F. Ngendahayo, P. Viseur Sellers, *The International Criminal Court, The Victims and Witnesses Unit (art.43.6) of the Rome Statute*, a Discussion Paper, March 2000.

[484] See FIDH, supra note 479 at 85-89.

persons at risk[485]. The Court must ensure that the measures are not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.

As we will see in the chapter concerning the current situations, ICC opened investigations in four African countries[486]. The situation in DRC offers already examples of using the protective measures with regard to the victims and witnesses. On 4 August 2006[487] the Pre-Trial Chamber I, presided by Single judge Sylvia Steiner ordered the Registrar to provide as soon as possible to the Prosecution and Defence Counsel a non-redacted copy of the Applications for participation, in which any information leading to the identification of the applicants had to be deleted. The judge also ordered all the organs of the Court not to contact the applicants directly and to do so only, if necessary, via the Victims Participation and Reparations Section[488].

In order to make possible the disclosure meetings, an E-Court Protocol for the Provision of Evidence, Material and Witness Information in Electronic Version[489] was created. In this way, if the Counsel of Defence requested it, the Prosecution could provide a CD containing the related information for the Defence at the occasion of disclosure meetings.

At the recommendation of the Victims and Witnesses Unit a general framework concerning protective measures for Prosecution and Defence witnesses was created.[490]

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[485] See also Helen Brady, 'Protective and Special Measures for Victims and Witnesses' in R. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, 2001, at 434-456.

[486] As the situation in August 2008.

[487] Decision authorizing the Prosecutor and the Defence to file observations on the applications of applicants a/0004/06 to a/0009/06, a/0016/06 to a/0046/06 and a/0047/06 to a/0052/06 in the case of the *Prosecutor v. Thomas Lubanga Dyilo*.

[488] See *Prosecutor v. Dusan Tadic*, Gray supra note 470, para. 5.

[489] Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information in Electronic Version for their Presentation during the Confirmation Hearing, public, 28 August 2006.

[490] Decision on a General Framework concerning Protective Measures for Prosecution and Defence Witnesses, 19 August 2006.

II.4. 3. Participation in proceedings

The only kind of participation of victims that ICTY provides is that of participation as a witness. So, ICTY does not recognize the victim's right to participate in a trial in his or her own name, but only allows participating as a witness. Rule 90 refers to the testimony of a witness, rule 90 bis establishes how the transfer of a detained witness has to be done and rule 94 bis is about the testimony of an expert witness. ICTY recognizes the right of a child to participate as a witness in the trial and the Chamber may allow him or her to testify without saying the solemn declaration. The rule 90 (B) specifies that a judgment can not be based only on such a testimony.

Examples of participation of victims as a witness can be easily found in the Jurisprudence of the ICTY[491].

For the first time in the history of international law, ICC gives the victim the right to participate in a trial not only as a witness, but in his or her own name, too[492]. The ICTY experience showed that the persons who suffered because of an odious crime are afraid to come to testify, and if they come, they are not satisfied with the position of the witness. Yes, they want to come to help the system of justice in finding the truth, but they would be more interested to come if they could express their personal experiences, their own points of view, and most of all, their needs.

In the ICTY practice it was formed an assumption that if a person testified, then he or she was the witness of the Prosecution, therefore, the victims who testified for the Prosecution, were in a way protected by the prosecutor. In reality, it was not like this, and the victims were not protected at all. In Rwanda, which is a

[491] See e.g. *Prosecutor v. Kupreskic* et al., IT-95-16-T, *Prosecutor v. Delalic*.

[492] See Emily Haslam, *Victim participation at the International Criminal Court: A triumph of Hope Over Experience?,* in Dominic McGoldrick, Peter Rowe, Eric Donnelly (Eds.), "The Permanent International Criminal Court. Legal and Policy Issues", Hart Publishing, Portland, 2004, at 315-34.

civil law country, they had the “partie civile” institution[493], but the ICTR did not. As a consequence, the victims stopped cooperate. ICC learned from that.

The rules pf procedure and evidence contain a whole subsection regarding the participation of victims in the proceedings. Rule 89 explains how to make an application in order to participate[494]. The application can be made by the victim, or by someone else on his or her behalf. The application has to be written and addressed to the Registrar, who will transmit it to the Chamber. A copy will be given to the Prosecutor and the defense.

The victim can choose a legal representative. Rule 90 foresees that a victim or a group of victims can request a common legal representative or more representatives. The legal adviser can also be chosen by the Court. If the victims don’t have the financial means to pay for the legal representative chosen by the Court, they may ask the Registry to offer them financial assistance[495]. On 19 September 2005 The Office of Public Counsel for Victims (OPCV) was established, which provides support and assistance to the legal representatives of victims and to victims participating in the proceedings as well as asking for reparations.

The Office provides legal research and advice to victims and their legal representatives at all stages of the proceedings in accordance with the Rome Statute, the Rules of Procedure and Evidence, the Regulations of the Court and the Regulations of the Registry. The Office also appears before a Chamber in respect of specific issues, when required[496].

The victims can ask to participate in every stage of the proceedings. This is a very interesting element of procedural law. In the national systems, a victim can ask to participate in his or her own name in a trial only until a certain stage. For

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[493] Literally “civil party”, a private complainant, a person who suffered a material loss as a consequence of the criminal act committed, who can participate in the trial in his or her own name in order to get reparation. The institution is characteristic for Romano-Germanic legal systems.

[494] See also Victims Rights Working Group, *Victim Participation at the International Criminal Court, Summary of Issues and Recommendations,* November 2003, at 7.

[495] See also Redress, *Ensuring the Effective Participation of Victims before the International Criminal Court, Comments and Recommendations Regarding Legal Representation for Victims*, May 2005, at 3.

[496] http://www.icc-cpi.int/victimsissues/victimscounsel/OPCV.html.

example, in Romanian law there is a difference between the victim who wants to participate in a trial and the victim who doesn't want that. They have different names. The one who wants to participate is called 'parte vătămată'[497] and the one who does not want to participate is called 'persoană vătămată'[498]. What is very interesting is that, unlike under the ICC, where a victim who participates in the trial can also be a witness, in the Romanian law, the victim who chooses to participate in his or her own trial, can not participate as a witness[499]. Only the victim who doesn't participate in the trial as a part, can participate as a witness. On the other hand, the victim, can become a part in the trial, only untill a specific moment, which is the confirmation of charges. After this moment, the victim can participate only as a witness and not as a part, not in his or her own name.

The participation regime under the ICC is potential and also limited[500]. The victim may personally take part in the hearing but he or she does not enjoy the same rights as the other parties to the proceedings. The victim may not participate in the investigation of the Prosecution, have access to the evidence gathered by the parties nor call witnesses to testify. The victim has no right of appeal and cannot on that basis, present his or her arguments against the accused to the Appeals Chamber[501].

ICC already confronted with some victims applications to participate in the proceedings. On 14 June 2005 six persons asked to participate in the proceedings[502] and on 17 January 2006 the Pre-Trial Chamber I[503] decided that in order to permit the victims to participate in the proceedings, first has to be

[497] Injured part.
[498] Injured person.
[499] See Romanian Criminal Procedure Code, Article 82. In Hungarian law an accused may give evidence only in this position, and not only as witness as well. See Réka Végvári, *Shifts in Thinking Concerning Law of Criminal Procedure in Witness Protection,* in Acta Juridica Hungarica, 48, No.4, 2007 (361-72) at 366.
[500] See C. Jorda, J. de Hemptinne, *The Status and the Role of the Victim* in A. Cassese, P. Gaeta and J.R.W.D. Jones (Eds.), "The Rome Statute of the International Criminal Court: a Commentary", vol. 2, (2002), 1382 at 1419.
[501] Ibid at.1406.
[502] ICC-01/04-75-Conf.
[503] ICC-01/04-101.

recognised the quality of victims to those persons[504]. That is why on 28 March 2006, the Chamber gave the possibility to the Office of the Prosecutor and the Counsel of Defence to present their observations regarding the recognition of the quality of victim for the 6 persons[505]. On 7 April 2006 the prosecution requested the Pre-trial Chamber I to deny the applications of VPRS 1 to 6 to participate as victims in the case against *Mr. Thomas Lubanga Dyilo*[506]. The Prosecution's stand point was that the six persons did not provide sufficient evidence that they suffered losses directly linked to the crimes constituted against Mr. Lubanga Dyilo[507]. The Counsel of Defence pronounced in the same way[508].

The Legal Representative of the Victims answered to these observations and on 31 May 2006 provided more arguments in favour of the status of victims for the six applicants[509]. As a consequence, with some exceptions, the Prosecution recognised the status of victims for the applicants and requested the Chamber to grant it to them[510]. Even if the Chamber did not allow them to participate[511], it reminded the victims their right to apply again in another stage of the trial, as the Rule 89 (2) provides[512]. Only one month later, the Chamber recognised the status of

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[504] ' aussi longtemps que toute personne physique ou juridique demandant la qualité de victime en relation avec une situation demande également de se voir accorder la qualité de victime dans toute affaire découlant de l'enquête d'une telle situation, la Chambre, dès qu'une telle affaire existe, prend automatiquement en compte cette seconde demande sans qu'il soit nécessaire de présenter un second formulaire', ICC-01/04-101, para 67.

[505] Décision autorisant Procureur et la Défense à déposer des observations au sujet du statut de victime des Demandeurs VPRS1 à VPRS 6 dans le cadre de l'affaire le *Procureur c. Thomas Lubanga Dyilo*.

[506] Prosecution's Observations concerning the Status of Applicants VPRS 1 to 6 and their Participation in the Case of The *Prosecutor v. Thomas Lubanga Dyilo*, para. 23.

[507] See *Prosecutor v. Dusan Tadic*, see Gray supra note 470, para. 21.

[508] Observations du conseil de permanence au sujet du statut de victime des demandeurs VPRS 1 á VPRS 6 conformément á la decision du 28 mars 2006.

[509] Observations du Répresentant legal des victims VPRS 1 á 6 suite aux observations du Procureur et du Conseil de la defense, au sujet du statut de victime des demandeurs VPRS 1 á VPRS 6 dans le cadre de l'affaire Le *Procureur c. Thomas Lubanga Dyilo*.

[510] Prosecution's Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06, para. 23, 6 June 2006.

[511] Décision sur les demandes de participation á la procedure preésentees par les Demandeurs VPRS 1 á VPRS 6 dans l'affaire Le *Procureur c. Thomas Lubanga Dyilo*, 29 June 2006, at 9.

[512] 'RAPPELLE que tout Demandeur dont la demande a été rejetée peut en déposer une nouvelle à une phase ultérieure de la procédure, en vertu de la règle 89-2 du Règlement', see Jorda and Heptinne, supra note 500, at 10.

victim for three persons[513]. The victims asked to be present at the hearings when the confirmation of charges would take place and the Chamber invited their Legal Representative to present the legal methods which they intend to use.

As we can see, the participation of victims became a reality within ICC. The Victims' Representatives "have requested that they participate in the confirmation hearing, specifically by being entitled to make oral interventions, in particular opening and closing statements, and by being permitted to question the accused. The Victims' Representatives have also stated that they propose submitting documents in response to those filed by the Prosecution and the Defence"[514]. The Chamber decided on this matter on 22 September 2006[515].

Victims' requests to participate in the proceedings were also made by persons who suffered harm in Darfur, Sudan. Raymond M. Brown and Wanda M. Akin-Brown, in conjunction with Darfur Rehabilitation Project, Inc. (DRP), a not-for-profit organization formed by Darfurians in response to the human rights violations in their homeland, submitted the first applications on behalf of victims of the Darfur Crisis to participate in the criminal proceedings before the ICC[516]. On 6 December 2007 with a corrigendum issued on 14 December, the Pre-Trial Chamber I granted the "procedural status of victim" to11 Applicants (a/0011/06, a/0015/06, a/0021/07, a/0023/07, a/0033/07, a/0035/07 and a/0038/07), allowing them to participate in the proceedings at the investigation stage of the Situation of Darfur, Sudan[517].

[513] Décision sur les demandes de participation á la procedure a/0001/06, a/0002/06 et a a/0003/06 dans le cadre de l'affaire le *Procureur c. Thomas Lubanga Dyilo* et de l'anquete en République démocratique du Congo, 28 July 2006, at 16.

[514] Prosecution's Response to 'Observations concernant les modalités de la participation des Victimes, 25 August 2006, at 8.

515 Décision sur les modalités de participation des victimes a/0001/06, a/0002/06 et a/0003/06 à l'audience de confirmation des charges.

[516] See 'Darfur Victims sue Sudanese Government in ICC' in *Sudan Tribune*, 24 October 2006, available at http://www.sudantribune.com/spip.php?article18196.

[517] See http://www.icc-cpi.int/library/cases/ICC-02-05-111-Corr-ENG.pdf.

II.4. 4. Reparation for victims

ICTY recognizes a limited role to the victim's right to reparation. Article 24 (3) foresees that "In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by mains of duress, to their rightful owners." Rule 105 reads the right to the restitution of property and rule 106 establishes the right to compensation. The tribunal can take some measures to ensure the preservation and the protection of the property. A very interesting situation is when the Trial Chamber can not determine the ownership of the property, and then, this power goes to the national authorities. This is not always a good solution for the victims, because sometimes the national systems don't work appropriately and the victims risk not getting back their goods. As for the compensation, it is also left into the care of the national authorities.

The person convicted does not have to be in actual possession of the property which leads to the fact that the convicted person does not have to be the main perpetrator of the unlawful taking of property and also, the Tribunal can order that the property "in the hands of third parties otherwise not connected with the crime"[518] be restituted. The decision to initiate such a restitution procedure rests with the Prosecutor or the Chamber[519].

In the *Milosovic* case the judge ordered the freezing of assets under article 19(2) of the Statute and Rules 47 (H) and 54[520], and the *Naletilic and Martinovic* case might be the first when in the pre-trial phase the prosecution has expressed an intention to raise the issue of restitution[521]. Unfortunately the Rules 105 and 106 seem not to be invoked in front of the national authorities.

ICC is the first international court which can oblige an individual to pay reparation to another individual, as until now this fact was left into the concern of

[518] Rule 105 (C).
[519] See Chifflet, supra note 465, at 101.
[520] See *Prosecutor v. Milosevic*, Decision on Review of Indictment and Application for Consequential Orders, Case no. IT-99-37-I, 24 May 1999, para.27.
[521] See Chifflet, supra note 465.

the states and not individuals. As article 75[522] provides, reparation can be provided including restitution, compensation and rehabilitation[523]. Rules 94-99 contain dispositions concerning the reparation to the victims. The reparation can be paid through the Victims' Fund and can be individual or collective. In this latter case, the reparation can be paid to an inter-governmental, national or international organization.

The Trust Fund was established by the Assembly of States Parties and its aim is to get money for victims. A person found guilty may be in an impossibility of compensating the victims, and that's why the Trust Fund can help. The funds can come from grants from different governments, individuals or organizations[524]. One of the Court basic principles is the one of the complementarity. In order to succeed, ICC needs the help of the states parties. Rule 217[525] refers to the cooperation and measures for enforcement of fines, forfeiture or reparation orders and rule 219 foresees that national authorities do not have the ability to modify the reparations

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[522] '1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law'.

[523] See William A. Schabas, "An Introduction to the International Criminal Court", second edition, Cambridge University Press, 2004 at 171-75.

[524] Situation of Contributions and Pledges to the Trust Fund for Victims as of 29 August 2006: Amount received: EURO 1 630 237.20 Amount pledged: EURO 275 000.00 Source: http://www.icc-cpi.int/vtf.html.

[525] 'the Presidency shall, as appropriate, seek cooperation and measures for enforcement […] as well as transmit copies of relevant orders to any State with which the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection'.

specified by the Court, the scope or extent of any damage, loss or injury determined by the Court or the principles stated in the order. As the right to participate in the trial, the right to reparation is also potential and limited[526]. By establishing such rules, ICC is trying not only to make justice by punishing the criminals, but also by helping victims to get justice for themselves[527].

The situation in DRC is the first one to offer examples of such measures which can help in restitution, compensation or rehabilitation. After the Pre-Trial Chamber I issued a warrant of arrest for Mr. Thomas Lubanga Dyilo on February 2006, the decision of identification, tracing and freezing or seizure of his property and assets[528] was taken. This decision was made by taking also into account the paragraph 15 of United Nations Security Council resolution 1596[529], which states that:

" [...] all States shall, [...] immediately freeze the funds, other financial assets and economic resources which are on their territories from the date of adoption of this resolution, which are owned or controlled, directly or indirectly, by persons designated by the [Sanctions] Committee pursuant to paragraph 13 above, or that are held by entities owned or controlled, directly or indirectly, by any persons acting on their behalf or at their direction [...] ".

For this purpose, the Chamber requested the States Parties to the Statute "to take all necessary measures, in accordance with the procedures provided in their national law, in order to identify, trace, freeze and seize the property and assets of Mr. Thomas Lubanga Dyilo on their territory, including his movable and immovable property, bank accounts or shares, without prejudice to the rights of

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[526] See Jorda and Hemptinne, supra note 500, at 1407.

[527] Still, some aspects require improvement, e.g. issues regarding the provisional measures or enforcement of reparation orders. See Carla Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations,* in 15 Leiden Journal of International Law 667–686 (2002).

[528] Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the property and assets of Mr. Thomas Lubanga Dyilo, 31 March 2006.

[529] UN document S/RES/1596 (2005).

bona fide third parties". The same decision[530] was also taken against the other persons brought in custody to the ICC after an warrant of arrest was issued on their names[531].

II.4. 5. Who is responsible towards the victims?

Reparation is as much about the restoration of dignity and the acknowledgement of the harm suffered, as it is about monetary compensation or restitution[532]. While the right has been clearly acknowledged, its practical application has been fraught with difficulties and uncertainties[533]. There are many issues that may still require clarification.

For example, who is responsible for providing redress – the perpetrator in his or her personal capacity, the state, non-state actors, or some combination of these? What principles should be used in determining the nature and scope of an award for reparation? How would domestic courts deal with cases of mass victimization? How is the measure of damages and compensation to be established in view of significant differences in legal systems and economic standards? Which body would be responsible for the provision of reparation in the form of social or medical services? Would states be required to assume any shortfall if perpetrators are insolvent[534]? How will the reparations provisions play out in practical terms[535]?

If we also analyze the definition of the victim, it suggests that we have to wait until the end of the trial, for the Court to pronounce a decision. If we have to wait, then we still deal with a "victim" or only with a "witness"? If we do accept

[530] See e.g. *Prosecutor v. Germain Katanga,* http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-7-tENG.pdf.
[531] See e.g. *Prosecutor v. Germain Katanga,* http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-1_tEnglish.pdf.
[532] See, generally, Redress, *Torture Survivors' Perceptions of Reparation, A Preliminary Survey* (2001) available at http://www.redress.org/publications/TSPR.pdf.
[533] See Albert Randelzhofer and Christian Tomuschat, (Eds.), "State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights", 1999.
[534] All of these issues were raised by M. Cherif Bassiouni in his *Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms*, UN Doc. E/CN.4/1999/65 (8 February 1999).
[535] Ferstman, supra note527 at.669.

that we deal with a victim, then what about the presumption of innocence for the accused?

Can the state responsibility be taken into account? Generally, the states responsibility refers to the liability of states for conduct in violation of the rules of international law and resulting in injury to other states. Infringement or denial of a right owed to another state creates a duty to redress the violation or to make reparation. So, the right has to be owed to another state, not to an individual. The subjects of law are in this case states and not individuals.

There are three main conceptions in the international public law doctrine regarding the state responsibility. The first is the theory of the "State act", which denies state's responsibility because the state is an entity, a fiction[536]. Another theory sustains that a state can be responsible because it has its own will, different from the will of its members[537]. Vespasian Pella called the state criminality "collective criminality"[538]. The third theory denies the states' responsibility because the criminal responsibility is an attribute of the human beings[539].

The International Law Commission (ILC) draft articles on state responsibility[540] make the difference between the criminal and the civil responsibility. All unlawful violations of international law are considered to be international delicts or torts. According to the ILC Draft "any internationally wrongful act which is not an international crime…constitutes an international delict"[541].

Article 19(2) of the Draft Articles defines an international crime as "an international wrongful act which results from the breach by a state of an international obligation so essential for the protection of the fundamental interests

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[536] See H. Kelsen, *Collective and individual responsibility in international law with particular regard to the punishment of the war criminals,* in Californian Law Review, 1943, at 540.
[537] See J. Dumas, "De la Responsabilité internationale des Etats" or Donnadieu de Vabres, "Traite de droit criminel et de la legislation pénale comparé", 1947.
[538] See Vespasian V. Pella, "La criminalitée colective des Etats et le droit de l'avenir ", Bucarest, 1925.
[539] See Bassiouni M. Cherif, "A Draft International Criminal Code and Draft Statute of an International Criminal Tribunal ", 1987.
[540] Yearbook of the ILC, 1979, II, at 90. See also Marcel Szabó, "A Jovateteli cikkek kodifikácioja az ENSZ Nemzetközi Bizottságában", PPKE JAK, 2007.
[541] Draft Article 19 (4).

of the international community that its breach is recognized as a crime by that community as a whole…".

According to Alain Pellet, while this definition is acceptable, "the legal regime of these crimes as envisaged by ILC is debatable", as a crime can definitely be committed by a state.[542]

It is a little bit unclear though, if the international crimes are perpetrated by individuals or by states. Brownlie claimed that "the state is only liable for delicts…(while)…the individual directly responsible for a crime against peace is liable to trial and punishment"[543]. The actions of a number of states organs, agencies and representatives must be attributed to the state for the purposes of determining international responsibility. So, the state is responsible for the acts of the executive, legislative and judicial branches of the government[544], for any action of the political sub-division of the state[545] or for any action of an organ, state employee or other agent of the government functioning within their official capacity[546].

Therefore the state is responsible only if an individual acts in his official capacity. Generally the crimes under the jurisdiction of the ICC are crimes of leadership. So if a crime is committed by a person in his or her official capacity, then the state should be responsible for the crime, and in this case, should compensate the victims. But if that person does not act in his or her official capacity, then the state can not be liable for the crimes committed by that person. Giving the current situations which ICC is dealing with, in three of four situations (the forth state is Sudan, where the situation is special), no state is responsible because the accused acted in their personal capacity. So only the accused should pay the victims, should offer them compensation. But what happens if the criminal does not have founds to offer to the victims? There is always the possibility of the

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[542] See Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, in European Journal of International Law, Vol. 10, 1999, at 425-34.
[543] I. Brownlie, "International Law and the Use of Force by States", 1963, at 15.
[544] Draft Article 6.
[545] Draft Article 5.
[546] Draft Article 8.

Trust Fund, but what if this is not enough? Should then the state whose national committed the crime compensate the victim?

Concluding, we may say that compared to the ICTY Statute, the Rome Statute and the ICC Rules represent a significant step forward in the recognition of the rights of victims in international criminal proceedings. Although the victim is not formally a party in the trial, he or she enjoys the right of being heard and of being represented in the proceedings[547].

Still, there are some difficult aspects which have to be improved and with this respect, specialists made more suggestions[548]. More questions[549] needs to be answered:

What effects would have an amnesty for the victims? Who is going to compensate the persons who are victims of a "situation" but who are not victims of a "case"? For example, at the beginning, ICC was seized with the situation in Congo. A lot of victims were considered for participation or compensation. After the situation became a case, and Mr. Thomas Lubanga Dyilo was accused, the number of victims to fulfil the criteria requested by the Rome Statute suddenly became lower. Only the persons who suffered harm or loss as a consequence of one or more of the three accusations can submit for participation and compensation. What about the others victims? The ones who suffered harm because of a crime committed by someone else in Congo? What about the persons who suffered harm after a crime committed by Mr. Thomas Lubanga Dyilo, crime which is not under the jurisdiction of the ICC, or even if it would be, there is not enough proof for the Prosecution to charge with? What about these victims? Who is going to offer them reparations?

What will happen with the indirect victims? The ones who remained on a territory marked by the terrible crimes? The victims of hunger and disease?

[547] See Jorda and Hemptinne, supra note 500, at 1408.
[548] Ibid. at 411-417.
[549] These aspects were discussed by Carla Ferstman and the participants of the first Marie Curie Top Summer School, held in 3-14 July 2006 in The Hague.

CHAPTER III

The International Criminal Court – an African Criminal Court?

III. 1. Democratic Republic of the Congo – Situation and Cases

III.1. 1. Introduction

It has been more decades since Africa has been hosting large-scale political violence. Nearly half of Africa's wars, military coups, rebellions or insurrections occurred since 1988, the period that followed the end of the cold war.[550] There has been too little justice at the national level and the trials that eventually took place were an example of delayed justice or of trials against governments' top-leaders.[551] The International Criminal Court comes to eliminate impunity and it already deals with more situations in Africa. One of them is the situation in Democratic Republic of the Congo (DRC) which marked a new era in international law, as the Prosecutor of the ICC opened his first investigation and brought the first cases before the Court. In order to understand the legal steps of the ICC it is absolutely necessary to take a survey of the political background in DRC. Therefore, a short history of the conflict and peace process will be taken into consideration. Then, the implications of the state's referral shall be analyzed, as well as the four cases before the Court and their early jurisprudence. Finally a few conclusions are considered.

[550] See Richard Jackson, *Africa's Wars: Overview, Causes and the Challenges of Conflict Transformation,* table 2.1 at 18 in Oliver Furley, Roy May (Eds.), "Ending Africa's Wars. Progressing to Peace", Ashgate, Hampshire, 2006.

[551] For an Ethiopian example see Firew Kebede Tiba, *The Mengistu Genocide Trial in Ethiopia,* in Journal of International Criminal Justice 5 (2007), 513-528.

III.1. 2. Political background

Congo officially became a Belgian colony in 1908 after the brutal regime of the Belgian King, Leopold II[552] and it was only in 1960 that it gained political independence.[553] Mobutu had a violent and dictatorial way of ruling the country, not so different from the most African leaders at the time.[554] During the Cold War, Zaire, as the country was renamed by Mobutu, had a strong support from West and it became a "staging post for US anti-communist wars in Africa".[555]

The first acts of violence took place in Ituri (south of DRC) in 1992 within the context of Hema-Lindu conflict[556] and in Kivu (north of DRC) in 1993. The conflict, known as "Masisi war", the result of conflicting political and ethnical interests[557], was transformed in 1996 in the "First Banyamulenge Rebellion" because of the Tutsi revolt which began both at the Congo borders with Uganda and Rwanda.[558] The eastern part of the DRC, reach in diamonds, gold, coltan and timber, with a fertile land became an attraction for the Rwandan refugees who fled the new Tutsi regime or for the rebel groups fighting the regime in Rwanda, Burundi and Uganda.[559] The wave of refugees, as well as the politicization of the peace campaigns in 1993-1994 contributed to the failure of reaching peace. President Mobutu was seen as a menace for Rwanda and Uganda, since he was an enemy of Musevini and he could benefit of two armies: his own army and the

[552] See Adam Hochschild, *King Leopold's Ghost. A Story of Greed, Terror, and Heroism in Colonial Africa.* First Martiner Books, 1999.
[553] For a comparison of the political parties in a couple of African countries, see Sabine C. Carey, *A Comparative Analysis of Political Parties in Kenya, Zambia and the Democratic Republic of Congo,* in Democratization, Vol.9, No.3, Autumn 2002, at 53-71.
[554] See Larry Devlin, *Chief of station, Congo. A memoir of 1960-67,* Public Affairs, New York, 2007 at 263.
[555] Patricia Daley, *Challenges to Peace: conflict resolution in the Great Lakes region of Africa,* in Third World Quarterly, vol. 27, No.2, 2006, at 306-7.
[556] Hema and Lindu are two ethnic groups in Congo. While Hema is a pastoralist group, Lindu is dedicated to agriculture.
[557] See Stanislas Bucyalimwe Mararo, *Kivu and Ituri in the Congo War: The Roots and Nature of a Linkage,* at 204, in Stefaan Marysse, and Filip Reyntjens (Eds.), "The Political Economy of the Great Lakes Region in Africa", Palgrave, Hampshire, 2005.
[558] Ibid at 190.
[559] See Stefaan Marysse, *Regress, War and Fragile Recovery: The Case of the DR Congo,* in Stefaan Marysse, and Filip Reyntjens (Eds.), "The Political Economy of the Great Lakes Region in Africa", Palgrave, Hampshire, 2005 at 134.

former Rwandan Armed Forces which fled Rwanda because of the Genocide.[560] It was a perfect time for Laurent Kabila[561], an ally of both Rwanda's Kagame and Uganda's Musevini[562], to seek military help from Rwanda and Uganda and to launch a military campaign against Mobutu. After Mobutu was removed from power, Kabila auto proclaimed himself President of the country. When he tried to obtain full military autonomy from Rwanda, which controlled part of Kivu, a second war, or a "Second Banyamulenge"[563] started in 1998, in which Uganda, Rwanda and Burundi, among other African states were deeply involved. Leaving behind a number of more than three millions of victims and more than two and a half millions of refugees,[564] a cease-fire agreement was signed in July 1999. The Lusaka Cease-fire Agreement provided for the cessation of hostilities and recognized the armed political groups supported by Rwanda and Uganda in Eastern DRC. The Agreement called for the withdrawal of military forces and for political settlement of Congolese actors, which was supposed to happen in 90 days within the Inter-Congolese Dialogue (ICD). Unfortunately, the Lusaka Agreement proved to be only a false start since it took ICD more than three years to reach a new agreement.[565]

The conflict in DRC attracted the interest of the international community and both international organizations and states tried to help in reaching peace[566]. UN Security Council adopted more Resolutions expressing its concern for the situation in DRC, demanding for an immediate halt to the hostilities and calling for a cease-

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[560] See also Filip Reyntjens, *Rwanda, Ten Years on: From Genocide to Dictatorship,* at 15-47 in Stefaan Marysse, and Filip Reyntjens (Eds.), "The Political Economy of the Great Lakes Region in Africa", Palgrave, Hampshire, 2005.

[561] Laurent Kabila born 1939, was a convinced anti Mobutu regime. He launched sporadic attacks against Mobutu and his regime. In 1996 he was recruited to lead a revolt in South Kivu. See Henry C. Hoeben, *Human Rights in the DR Congo: 1997 until the present day. The Predicament of the Churches.* Missio, 2001 at 8.

[562] For a short biographical note of each see ibid at 6-7.

[563] See Mararo, supra note 557 at 205-6.

[564] See Amnesty International Report, *Democratic Republic of the Congo. "Our brothers who help kill us" – economic exploitation and human rights abuses in the east,* April 2003, at 1.

[565] See Emeric Rogier, *Democratic Republic of Congo: Problems of the Peacekeeping Process,* in Oliver Furley, Roy May (Eds.), "Ending Africa's Wars. Progressing to Peace", Ashgate, Hampshire, 2006. at 99-100.

[566] For a critical approach of the UK involvement in the Great Lakes Region crisis, see Zoe Marriage, *Defining Morality: DFID and the Great Lakes,* in Third World Quarterly, Vol.27, No.3, at 477-90, 2006.

fire.[567] Following the Lusaka Agreement, a neutral cease-fire monitoring body, MONUC, and a Joint Military Commission (JMC) were set up. MONUC had an initial strength of 5,537 military personnel, including up to 500 observers and had as a mandate among other obligations, to monitor the implementation of the Agreement, to investigate violations of the ceasefire, to establish and maintain continuous liaison with all parties military forces, and to facilitate humanitarian assistance and human rights monitoring.[568] MONUC's mandate was extended a couple of times[569] and the number of its personnel was increased[570], but still, it was constantly criticized by international NGOs and Congolese civil society for being "understaffed, passive and unable to protect civilians on many occasions".[571]

The Inter-Congolese Dialogue had as primary goal to create a new Congolese army, to organize general elections and to provide an interim constitution which would offer equal rights to everyone. Kabila did not agree with the proposed interim administration which was to govern the country based on the principle of consensus and opposed to the dialogue.[572] After his assassination in 2001, his son Joseph Kabila was appointed as President and he was more cooperative to dialogue. A meeting was arranged in Sun City in February-April 2002 where economical and political issues were to be discussed. The dialogue failed both economically and politically. They did not find a solution to the allegations of illegitimate exploitation of the DRC's natural resources.[573] Later that year, the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC, created by the UN, presented its final report.[574]

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[567] See UNSC Res. 1234/1999, 1258/1999, 1265/1999, 1273/1999, 1279/1999.
[568] See UNSC Res. 1291/2000.
[569] See UNSC Res. 1355/2001, 1417/2002. See also *Second special report of the Secretary –General on the United Nations Organization Mission in the Democratic Republic of the Congo,* S/2003/566, 27 May 2003.
[570] See UNSC Res. 1445/2002, 1468/2003.
[571] Amnesty International, supra note 564 at 4. See also Christine Gray, *Peacekeeping and enforcement action in Africa: the role of Europe and the obligations of multilateralism,* in Review of International Studies, 2005, 31 at 210.
[572] Rogier, supra note 565 at 101-02.
[573] See also Aaron Ezekiel, *The application of International Criminal Law to resource exploitation: Ituri, DRC,* in Natural Resources Journal, Vol. 47, issue 1, 2007 at 225-45.
[574] S/2002/1146, 16 October 2002. For a critical opinion on UN Panel using the notion "illegality" see Stefaan Marysse, supra note 559 at 136-48. For a general analyze of the linkage between diamonds and war in Africa see Ola Olsson, *Diamonds Are a Rebel's Best Friend,* in the World

They expressed their concerns about the criminal groups linked to the armies of Rwanda, Uganda and Zimbabwe, as well as to the DRC Government, which took advantage of the war to build-up a self-financing war economy centered on mineral exploitation.[575] The situation was not much better three years later, when the Lutundula Commission[576] submitted its report on investigations into mining and other business contracts in DRC.

The Sun City accord failed politically, also because it did not bring a solution to some of the key issues of the conflict. The government wanted to stay in command of the army and they offered only low-ranked positions to the rebels, which could not be accepted by the latter. Finally, only a bilateral agreement was signed between the government and the Movement for the Liberation of Congo (MLC) which provided that Kabila remained the President of DRC and Jean Pierre Bemba, an armed opposition leader, would get the seat of Prime Minister. The agreement was not signed by many opposition parties or the rebel group Congolese Rally for Democracy (RCD), who eventually formed a coalition to oppose the agreement.[577]

Uganda and Rwanda seemed to agree with the withdrawals of their troops from DRC, as the Lusaka ceasefire provided. Bilateral agreements were concluded with both Rwanda and Uganda in July and August 2002. By October 90 per cent of Ugandan troops left DRC and both Burundi and Rwanda announced UN that they completely withdraw their military forces.[578] The withdrawals of the foreign troops came after an agitated number of events when DRC instituted proceedings before the International Court of Justice (ICJ) against Burundi, Uganda and Rwanda for "acts of armed aggression committed . . . in flagrant breach of the United Nations Charter and of the Charter of the Organization of African Unity (OAU)".[579]

Economy (2006). The table at 1136 shows that DRC had in 2002 the second production of diamonds in Africa after Botswana.

[575] S/2002/1146 at 5 par. 12.

[576] A special National Assembly commission lead by Cristophe Lutundula.

[577] Amnesty International, supra note 564 at 4.

[578] Rogier, supra note 565 at 107. See also *Second special report of the Secretary –General on the United Nations Organization Mission in the Democratic Republic of the Congo,* S/2003/566, 27 May 2003.

[579] See application dating June 23, 1999, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda, Democratic Republic of the Congo v. Uganda,*

Surprisingly, as if committing an act of aggression[580] was a reversible process, in 2001 DRC requested ICJ to remove from its list the case against Burundi and Rwanda.[581] One year later, DRC changed its mind again, and in May 2002 introduced a new application against Rwanda[582] which was to be ended in February 2006 when ICJ found it had no jurisdiction to entertain the application filed by DRC.[583]

After Rwanda and Uganda withdraw their troops, a new agreement was achieved in December 2002 and completed in April 2003 in Pretoria. The "Global and All-Inclusive Agreement" provided for the establishment of a government which was supposed to rule in the period of transition until new elections were held[584]. The solution they agreed on, Kabila as President and four Vice-Presidents, did not prove to be a proper solution for the conflict in Congo.[585] New elections were held in 2006 and Joseph Kabila was elected as President. Unfortunately it seems that "despite widespread optimism following the 2006 elections, violence against civilians, political repression, and impunity has continued during Joseph Kabila's first year as the newly elected president of the Democratic Republic of Congo."[586] Amnesty International also reported serious violations of human rights that took place during the elections and the period following.[587]

Concerning the relations between DRC and Uganda, these continued to be tensioned. Unlike the cases against Burundi and Rwanda brought by DRC at ICJ,

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Democratic Republic of the Congo v. Burundi). See also International Court of Justice, Press Release 1999/34, June 23, 1999, http://www.icj-cij.org/docket/index.php?pr=523&code=cr&p1=3&p2=3&p3=6&case=117&k=85.

[580] See also the chapter dedicated to the crime of aggression in this dissertation.

[581] See International Court of Justice, Press Release 2001/2, February 1st, 2001, available at http://www.icj-cij.org/docket/index.php?pr=526&code=cr&p1=3&p2=3&p3=6&case=117&k=85.

[582] http://www.icj-cij.org/docket/files/126/7070.pdf.

[583] Case concerning armed activities on the territory of the Congo, new application 2002, *Democratic Republic of the Congo v. Rwanda,* Jurisdiction of the Court and Admissibility of the Application, Judgement of February 3rd, 2006. available at http://www.icj-cij.org/docket/files/126/10435.pdf.

[584] See also S/2003/653, *Report of the Security Council mission to Central Africa,* 7-16 June 2003, Recommendations.

[585] See Mararo, supra note 557 at 215.

[586] Human Rights Watch, *World Report,* 2008, Events of 2007, at 104.

[587] See Amnesty International Report, *Democratic Republic of Congo. Torture and killings by state security agents still endemic,* October 2007. See also *Raped for Supporting the Opposition,* November 2007.

which were withdrawn, as mentioned above, the case against Uganda continued to be pending until 2005, when ICJ issued its judgment.[588] The Court found that "the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention".

Founding Uganda guilty of violating "the principle of non-use of force in international relations and the principle of non-intervention" it is not exactly the same with the allegations that DRC sustained, namely that Uganda violated "the principle of non-use of force in international relations, including the prohibition of aggression"[589] and also committed "an act of aggression within the meaning of Article 1 of resolution 3314 of the General Assembly of the United Nations of 14 December 1974".[590] Practically, ICJ did not find what DRC asked for, namely, that an act of aggression had been committed, but rather preferred to replace such allegations with expressions like "the principle of non-use of force" or "the principle of non-intervention".[591]

The judges separate opinions worth to be shortly taken into consideration. They vary from partly accepting the judgment to not accepting it at all or accepting it but strongly advising more action by ICJ. Thus, Judge Elaraby concluded in his separate opinion that "the Court should have found that the unlawful use of force by Uganda" amounted "to aggression", as this was the central argument of DRC in the proceedings.[592] Judge Simma also aligned himself with this opinion as he considered that "if there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC".[593]

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[588] *Democratic Republic of the Congo v. Uganda,* ICJ Judgement of 19 December 2005, Case concerning armed activities on the territory of the Congo, http://www.icj-cij.org/docket/files/116/10455.pdf.
[589] Ibid point 24.
[590] Ibid point 23 (a).
[591] For other such examples, see the chapter dedicated to the crime of aggression in this dissertation.
[592] Summary of the judgment of 19 December 2005 separate opinion of Judge Elaraby.
[593] Ibid separate opinion of Judge Simma

Judge Parra-Aranguren agreed that Uganda violated the principle of non-use of force in international relations by engaging in military activities against the Democratic Republic of the Congo "between 7 and 8 August 1998 and 10 July 1999" but he did not agree with the finding that "the violation continued from 10 July 1999 until 2 June 2003, when Ugandan troops withdrew from the DRC territory, as in his opinion the DRC consented during this period to their presence in its territory under the terms and conditions prescribed in the Lusaka Ceasefire Agreement of 10 July 1999" as well as in the other agreements that followed.[594]

Judge Kooijmans considered that Uganda's armed action represented "an unlawful act" which should be considered only in the light of the *ius in bello*. He disagreed with ICJ including occupation in the concept of the unlawful use of force, as he considered that this would contribute "to the reluctance of States to apply the law of belligerent occupation when that is called for".[595] Judge Katega was the only one that voted against the Court's finding that Uganda violated the principle of prohibiting the use of force in international relations and the principle of non-intervention as he considered DRC consented all the time to the presence of the Ugandan troops and that Uganda acted in self-defence.[596]

The Court also found that Uganda violated "its obligations under international human rights law and international humanitarian law" when "committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict". Concerning the illegal exploitation, ICJ found that "Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting,

[594] Ibid separate opinion of Judge Parra-Aranguren.
[595] Ibid, separate opinion of Judge Kooijmans.
[596] Ibid separate opinion of Judge Katega.

plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law".[597] Further, the Court also found that DRC itself was guilty of violating the obligations owed to Uganda under the Vienna Convention on Diplomatic Relations of 1961.

This was the political, economical and judicial context when ICC was called to punish the perpetrators of the most heinous crimes of international concern in DRC. As one may imagine, it is not easy for ICC to deal with a post-conflict situation. The situation is much more difficult as it is the first situation where the Prosecutor started to investigate.

III.1. 3.The situation in the DRC. Accountability at national level

In 2003 the Prosecutor of the ICC was ready to use his *proprio motu* power to start an investigation in DRC after receiving more communications from individuals and non-governmental organizations concerning the heinous crimes committed there.[598] Instead of a first *proprio motu* referral, it was preferred a state-referral as it existed already a precedent from Uganda[599] and the cooperation from DRC was to facilitate the work of the Office of the Prosecutor. In April 2004 DRC, state party to the Rome Statute since April 2002, responded to the international voices and referred its situation to the ICC to determine if one or more persons should be charged with crimes under its jurisdiction. The referral of the situation in Congo has a historical importance for international law as it represents one of the first applications of the principle of complementarity[600], an absolute novelty for international law. It offered the Prosecutor the possibility to start the first investigation[601] and to proceed with the first case before the International Criminal Court.[602]

[597] ICJ Press Release 2005/26, *Democratic Republic of the Congo v. Uganda,* 19 December 2005, http://www.icj-cij.org/docket/index.php?pr=995&code=co&p1=3&p2=3&p3=6&case=116&k=51.
[598] ICC Press Release ICC-OTP-20040419-50-En, 19 April 2004.
[599] See Uganda State's referral, ICC Press Release ICC-20040129-44-En, 29 January 2004.
[600] The first application was made by Uganda. See the chapter dedicated to Uganda in this dissertation.
[601] ICC Press Release ICC-OTP-20040623-59-En, 23 June 2004.
[602] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.

Both Uganda's and DRC's referrals represented a kind of surprise for international lawyers, as it was assumed that most of the referrals would come from third states[603], which would lodge a complaint against another state.[604] Soon, self-referrals were to become the most common trigger mechanism at ICC.[605] One may say that states' recognizing their own unwillingness or inability to deal with the most serious international crimes represents the most unexpected achievement of the ICC. If in the future states would recognize they committed acts of aggression, one of the main problems concerning the crime of aggression would be solved and fervent discussions concerning the organ which should have the role to decide if an act of aggression occurred would be ended. That would be far beyond the drafters of the Rome Statute hoped.

By referring its situation to the ICC, the Democratic Republic of the Congo admitted it is unable to deal with the most heinous crimes. The letter addressed to the ICC by the President of the DRC read that the competent authorities are unfortunately, not able to open investigations concerning the international crimes or to take the necessary measures without the help of the International Criminal Court.[606]

It seems that the judiciary reform that DRC started right after signing the Rome Statute has not succeeded yet. As the states which signed the Rome Statute are obliged to modify their national law where required so that the Rome Statute could be implemented[607], DRC also initiated a legislative process. An Amnesty Law passed providing amnesty for crimes and political offences committed between August 1996 and July 2003. War crimes and crimes against humanity were

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[603] See William W. Burke-White, *Complementarity in Practice*: *The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo,* in Leiden Journal of International Law 18 (2005) at 563-4.

[604] See William A. Schabas, *First Prosecutions at the International Criminal Court,* in Human Rights Law Journal, Vol. 27, No. 1-4, 2006 at 27.

[605] The Central African Republic became the third state which referred its own situation.

[606] '... les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d'engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale'. Letter from Mr. Joseph Kabila, 3 March 2004, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-32-AnxA1_French.pdf.

[607] Article 88 of the Rome Statute provides that "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation".

excluded.[608] These were to be punished under the legislation proposed in 2002[609] and modified a couple of times[610], but this draft is still waiting for parliamentary approval.[611]

Amnesty International's comments on the proposed legislation indicate that there are dispositions consistent with the Rome Statute, but the draft still needs to be improved.[612] Thus, the organization welcomed the *habeas corpus* rights offered by article 1 of the draft legislation, as well as the elimination of the official immunities for the perpetrators of the crimes within the jurisdiction of the Court, but at the same time it expressed its concern that the legislation permits the defence of superior orders coming from a military or a civilian supervisor. In the spirit of the Rome Statute, the draft offers no pardon or amnesty for the international crimes, but it also provides for death penalty in case of genocide and crimes against humanity. While the legislation made a lot of progress concerning the definition of the crimes, mainly concerning genocide and war crimes, still there are some acts incriminated by the Rome Statute, the Geneva Conventions and their Additional Protocols, that remained out from the draft provisions.[613]

Some improvements seem to be present in the national legal system, but overall the judicial process continues "to be characterized by political interference and corruption"[614] as "there is an increasing tendency to interfere by political and military authorities into the administration of military justice".[615] In 2006 some hope for justice arose when domestic military courts delivered more important judgments: "in Ituri, an officer was convicted of war crimes; in Bukavu, a former

[608] See Human Rights Watch, *Democratic Republic of Congo.* Elections in sight: "Don't Rock the Boat"?, 15 December 2005 at 14. The Report is available at http://www.monuc.org/downloads/hrw15dec.pdf.
[609] Draft Legislation – Implementation of the Statutes of the International Criminal Court, available at http://www.iccnow.org/documents/DRCDraftLegEng.pdf.
[610] See e.g. Projet de loi portant mise en oevre du statut de la Cour Penale Internationale available at http://www.iccnow.org/documents/DRCDraftLegFren2.pdf.
[611] Coalition for the International Criminal Court, Regional and Country Info, Democratic Republic of the Congo, 15 February 2008.
[612] Amnesty International Comments on the September 2005 draft legislation to implement the obligations of the Democratic Republic of Congo (DRC) under the Rome Statute of the International Criminal Court, Ref: TG/AFR 62/06.09, AI Index: AFR 62/004/2006, London 14 February 2006.
[613] Ibid.
[614] Human Rights Watch Report, supra note 586 at 109.
[615] MONUC, The Human Rights Situation in the DRC from January to June 2006, available at http://www.monuc.org/downloads/HRD_6_month_2006_report.pdf.

army officer was convicted for recruiting children in the armed forces; and in Equateur, 48 soldiers were found guilty of rape, murder and looting, as crimes against humanity, in two separate trials".[616] A very important aspect that MONUC pointed out is the direct application of the ICC Rome Statute by the military courts in these judgments. The judges applied the definitions of the crimes within the Statute and excluded the death penalty. The ICC Rules of Procedure and Evidence were also applied, granting more protection to victims and defendants. It seems like in these judgments the Congolese courts started realizing that continuing to apply the dispositions of the Congolese law which are inconsistent with the Rome Statute, might lead to their qualification as 'unwilling' or 'unable' to prosecute.

In August 2006 militia leader Yves Panga Mandro Kahwa was sentenced to 20 years' imprisonment for crimes against humanity but not much later "he was acquitted after an appeals process marred by irregularities".[617] Another hope to justice was given when the former presidential candidate Marie Thérèse Nlandu and nine others were tried for organizing an insurgency. Soon they were all acquitted. [618] Many other perpetrators of war crimes and crimes against humanity remain at large enjoying impunity. As MONUC reported, warrants of arrest for soldiers accountable for killing 30 civilians in Kilwa, Katanga Province, in October 2004 "were not carried out, blocked by a lack of cooperation between the military hierarchy and the military prosecutor. Two important former warlords from Ituri, suspected of multiple international crimes, are reported to remain at liberty in the capital, Kinshasa. Eight other Ituri militiamen, charged with war crimes and crimes against humanity, have been in custody without trial for over a year. The trial of a military officer in North Kivu for the murder of seven individuals, including four children, has been suspended since July 2005 following an undue intervention by the military hierarchy, and in South Kivu, the Commander of the 10th Military Region (MR) refused to execute the arrest of four officers accused of human rights violations including rape, torture and arbitrary arrest, under the pretext that he needed those officers for military operations".

[616] Ibid.
[617] Amnesty International's Comments on DRC's draft legislation, supra note 612.
[618] Ibid.

Failure of the domestic courts to hold accountable the perpetrators of grave violations of international humanitarian law, ICC seems to be the only chance for impunity to be ended.

The referral of the DRC has important consequences both at national and international levels. At international level, it is a proof that ICC exists not only on paper, but also in reality and that the more than one hundred states did not ratify the Statute from political reasons but to end impunity. At the same time it is a call for the states which did not accede to the Rome Statute yet, to do so and it is also a courageous act from a state to recognize it needs help to fight impunity.[619]

At national level it might represent a motivation for judiciary so that in the future to carry out and conduct proceedings in a manner consistent with intent to bring the persons who committed the crimes of international concern to justice. The referral may also have a deterrent effect not only in Congo but also anywhere these kinds of crimes are committed, as the perpetrators did not consider the fact they could be handed over the ICC by their own government.

III.1. 4. Cases before the ICC

After DRC referred its situation[620] based on article 14 of the Rome Statute[621] the Prosecutor considered an estimated 5,000 to 8,000 unlawful killings committed in Ituri since 1 July 2002,[622] as "a reasonable basis to commence an

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[619] There are more opinions concerning the reasons the President of DRC referred the situation to the ICC. For example, William W. Burke-White, in his article *Complementarity in Practice*: *The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo,* see supra note 603, argues that Kabila used criminal justice as a political weapon to discredit his enemies and to win the elections in 2006. Two of Kabila's political rivels, Bemba and Ruberwa, "are among those most likely to be the subject of any early investigation" of the ICC as more reports to the Prosecutor implicated them in "war crimes and crimes against humanity in the Ituri region".

[620] See Anita Usacka, *The Complementarity Regime of the International Criminal Court,* in International Law 1 (29) / 2007 at 60-61. Prof. Anita Usacka is one of the three judges in the Pre-Trial Chamber I which deals with the situation in DRC.

[621] Article 14 (1) reads as follows: "A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes".

[622] See Schabas, supra note 604 at 32.

investigation".[623] The situation of DRC has been assigned to Pre-Trial Chamber I and four warrants of arrest have been issued by the beginning of May 2008.

III.1. 4. a) *Prosecutor v. Thomas Lubanga Dyilo*

The first warrant of arrest was against Thomas Lubanga Dyilo[624], the founder of political and military movements as the Union of Congolese Patriots (UPC) and the Forces patriotiques pour la libération du Congo (FPLC). As a result of the cooperation from DRC[625], Mr. Lubanga, who was already detained in DRC as a suspect of genocide and crimes against humanity,[626] was transferred to The Hague, the day the warrant of arrest was unsealed, 17 March 2006. Three days later, he first appeared before ICC, where he was informed of the charges against him[627] and Mr. Jean Flamme from Belgium was appointed temporarily as duty counsel.[628] A three-week Confirmation of Charges hearing in the Lubanga case was held in November 2006. On 29 January 2007, ICC Pre-Trial Chamber I confirmed the charges against Mr. Thomas Lubanga Dyilo. The trial was supposed to start at the end of March 2008, but at the request of the defence it was postponed at least until June and then put on stay.[629]

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[623] According to article 18 of the Rome Statute.
[624] Following Lubanga's arrest, remarks were made by Kofi Annan, UN Secretary General or by the Presidency of the European Union. See http://www.un.org/apps/sg/offthecuff.asp?nid=854 or http://www.eu2006.at/en/News/CFSP_Statements/March/2803Lubanga.html.
[625] See Accord de Cooperation Judiciare Entre la Republique Democratique du Congo et le Bureau du Procureur de la Cour Pénale Internationale, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-32-AnxA8_French.pdf.
[626] See E.N. Trikoz, *First Criminal Investigations in Practice of the International Criminal Court,* in International Law 1 (29) / 2007 at 230. See also Prosecution's Submission of Further information and Materials, 25 January 2006. The Prosecution mentions that the arrest of Lubanga in Congo was the result of "international pressure arising from the reaction to the killing of UN (MONUC) peacekeepers on 25 February 2005". See the document at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-32-AnxB_English.pdf.
[627] The war crimes of enlisting, conscription, and using children under the age of fifteen, to participate actively in hostilities. See ICC Newsletter, November 2006, No.10, Background to the case *Prosecutor v. Thomas Lubanga Dyilo,* available at http://www.icc-cpi.int/library/about/newsletter/10/en_03.html.
[628] Ibid, Chronology of the Thomas Lubanga Dyilo Case, available at http://www.icc-cpi.int/library/about/newsletter/10/en_01.html.
[629] The Rome Statute provides that the trial should start only after three months after Prosecution disclosed all evidence. Apparently, the defence has not been yet provided with all the evidence against Lubanga. See Reuters, *First trial at permanent war crimes court delayed,* 14 February 2008

The case against Lubanga confronts with a lot of difficulties as it is the first case before the ICC. First of all, everyone is watching ICC: the states parties, the non states parties, the Security Council, the European Union, the human rights organizations, the victims. There must be no mistake, so that ICC maintain or gain more confidence. Secondly, there is a strong curiosity to see if the Rome Statute or the Rules of Evidence and Procedure really work in practice.[630] Thirdly the case represents a challenge for judges, lawyers, prosecutors or other specialists in law, as well as for young scholars. There is a high risk of critics in case something goes wrong and this might lead to pressure. Another difficulty is of administrative matter. Lack of personnel and funds may be a serious obstacle in ensuring an operative trial for Mr. Lubanga.[631]

The Rome Statute provides for high standard guarantees concerning fair trial rights. From this point of view there is no question that it is much better for Lubanga for his trial to take place in The Hague. International organizations criticized DRC for failing "to observe international standards of due process", as Lubanga and others have been arrested and held "for weeks before bringing any charges against them, in clear violation of Congolese legal procedures"[632] and no effort to bring them to trial has been made after being in detention for ten months. The further problematical aspects arose from the provisions of the Congolese law concerning the confirmation of the detention after twelve months. As no investigations seemed to be made in Lubanga's situation, the ICC Prosecutor,

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or Jurist, Katerina Ossenova, *ICC judge says war crimes trial of Congo Militia leader may be delayed,* 13 February 2008, available at http://africa.reuters.com/top/news/usnBAN456818.html and http://jurist.law.pitt.edu/paperchase/2008/02/icc-judge-says-war-crimes-trial-of.php. See also ICC Press release, *Trial Chamber imposes a stay on the proceedings of the case against Thomas Lubanga Dyilo,* ICC-CPI-20080616-PR324-ENG, 16 June 2008, available at http://www.icc-cpi.int/press/pressreleases/381.html.

[630] See also Institute for War and Peace, Janet Anderson, *ICC Enters Uncharted Territory,* 24 March 2006, available at http://www.iwpr.net/?p=tri&s=f&o=260514&apc_state=henh.

[631] During my participation of the First Marie Curie Summer School in July 2008, in The Hague, I had the opportunity to attend a hearing in Lubanga's case. After four months from Lubanga's arrest, Mr. Jean Flamme, Lubanga's lawyer, was asking for more personnel, and most important for paid personnel. He stressed the need fore paid interns, as it was difficult to find someone who spoke English and French to come to work in The Hague, without his/her expanses to be covered. He also asked for a new hearing as it was only a couple of days that internet was introduced at Scheveningen and both Lubanga and the legal team needed a training to learn how to deal with the materials in electronic format.

[632] See Human Rights Watch, supra note 608 at 15.

concerned that Lubanga might be released, asked for a warrant of arrest on his name from the Pre-Trial Chamber I[633]. The warrant of arrest was issued as the Pre-Trial Chamber found there were "reasonable grounds to believe that from July 2002 to December 2003 members of the FPLC carried out repeated acts of enlistment […], conscription […] and repeatedly used children under the age of fifteen to participate actively in the hostilities"[634].

It is hard to understand why the Prosecution focused only on these allegations as more other unlawful acts had been committed. For example in 2002-2003 more than 800 civilians from Lendu tribe have been killed by FPLC and more villages have been the target of the operation called 'Chikana Namukono' based on murder, torture and sexual violence.[635] Since December 2004 thousands of people have been displaced from the city of Mongbvalu or the ones who remained have been living in terror.[636] The fact that Lubanga was charged only with the three war crimes mentioned above is even more worrying as ICC Prosecutor is aware of the fact that since 1 July 2002 around 8,000 people have been killed and 600,000 have been displaced in Congo's eastern Ituri province.[637] Further, it has been said that Lubanga was arrested back home for genocide and the question that arises is how come he is not charged with this awful crime before ICC?

Apparently, the prosecution aims to start a trial against Lubanga on charges that may be more easily proved and only after this trial ends, could they charge Lubanga with additional crimes: "there are more crimes, of course, and that is why we, after the first trial, will consider if it's needed to present new charges ... against him".[638] There is a risk with this strategy, though. After a trial against Lubanga on

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[633] See Prosecution's Submission of Further information and Materials, 25 January 2006 paras. 12-14 and 20, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-32-AnxB_English.pdf.
[634] Warrant of arrest, Situation in the Democratic Republic of the Congo in the Case of the *Prosecutor v. Thomas Lubanga Dyilo,* 10 February 2006, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf.
[635] See Joint NGO Letter sent to ICC Prosecutor, 31 July 2006 available at http://www.iccnow.org/documents/DRC_joint_letter_eng.PDF.
[636] See Trikoz, supra note 626 at 229.
[637] See Associated Press, *International prosecutor says Congolese warlord may face additional war crimes charges,* 7 August 2006, available at http://www.firstglobalselect.com/scripts/cgiip.wsc/globalone/htm/news_article.r?vcnews-id=350883.
[638] Ibid.

charges of war crimes concerning enlisting, conscripting and using children under fifteen in hostilities, which may end in sentencing Lubanga for life, the Prosecution might stop charging him, as no more severe punishment would wait for Lubanga. The lawyers, the judges and the prosecutors could turn their attention on other situations, other cases, other perpetrators. The problem would be that the whole process could not be called 'justice' and more necessarily 'justice for victims', but rather 'catching' Lubanga.

III.1. 4. b) Confirmation of charges

On 27 January 2007 the Pre-Trial Chamber I confirmed the three charges against Thomas Lubanga Dyilo. The Chamber decided that "there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is criminally responsible as co-perpetrator for the war crimes of enlisting and conscripting of children under the age of fifteen years into the FPLC, the military wing of the Union des Patriotes Congolais (UPC) and using them to participate actively in hostilities in Ituri (Democratic Republic of the Congo) from September 2002 to 13 August 2003".[639]

The Decision on Confirmation of Charges (hereinafter the Decision) deserves a special attention since it is the first in the history of ICC and it contains some important positions which will create precedents for the future cases at ICC and for international law, in general. The Decision is an important legal document which brings together interpretations from international legal instruments as the Hague and the Geneva Conventions or the Vienna Convention on the Law of Treaties, as well as from the jurisprudence of European Court of Human Rights, ICTY, ICTR, Special Court for Sierra Leone, International Court of Justice or Inter American Court of Human Rights. The Decision[640] has 410 paragraphs and it comprises six parts. The first part is an introduction where the factual background

[639] ICC Press Release ICC-CPI-20070129-196-EN, 29 January 2007.
[640] Decision on confirmation of charges, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803_French.pdf and http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN_English.pdf.

is presented, as well as the major procedural steps that were taken in the *Prosecutor v. Thomas Lubanga Dyilo* case. The second part concerns some preliminary evidentiary matters, while the third analyzes procedural matters. The forth part of the decision is focusing on the elements of the three crimes Lubanga was charged with, and the last two parts are dealing with the principle of legality, mistake of law and the criminal responsibility.

The first important aspect analyzed by the Pre-Trial Chamber I (hereinafter the Chamber), was the standard of confirmation of charges pursuant to article 61 (7) of the Rome Statute: "the Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". The keywords were 'substantial grounds'[641] as the Chamber considered that the purpose of the confirmation hearing was limited to committing for trial "only those person against whom sufficient compelling charges going beyond mere theory or suspicion have been brought".[642] If the Prosecution presents solid and material sufficient evidence, "demonstrating a clear line of reasoning underpinning its specific allegations"[643], the Chamber establishes the presence of 'substantial grounds' to commit the accused to trial.[644] To define the 'substantial grounds', the Chamber relied on international recognized human rights jurisprudence, giving as examples the judgment in *Soering v. United Kingdom*[645] and a joint partially dissention opinion appended to the judgment in *Mamatkulov and Askarov v. Turkey.*[646]

Afterwards the Chamber moved to some matters relating to the admissibility of evidence and its probative value taking into consideration the testimonies of the witnesses and victims and responding to the challenges raised by the parties relating to the evidence. For example, the defence made a request based

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[641] See also Olivier Beauvallet, *Enrôlement, conscription et engagement de mineurs de 15 ans dans un conflit armé: premier renvoi devant la formation de jugement de la CPI,* in Droit pénal no.3, Mars 2007, alerte 7.
[642] The Decision par. 37.
[643] Ibid par. 39.
[644] See also Trikoz, supra note 626 at 242.
[645] ECHR, *Soering v. United Kingdom,* application no.14038/88, Judgment of 7 July 1989.
[646] ECHR, Case of *Mamatkulov and Askarov v. Turkey, applications nos.* 46827/99 and 46951/99, Judgment of 4 February 2005.

on article 69 (7) of the Rome Statute[647], arguing that some evidence obtained in Congo is based on unlawfulness of the search and seizure, and therefore, in violation of international recognized human rights. Even if the Court is not bound by the decisions of national courts on evidentiary matters[648], the Chamber searched for jurisprudence of the ECHR, especially to some decisions concerning the right to privacy and the principle of proportionality. The Chamber found that even if the Congolese authorities breached procedural rules concerning the right to privacy, this "can not be considered so serious as to amount to a violation of internationally recognized human rights".[649] Concerning the principle of proportionality, the Chamber found that "the search and seizure of hundreds of documents and items pertaining to the Situation in the DRC, conducted in order to gather evidence for the purpose of domestic criminal proceedings infringed the principle of proportionality sanctioned by the ECHR".[650] Further the Chamber found that "in the light of ECHR jurisprudence, the infringement of the principle of proportionality can be characterized as a violation of internationally recognised human rights".[651]

One may wonder what significance this finding would have for Congolese authorities, considering the principle of complementarity. Would this be binding for DRC courts? It is absolutely sure that the judgments of the ICC concerning a sentence of imprisonment[652] or fines and forfeitures[653] are compulsory for the States Parties, but the Statute mentions nothing for the other findings of the Court, as there is the case here. Would this finding entitle Lubanga to sue the Congolese

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[647] The article reads as follows: "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
(a) The violation casts substantial doubt on the reliability of the evidence; or
(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."
[648] The Decision, par. 69.
[649] Ibid, par. 73.
[650] Ibid par. 81.
[651] Ibid par. 82.
[652] Article 105 (1) of the Rome Statute reads as follows: "Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it."
[653] Article 109 (1) of the Rome Statute foresees: "States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law."

authorities for the infringement of the right to privacy and principle of proportionality?

Coming back to the Decision[654], the Chamber did not exclude the evidence incriminating Lubanga as the found violations did not justify the exclusion of the Items Seized. The Chamber found the solution in the rules applicable before the international criminal tribunals and their jurisprudence which established the exclusion "only in cases in which very serious breaches have occurred, leading to substantial unreliability of the evidence presented."[655]

Another aspect which deserves a special attention is the finding of the Court relating to the existence and nature of the armed conflict in Ituri which has consequences on the qualification of the crimes. Originally, the Prosecutor charged Lubanga for the three war crimes committed in the period of July 2002 – December 2003, in a conflict not of an international character. The Chamber found that there are substantial grounds to believe that Lubanga committed the three crimes but also in a conflict of an international character and for a shorter period of time, from September 2002 till 13 August 2003.

The Chamber considered an armed conflict to be of an international character if it took place between two or more states, including the partial or total occupation of the territory of another state, or if a state intervened with troops in a conflict within other state or if some participants in an internal conflict acted in the name of another state.[656] Taking into consideration the jurisprudence of ICTY and the judgment of ICJ in *Democratic Republic of the Congo v. Uganda,*[657] where the Court found that Uganda established and exercised authority in Ituri as an occupying Power,[658] the Chamber considered qualifying the conflict in DRC from July 2002 till 2 June 2003 as a conflict of an international character. This fact lead

[654] See also M.A. Drumbl, *ICC Decision Confirming War Crimes Charges for Conscripting, Enlisting and Using Child Soldiers,* in American Journal of International Law, Vol. 101, Issue 4, 2007, at 841-48.
[655] The Decision par. 87.
[656] The Decision par. 209.
[657] *DRC v. Uganda*, Judgment, supra note 588. See also James Thuo Gathii, *Armed Activities on the Territory of the Congo (DRC v. Uganda),* in American Journal of International Law, Vol. 101, No.1, 2007, at 142-49.
[658] The Decision par 214.

to changing the charges, from the war crimes of "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities", acts committed "in armed conflicts not of an international character"[659] into the war crimes of "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities", acts that are committed in an "international conflict."[660]

Two problems arose: 1) should the Chamber adjourn the hearing and request the Prosecutor to consider amending the charges?[661] 2) Is the term 'national armed forces' (as detailed in Article 61 (7) (c) (ii)) equivalent with the term 'armed forces or groups' (as detailed in Article 8 (2) (e) (vii) of the Rome Statute)? Firstly, the Court found that given the similar scope of the two articles, regardless of the characterization of the armed conflict, there was no need to adjourn the hearing and asked the Prosecutor to amend the charges.[662] Both articles protect the children under fifteen from their enlisting, conscripting or use in hostilities, criminalising the same conduct whether it is committed in an international conflict or in a conflict of a not international character. Secondly, following the logic of the Geneva Conventions and Hague Regulations concerning the Laws and Customs of War, as well as the rules of interpretation set out by the Vienna Convention on the Law of Treaties, or the precedents set by the jurisprudence of ICTY, the Chamber considered that the term 'national' is not necessary 'governmental'. Therefore, the term 'national armed forces' is not limited to the armed forces of a state, which leads to the inclusion of the term 'armed forces or groups'.[663]

Another aspect which deserves our consideration is the interpretation that the Chamber gave to the concept of co-perpetration[664] embodied in article 25 (3) (a) of the Rome Statute, article on which the charges were based on, reading as follows: "in accordance with this Statute, a person shall be criminally responsible

[659] Article 8 (2) (e) (vii) of the Rome Statute.
[660] Article 8 (2) (b) (xxvi) of the Rome Statute.
[661] Based on Article 61 (7) (c) (ii) of the Rome Statute.
[662] The Decision par. 204.
[663] Ibid par. 285.
[664] For the concept of co-perpetration of torture see Ward Ferdinandusse, *Prosecutor v. Case No. AO7178,* in American Journal of International Law, Vol. 99, No.3, 2005, at 686-90.

and liable for punishment for a crime within the jurisdiction of the Court if that person…commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible." The Chamber gave the concept of co-perpetration a unique interpretation, as it considered the concept coincides with that of joint control over the crime.[665] Thus, the Chamber excluded both the objective and subjective approaches for distinguishing between principals and accessories to a crime, accepting a third approach based on the concept of control over the crime.

The Chamber's interpretation is different from the one reflected in the jurisprudence of the *ad hoc* tribunals, the subjective approach, which is based on the concept of joint criminal enterprise[666] or the common purpose doctrine.[667] According to the subjective theory, only those who make their contribution with the shared intend to commit the offence can be considered principals to the crime, regardless of the level of their contribution to its commission.[668] The Chamber's interpretation is different from the objective theory also, as the latter, consider principals to the crime only those who physically carry out one or more of the objective elements of the offence.[669] The unique interpretation is based on the idea that where a criminal offence is committed by a plurality of persons who co-ordinate their contributions in realizing the object elements of a crime, any person can be held responsible for the acts of the others, and therefore, can be considered principal to the whole crime.[670] The concept of joint control over the crime requires two necessary objective elements: a) existence of an agreement or common plan between two or more persons, b) coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime, and

[665] Ibid, par. 341.
[666] See Antonio Cassese, "International Criminal Law", Second Ed., Oxford University Press, 2008, at 189-213.
[667] See also Kevin Jon Heller, *Prosecutor v. Karemera, Ngirumpatse and Nzirorera, Case No. ICTR-98-44-AR73(c). Decision on Prosecutor's Interlocutorry Appeal of Decision on Judicial Notice,* in American Journal of International Law, Vol. 101, No.101, 2007, at 157-63.
[668] The Decision par. 329.
[669] Ibid, par. 328.
[670] Ibid par. 326. See also Kai Ambos: Article 25: Individual Criminal Responsibility, in *Commentary on the Rome Statute of the International Criminal Court,* Baden-Baden, Nomos, 1999, at 479.

three subjective elements: a) the suspect must fulfil the subjective elements of the crime in question, b) the suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime, c) the suspect must be aware of the factual circumstances enabling him or her to jointly control the crime. By adopting such interpretation of the co-perpetrator, the Chamber also established an interesting concept of a group crime.[671] It would have been more efficient if the other members of the group were charged together with Lubanga, though.

After deciding on the nature of the armed conflict and on the form of Lubanga's participation, the Chamber focused on the elements of crimes foreseen by articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute[672]: the perpetrator conscripted and enlisted one or more persons into the national armed forces (an armed force or group) or used one or more persons to participate actively in hostilities, such persons were under the age of 15, the perpetrator knew or should have known the persons were under 15, the conduct took place in an international armed conflict (conflict not of an international character), the perpetrator was aware of the armed conflict.[673]

The Court found that that there was sufficient evidence to establish substantial grounds to believe that children under fifteen were enlisted and conscripted into the UPC/FPLC from July 2002 to December 2003, as this became a common practice.[674] The children were either forcibly recruited, either made available to Lubanga's forces by their parents, either joined voluntarily. The question to be answered was if conscripting, enlisting and using children in hostilities was considered a crime under the Congolese law, or was it rather a way of living out there? If these kinds of conducts were not incriminated by the Congolese law before 11 April 2002, after this moment, they surely were, as it was then that DRC ratified the Rome Statute. Uganda, then the occupying power in Ituri, also ratified the Statute on 14 June 2002. Therefore, the Rome Statute was in

[671] Trikoz, supra note 626 at 242.
[672] On the point of view that Article 8 of the Rome Statute marks a retrograde step with respect to existing international law, see Cassese, supra note 666 at 94-96.
[673] The Decision par. 240.
[674] Ibid par. 250.

force in both DRC and Uganda when the crimes were committed. On the other hand, child recruitment is a violation of international humanitarian law. Both DRC and Uganda ratified the Geneva Conventions of 1949 in 1961 and Protocol I in 1982 and respectively in 1991.

Article 77 (2) of the Protocol Additional I prescribes that:

"the Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest".[675]

Article 43 (3) of the Protocol Additional II, foresees that:

"children shall be provided with the care and aid they require and in particular: (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities". As the Chamber stressed out the term 'recruiting' used in the Protocols differ from 'conscripting' and 'enlisting', terms used by the Rome Statute. While the drafters of the Protocols envisaged only the forcible recruitment of the children, the drafters of the Rome Statute had in mind also the voluntary recruitment."[676]

Regarding the using of children into armed conflicts, Article 77 (2) of Protocol Additional I provides that

"the parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities".[677]

Children are also protected by other international instruments.[678] For example International Labour Organization Minimum Age Convention 138[679] sets

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[675] To see the whole texts of the Geneva Conventions and their Protocols, see www.icrc.org.
[676] The Decision, paras. 245-247.
[677] See also ICRC, *Children in War,* July 2004.
[678] For a whole list of the documents protecting children see www.child-soldiers.org. See also D. J. Francis, '*Paper Protection' Mechanisms: Child Soldiers and the International Protection of Children in Africa's Conflict Zones,* in Journal of Modern African Studies, Vol. 45, Issue 2, 2007, at 207-31.
[679] The texts of the ILO Conventions can be found on www.ilo.org.

the obligation for the signatory states to abolish child labour and "to rise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons". ILO Worst Forms of Child Labour Convention 182 commits each state which ratifies it to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency". Convention on the Rights of the Child[680] prescribes on its article 38 the age of 15 as the minimum for recruitment or participation in armed conflict.[681] The African Charter on the Rights and Welfare of the Child[682] also provides that "States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child" (Article 22.2).

The Organization of the United Nations also takes measures to protect children from armed conflict. The General Assembly adopted Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. The protocol sets 18 as the minimum age for direct participation in hostilities, for recruitment into armed groups, and for compulsory recruitment by governments. States may accept volunteers from the age of 16 but must deposit a binding declaration at the time of ratification or accession, setting out their minimum voluntary recruitment age and outlining certain safeguards for such recruitment.[683] The UN Security Council also, adopted more Resolutions condemning the recruitment and use of children in hostilities.[684] Recently, UNICEF lead the process of reviewing the "Cape Town Principles and Best Practice on the prevention of recruitment of children into the armed forces and on demobilization and social reintegration of child soldiers in Africa", adopted by non-governmental

[680] Available at http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm.
[681] For an analyse of the concept pf 'child', see Nairi Arzoumanian and Francesca Pizzutelli, *Victimes et bourreaux: questions de responsabilité liées á la problématique des enfants-soldats en Afrique,* IRRC December 2003, Vol. 85, No. 852.
[682] Available at http://www.africa-union.org/root/au/Documents/Treaties/Text/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf.
[683] The Optional Protocol is available at http://www2.ohchr.org/english/law/crc-conflict.htm.
[684] See e.g. Report of the Secretary General on Children and armed conflict, A/58/546-S/2003/1053, 10 November 2003.

organizations at a conference in Cape Town in 1997. The result was materialized in two documents: the Paris Commitments and the Paris Principles. The Paris Commitments[685] consists of a set of legal and operational principles needed to protect children from recruitment or use in armed conflict while the Paris Principles[686] refer also to the release of children from the army and their reintegration into civilian life and family.

Therefore, there were enough international instruments which incriminated the recruitment and the use of children into hostilities. Furthermore, there was already a precedent in international law which established that "child recruitment was already criminalized before it was explicitly set out as a criminal prohibition in treaty law", precedent established by the Special Court for Sierra Leone in the Norman case.[687] Norman, Fofana and Kondewa were charged by the Prosecutor of the SCSL among other charges, with "enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities".[688] Even if Norman died in February 2007 and Fofana was found guilty of other counts than using children under 15 into hostilities, the SCSL found that Kondewa was guilty of 5 counts of charges, among which, the use of children under 15 into armed hostilities.[689] This charge can be found against Charles Taylor, also, at count 9, "conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities".[690]

There are enough proofs that Lubanga knew that child recruitment was a crime. He even gave a decree on June 2003 ordering the demobilization from the

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[685] Available at http://www.child-soldiers.org/childsoldiers/Paris_Commitments_March_2007.pdf.
[686] Available at http://www.child-soldiers.org/childsoldiers/Paris_Principles_March_2007.pdf.
[687] *The Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa,* Decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004.
[688] *The Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa,* Indictment, 5 February 2004, available at http://www.sc-sl.org/Documents/CDF/SCSL-04-14-PT-003.pdf. See also Matthew Happold, *International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone's Decision in Prosecutor v. Samuel Hinga Norman,* in Leiden Journal of International Law, No. 18, 2005 at 283-97.
[689] See the indictment at http://www.sc-sl.org/Documents/CDF/SCSL-04-14-T-796.pdf.
[690] *The Prosecutor v. Charles Ghankay Taylor,* Indictment, available at http://www.sc-sl.org/Documents/SCSL-03-01-PT-263.pdf.

FPLC of any individual under the age of eighteen years. The order however was not executed and proved to be a "masquerade".[691]

The Chamber further found that there are grounds to believe that Lubanga acted with direct intention, so he knew the children he recruited and used in hostilities were younger than 15 years. This founding is based on the theory of co-perpetration adopted by the Court, according to which all the co-perpetrators must be mutually aware of, and mutually accept, the likelihood that implementing the common plan would result in the realization of the object elements of the crimes.[692] Consequently, the Court committed "Thomas Lubanga Dyilo to a Trial Chamber for trial on the charges as confirmed".[693] Immediately after the decision was brought, both the Defence and the Prosecution lodged an appeal, which eventually was rejected by the Chamber.[694]

The Decision on the Confirmation of Charges is very important for the international law and for the perception of the ICC. Procedurally speaking, the Decision has its significance, as for the first time in the history of international law victims were allowed to participate in the proceedings and new interpretations for concepts of international criminal law have been brought.[695]

Unfortunately, after 10 years from signing the Rome Statute, it seems that ICC is still not ready to start its first trial as the Trial Chamber I imposed a stay on the proceedings on 13 June 2008. The Chamber found out that the Prosecution had incorrectly used Article 54 (3) (e) of the Rome Statute[696] by using at trial the documents necessary solely for getting new evidence, and consequently, a significant body of exculpatory evidence has not been disclosed to the accused

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[691] Testimony of the witness Kristine Peduto, MONUC Child protection official, the Decision paras. 255-256.

[692] The Decision, par. 365.

[693] Ibid, final page.

[694] *Prosecutor v. Thomas Lubanga Dyilo,* Decision on the Prosecution and Defence applications for leave to appeal the Decision on the Confirmation of Charges, 24 May 2007, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-915_English.pdf.

[695] See also Mirela Pascaru, *Procurorul c. Thomas Lubanga Dyilo – decizia de confirmare a învinuirilor în prima cauză pe rolul Curții Penale Internaționale,* in Romanian Journal of International Law, Revista Română de Drept Internațional, Nr. 4 ianuarie-iunie 2007, at 154-58.

[696] Article 54 (3) (e) of the Rome Statute reads as follows: "The Prosecutor may… agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents".

infringing the right to a fair trial.[697] Furthermore, the Chamber ordered the release of Thomas Lubanga Dyilo[698] but the Prosecutor appealed both the Decision to put the trial on stay and the Decision to release Lubanga.[699] Not much later, the Appeals Chamber gave suspensive effect to the Prosecutor's appeal, meaning that the accused remained under custody of the ICC pending the final decision on the appeal.[700]

One may say that what was supposed to be the beginning of a success era for the ICC became the beginning of a crisis situation. The first person in custody might get released, due to a misinterpretation of the Statute.[701] However, the Prosecutor is highly confident that the problem will be solved and the trial will start in September, promising justice for Lubanga's victims.[702]

III.1. 4. c) *Prosecutor v. Germain Katanga*

The second person in ICC custody was Germain Katanga, surrendered and transferred to The Hague on 17 October 2007, based on a warrant of arrest issued on 2 July 2007 and unsealed on 18 October.[703] Mr. Katanga, also known as Simba,

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[697] See Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 ICC-01/04-01- 06/1401, 13 June 2008, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1401-ENG.pdf.

[698] See ICC Press release, *Trial Chamber I ordered the release of Thomas Lubanga Dyilo - Implementation of the decision is pending,* ICC-CPI-20080702-PR334-ENG, 2 July 2008, available at http://www.icc-cpi.int/press/pressreleases/394.html&l=en. See the whole text of the Decision, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1418-ENG.pdf.

[699] Decision on the Prosecution's Application for Leave to Appeal the Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, ICC-01/04-01/06-1417, 2 July 2008, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1417-ENG.pdf.

[700] See ICC Press release, *The Appeals Chamber gives suspensive effect to the appeal against the decision on the release of Thomas Lubanga,* ICC-CPI-20080707- PR338-ENG, 7 July 2008, available at http://www.icc-cpi.int/press/pressreleases/400.html.

[701] See also Heikelina Verrijn Stuart, *The ICC in Trouble,* in Journal of International Criminal Justice, Vol.6, No.3, 2008 at 409-17.

[702] See ICC Press release, *The Office of the Prosecutor supports the need for a fair trial and promises justice will be done for Lubanga's victims,* ICC-CPI-20080624-PR329-ENG, 24 June 2008, available at http://www.icc-cpi.int/press/pressreleases/388.html.

[703] *The Prosecutor v. Germain Katanga,* Warrant of arrest, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-1_tEnglish.pdf.

was commander of the Force de résistance patriotique en Ituri (Patriotic Resistance Force in Ituri), "the FRPI", one of the armed groups involved in the conflict in Ituri. The warrant of arrest contained nine charges: six war crimes and three counts of crimes against humanity.[704]

The Prosecutor has reasons to believe that the FRPI and the FNI (Front des Nationalistes et intégrationnistes – National Integrationist Front) planned and carried out a systematic and widespread attack on the village of Bogoro, which had as consequences the murder of about 200 civilians, serious bodily harm to more others and sexual enslavement of women and girls. Also, there are reasons to believe that children under 15 were used in hostilities. The warrant of arrest on Katanga's name was issued as there were "reasonable grounds to believe that, as the highest ranking FRPI commander, and by designing the common plan and ordering his subordinates to execute it, Germain Katanga's contribution was essential to its implementation".[705]

The Prosecutor focused on the acts committed between January and March 2003, acts which include murder, inhuman or cruel treatment, the use of child soldiers, sexual slavery, willful killing, intentional attacks against the civilian population and pillage. International organizations state that Katanga committed these kinds of crimes even earlier, in 2002. Thus, Human Rights Watch said that "Germain Katanga helped lead one of the largest massacres in Ituri, that at Nyakunde Hospital in September 2002 (…) He ordered, tolerated or personally committed ethnic massacres, murder, torture, rape, mutilation and the recruitment of child soldiers". In December 2004 Katanga became general in the Congolese army but in March 2005 he was sent to jail in DRC for genocide, war crimes and crimes against humanity under Congolese law. Apparently there was no intention to bring him to trial.[706]

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[704] See also Moshe Zvi Marvit and Michelle Olson, *Prosecutor v. Thomas Lubanga Dyilo* (update) & *Prosecutor v. Germain Katanga,* The Chicago-Kent Journal of International and Comparative Law, Vol. 8, Spring 2008, Cases and Controversies

[705] Warrant of arrest, supra note 703.

[706] Human Rights Watch, *Second War Crimes Suspect to Face Justice in The Hague,* 18 October 2007. Available at http://hrw.org/english/docs/2007/10/18/global17125.htm.

On 22 October 2007 Katanga appeared for the first time before the ICC[707]. His hearing on the confirmation of charges, initially scheduled for 28 February 2008 has been postponed to 27 June as there were more issues pending and the Defence must have access to the evidence on which the Prosecution intends to rely on 30 days before the initiation of a confirmation hearing.[708]

III.1. 4. d) *Prosecutor v. Mathieu Ngudjolo Chui*

After less than four months from the Katanga's transfer to The Hague, on 7 February 2008, Mathieu Ngudjolo Chui, commander of the FNI and high-ranking member of the National Army of the Government of the DRC, was also surrendered and brought to the ICC detention centre, based on a warrant of arrest issued in July 2007.[709] He is charged with the same nine international crimes as Katanga is: six war crimes and three crimes against humanity for designing a common plan with Katanga or other FNI and FRPI military commanders, to carry out a systematic and widespread attack against the village of Bogoro. The Chamber issued a warrant of arrest on Chui's name as it had reasonable grounds to believe that he, as the highest ranking FNI commander, and by designing the common plan and ordering his subordinates to execute it, had an essential contribution to the implementation of that plan.

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[707] See *The Prosecutor v. Germain Katanga,* Decision Scheduling the First Appearance of Germain Katanga and Authorising Photographs at the Hearing of 22 October 2007, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-26_English.pdf. See also *War Crimes Suspect Appears Before International Criminal Court*, available at http://allafrica.com/stories/200710221998.html or Mike Corder, Associated Press, *Congolese war crimes suspect at Hague,* available at http://www.boston.com/news/world/europe/articles/2007/10/22/congolese_war_crimes_suspect_at_hague/.

[708] ICC Press release, ICC-CPI-20080131-PR282-ENG, 31 January 2008, available at http://www.icc-cpi.int/press/pressreleases/324.html. See also *Confirmation of charges postponed in the case against Germain Katanga and Mathieu Ngudjolo Chui,* ICC-CPI-20080428-PR309-ENG, available at http://www.icc-cpi.int/press/pressreleases/361.html.

[709] *The Prosecutor v. Mathieu Ngudjolo Chui,* Warrant of arrest, 6 July 2007, available at http://www.icc-cpi.int/library/cases/ICC-01-04-02-07-1-tENG.pdf.

The transfer of Mathieu Ngudjolo was received with appreciation by victims, governments, and international organizations.[710] Given the common plan and the collaboration between Katanga and Ngudjolo, their cases will be tried together.[711] Ngudjolo appeared for the first time before the ICC on 11 February 2008[712] and the Confirmation of Charges Hearing was first set for 21 May and later for 27 June 2008.[713]

The case of Ngudjolo is very interesting from the complementarity perspective. He argued that he had already been acquitted on some charges brought against him by ICC. He was arrested in 2003 in DRC for the murder of a businessman but he was acquitted because of the lack of evidence. Human rights groups said that the acquittal came because witnesses were afraid to testify as there is no law to protect the witnesses in DRC.[714] While in custody he was charged with war crimes and he was supposed to face trial at a military tribunal in Kinshasa, but he escaped and no judgment on war crimes was brought against him. After signing an amnesty deal with the government of DRC, Ngudjolo integrated into the national army as a colonel. In an interview he gave to Tristan McConnell from the Christian Science Monitor, he was very confident ICC would not arrest him: "in Congo we have so many criminals, we can't just talk about the militia leaders. If [the world wants] justice they must arrest the whole of the Congo!"[715]

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[710] See e.g. Coalition for an International Criminal Court, Press release CN-CPI/001/2008, 7 Feb. 2008 http://www.iccnow.org/documents/communique_CN-CPI_arrestation_Mathieu_Ngudjolo_fr1.pdf see also BBC News at http://news.bbc.co.uk/2/hi/africa/7232459.stm.

[711] See *The Prosecutor v. Mathieu Ngudjolo Chui,* Prosecutions Observations on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI, 14 February 2008, available at http://www.icc-cpi.int/library/cases/ICC-01-04-02-07-22-ENG.pdf. For a different opinion see the Defence Observations available at http://www.icc-cpi.int/library/cases/ICC-01-04-02-07-29-FRA.pdf.

[712] See *The Prosecutor v. Mathieu Ngudjolo Chui,* Decision Scheduling the First Appearance of Mathieu Ngudjolo Chui and Authorising Photographs at the Hearing of 11 February 2008, available at http://www.icc-cpi.int/library/cases/ICC-01-04-02-07-14-ENG.pdf.

[713] See ICC-CPI-20080428-PR309-ENG Press release.

[714] See Katy Glassborow and Marie Delbot, *Ngudjolo Trial Faces Double Jeopardy Claim,* 17 February 2008, available at http://www.iwpr.net/?p=acr&s=f&o=342800&apc_state=henpacr.

[715] Citation from Tristan McConnell, *A Congo Warlord – Arrested for Crimes against Humanity – Explains Himself,* the Christian Science Monitor, 15 February 2008, available at http://www.csmonitor.com/2008/0215/p20s01-woaf.html.

III.1. 4. e) *Prosecutor v. Bosco Ntaganda*

On 28 April 2008 the Pre-Trial Chamber I unsealed the warrant of arrest against Bosco Ntaganda former Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo (FPLC), and current alleged Chief of Staff of the Congrès national pour la défense du peuple (CNDP) armed group, active in North Kivu in the DRC.[716] Lubanga's former subordinate is also charged with three war crimes of enlisting, conscripting and using children under 15 into hostilities.

The warrant of arrest against Ntaganda, also known as "the Terminator", was issued in August 2006[717] but it was kept under seal because of the fear that "public knowledge of the proceedings in this case might result in Bosco Ntaganda hiding, fleeing, and/or obstructing or endangering the investigations or the proceedings of the Court".[718] According to the judges, the circumstances have changed and it seemed that it was better to make the warrant public. It is expected that DRC will efficiently cooperate so that Ntaganda to be soon in custody at ICC.

The cooperation with the Congolese authorities, based on the principle of complementarity, proves to be fructuous. Unlike Lubanga and Katanga who were in custody at the time of their arrest by ICC, Ngudjolo was enjoying liberty and he had no fear of an international trial. His arrest might have a deterrent effect on the other members of the armed groups in DRC who enjoy impunity and do not fear a trial because of the guaranties that amnesty deals with the government offer them. It might be the case of Cobra Matata, a close collaborator of Katanga, who took the leading of the FRPI after Katanga's arrest or other warlords as Laurent Nkunda, Jules Mutebusi and Kawa Panga who believe that after the Goma peace negotiations[719] their acts will be amnestied.[720]

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[716] *DRC: ICC Warrant of arrest unsealed against Bosco Ntaganda,* ICC-OTP-20080429-PR311-ENG, The Hague, 29 April 2008, available at http://www.icc-cpi.int/press/pressreleases/363.html.

[717] See warrant of arrest, available at http://www.icc-cpi.int/library/cases/ICC-01-04-02-06-2-tENG.pdf.

[718] *Warrant of arrest against Bosco Ntaganda unsealed,* ICC-CPI-20080429-PR310-ENG, The Hague, 29 April 2008, http://www.icc-cpi.int/press/pressreleases/362.html.

[719] A peace Conference was organized between 6 and 14 January 2008 in Goma, trying to find a solution for the security problems in Kivu. See details at http://www.iccnow.org/documents/CNCPI_SK_PR_6jan08_fr.pdf. See also IWPR, *ICC North Kivu Probe Urged,* available at http://iwpr.net/?p=acr&s=f&o=341009&apc_state=henh.

It is sure that the three warrants of arrest for the situation in DRC do not solve the problem of impunity but they surely represent a start. There are some concerns though, that the Prosecutor would move to the other parts of the country without fully investigating and leaving some "unfinished business in Ituri".[721] If the Prosecutor wants to stop impunity in DRC, he should not stop at the local warlords, but to investigate "senior military and political figures in the Great Lakes region who backed local warlords" as for example, "political masters in Kinshasa, Kampala and Kigali who armed and supported the militia groups operating in Ituri".[722]

The prosecutor must also start investigation on sexual violence which "is being used brutally and systematically as a weapon of war" in DRC. Signals of alarm have been pulled by UN representatives who declared that "rapes and sexual abuse are being committed with unprecedented cruelty, and the perpetrators have devised humiliating and degrading acts to inflict on their victims. A large number of rapes occur in public places and in the presence of witnesses".[723] There have been also voices asking "why does the ICC judge (militia chief) Thomas Lubanga for enrolment of child soldiers, but not for committing sexual crimes?"[724] As stated before, the Prosecutor might come with additional charges on Lubanga as one thing is for sure: ICC is on its way "to put an end to impunity".

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[720] See Club des Amis du Droit du Congo, Reaction to the arrest of Mathieu Ngudjolo, available on http://www.iccnow.org/documents/Communique_de_presse_CAD_Arrestation_de_Matthieu_Ngudjolo_eng.pdf.

[721] Mariana Goetz, Redress. See *ICC Prosecutor leaves unfinished business in Ituri,* 13 February 2008, available at http://iccnow.org/documents/REDRESS_press_release_on_Ngudjolo_eng.pdf.

[722] Param-Preet Singh, counsel with Human Rights Watch's International Justice Program. See human Right Watch, supra note 706.

[723] John Holmes, UN's Emergency Relief Coordinator. See http://www.globalin fo.org/eng/login.asp? ReturnPath= %2Feng%2Freader% 2Easp%3FArticleI d%3D54613.

[724] Chouchou Namegabe, representant of 50 human rights groups in eastern DRC. See http://www.thetimes.co.za/News/Article.aspx?id=657980.

III. 2. The Situation in Darfur, the Sudan

III.2. 1. The Conflict in Darfur

Another situation where ICC opened investigation is that in Darfur, a region in the largest country in Africa, the Sudan. It is particularly important because it represents the first Security Council's referral to the ICC under Chapter VII of the UN Charter and also because of the international community's pressure calling the situation there as Genocide.

Like more other African countries, Sudan was the field of battle of civil wars for a lot of years. After gaining independence from British – Egyptian rule in 1956, Sudan has been ruled predominantly by military regimes. People from south first revolted in 1963[725] and again in 1983. The conflict took a lot of lives and lead to a flux of refugees and internally displaced persons.[726] It was only in 2002 that the Government and the rebels initiated a peace process which ended in 2005. This was the historical background when another conflict burst, this time in Darfur. Two rebel African groups (Sudan Liberation Movement/Army SLM/A, and Justice and Equality Movement JEM) revolted against the Government, composed mainly from Arabs.

The Sudan Liberation Movement/Army is predominantly composed of people coming from Fur tribe, while the Justice and Equality Movement is representing mainly the Zaghawa tribe. The Fur, Masaalit and Zaghawa tribes are the most numerous black African tribes in Darfur and they are predominantly agriculturalists (Fur) or sedentary cattle herders (Zaghawa).[727] They share the same religion as the other tribes, the Islam, and besides Arab, they speak their own indigenous languages. The two rebel groups share the same goals as they are both

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[725] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva 25 January 2005, at 18.

[726] See Helen Young, Abdalmonium Osman and Rebecca Dale, *Darfurian Livelihoods and Libya: Trade, Migration, and Remittance Flows in Times of Conflict and Crisis,* in International Migration Review, Vol. 41, No. 4, (Winter 2007), 826-49.

[727] See Mika Vehnamaki, *Darfur Scorched: looming genocide in Western Sudan,* in Journal of Genocide Research 2006, 8 (1), March, at 51.

fighting against the central government's policies of marginalization, racial discrimination, exclusion and exploitation, real political criticism and socio-economic inequalities.[728] It was also about the permanent fight against nomadic Arabs and sedentary African tribes which the government did not seem to address,[729] while the conflict between Arabs (39%) and Africans (61%) seemed to develop.

The Government adopted a very interesting strategy, as it lacked military personnel. It called upon local tribes to fight against the rebels, developing the existing tensions between the Arab nomadic and African sedentary tribes. They were to become the *Janjaweed,* a term used for a bandit on a horse or camel.[730] Their people are supported military and financially by the Government of Sudan.[731] The Janjaweed started to fight the rebels and terrifying the civilian population, as the majority of people is formed by persons belonging to Fur, Masaalit and Zaghawa tribes. Therefore, they did not attack only the fighting rebels but they directed their attacks against the civilian population, too.

The Janjaweed systematically destroyed hundreds of villages in Darfur, killing boys and men, raping women and girls[732], destroying water wells and irrigation systems, food and seed stocks, looting cattle, in other words, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".[733] In 2005 the number of deaths was 80,000, while at the end of 2007 it reached 450,000. Around 2, 5 millions of refugees and internally displaced persons (IDP) were also reported.[734]

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[728] Ibid at 67. JEM is more religiously implicated though. Its leader Khalil Ibrahim pretends to be the author of *The Black Book,* the JEM's manifesto. See also Alex Cobham, *Causes of Conflict in Sudan*: *Testing The Black Book,* in The European Journal of Development Research, Vol. 17, No.3, Sept. 2007, at 462-80.

[729] Commission of Inquiry's Report, supra note 725 paragraph 59.

[730] Ibid, par. 69.

[731] Vehnamaki, supra note 727 at 65 or Commission's Report, supra note 725 par. 68.

[732] Vehnamaki, supra note 727 at 68.

[733] See Eric Reeves, *Darfur: Ongoing Genocide,* in Dissent, Fall 2004, at 19.

[734] See CRED, *Darfur: Counting the Deaths,* 26 May 2005, available at http://www.cred.be/docs/cedat/DarfurCountingTheDeaths-withClarifications.pdf. See also Vehnamaki, supra note 727 at 68 or Alex Cobham, *Causes of Conflict in Sudan*: *Testing The Black Book,* in The European Journal of Development Research, Vol. 17, No.3, Sept. 2007, at 462-3.

The peace process started by signing an agreement in September 2003 and it was followed by another one in April 2004. Both provided for ceasefire. Peace talks followed during the summer of 2004 and in November two Protocols were signed, one on the improvement of the humanitarian situation and the second on the enhancement of the security situation in Darfur.[735] Unfortunately, they did not lead to peace. The SLM/A and JEM asked for the disarming of the Janjaweed but the Government continued to deploy its ground and air forces.[736] The signing of the Darfur Peace Agreement later in May 2006, did not improve the situation. Violence seemed to be more chaotic and unpredictable, threatening the humanitarian intervention.[737]

III.2. 2. International responses

The first to react to the atrocities committed in Darfur, was the United States who, in the summer of 2004 called the situation "Genocide". In July and August they sent a team of investigators to the field to ascertain whether genocide had been perpetrated. The experts found that "the government of Sudan and the Janjaweed are guilty of committing genocide against the Fur, Masaalit, Zaghawa and other Black African tribes of Darfur".[738]

The findings of the investigation made the then US Secretary of State Colin Powell to accuse the government of Sudan of genocide. The international community also reacted but it was criticized for not sufficiently intervene to stop genocide.[739] The United Nations Security Council's responses got the same critics as it did not authorize the use of military force for humanitarian purposes against the wishes of a functioning state.[740] The first reaction of the Security Council was

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[735] Commission's Report supra note 725 par. 70.

[736] Eric Reeves, *Genocide by Attrition,* in Dissent, Winter 2005, at 24.

[737] Eric Reeves, *Genocide Without End? The Destruction of Darfur,* In Dissent, Summer 2007, at 9.

[738] Samuel Totten and Eric Marcusen, *The US Government Darfur genocide investigation,* Journal of Genocide Research, 2005, 7(2), at 285.

[739] Rhoda E. Howard-Hassmann, *Genocide and State-Induced Famine: Global Ethics and Western Responsibility for Mass Atrocities in Africa,* in Perspectives on Global Development and Technology, Vol. 4, Issue 3-4, 2005 at 504.

[740] Paul D. Williams, *Military Responses to Mass Killing: the African Union Mission in Sudan,* in International Peacekeeping, Vol. 13, No.2, June 2006, at 170.

to pass a resolution establishing a Commission of Inquiry "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable".[741]

The only effective international military response came from the African Union which received some help from the European Union and NATO.[742] In June 2004 the AU proposed an observer mission (AMIS) in Darfur which later was assisted by a UN team. As the mission did not succeed in neutralizing the Janjaweed, AMIS was extended.[743] The UN also remained actively in the region, providing assistance through the Office for Coordination of Humanitarian Affairs.[744] In the summer of 2005 US Government decided that AMIS should be handed over to a UN peacekeeping force but both AU and UN were reluctant, while Khartoum opposed.[745] Sudan also rejected the SC Res. 1706/2006[746] where the Council asked for Sudan's consent to a UN force.[747] The language of the Resolution drew a lot of criticism, being characterized as a "mockery" because it allowed Sudan a veto over the introduction of foreign troops.[748] A few months later, Sudan agreed on the UN–African Union Mission in Darfur (UNAMID), a hybrid AU–UN force.[749] New peace talks are to follow.

[741] SC RES. 1564/2004, available at http://daccessdds.un.org/doc/UNDOC/GEN/N04/515/47/PDF/N0451547.pdf?OpenElement.
[742] See also Natalia Touzovskaia, *EU-NATO Relations: How Close to 'Strategic Partnership'?* in European Security, Vol. 15, No.3, Sept. 2006, at 251-53.
[743] See Williams, supra note 740 at 176.
[744] Touzovskaia, supra note 742.
[745] See Alex de Waal, *Darfur and the failure of the responsibility to protect,* in International Affairs, 83:6, 2007, at 1042.
[746] SC Res. 1706/2006 available at http://www.sudanjem.com/pdf/1706_download.pdf.
[747] See Nsongurua J. Udombana, *Still Playing Dice with Lives: Darfur and Security Council Resolution 1706,* in Third World Quarterly, Vol. 28, No.1, 2007, at 99-116.
[748] See Global Progress Report, 2007 at 411.
[749] See SC Res. 1769/2007 available at http://www.un.org/News/Press/docs/2007/sc9089.doc.htm. See also *Sudan, UN reach agreement on peacekeeping plan,* CBC News, available at http://www.cbc.ca/world/story/2007/06/12/sudan-agreement.html.

III.2. 3. The Commission of Inquiry's findings

The Commission of Inquiry established following the SC Res. 1564/2004 began its work in October 2004 led by the prestigious international lawyer Antonio Cassese. The Commission reported back within three months concluding that even if the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law, there is no genocide in Darfur. The Commission found that "Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity." The Commission also mentioned that the crimes were committed primarily against "the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called 'African' tribes."[750] The rebels, in their turn, seem to be "responsible for serious violations of international human rights and humanitarian law which may amount to war crimes."[751]

When trying to find if there is genocide in Darfur, the Commission focused particularly on three directions: *actus reus, mens rea* and the concept of 'protected group'. Concerning the first element, the Commission found that there is no doubt that *actus reus* of genocide has been committed as there was evidence of "systematic killing of civilians belonging to particular tribes, of large-scale causing of serious bodily or mental harm to members of the population belonging to certain tribes, and of massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part (for example by systematically destroying their villages and crops, by expelling them from their homes, and by looting their cattle)."[752]

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[750] Commission's Report, supra note 725. at 3.
[751] Ibid. at 4.
[752] Ibid. Para. 507.

When it came for *mens rea* of genocide, the Commission found that it was missing as "the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare."[753] The Commission found therefore, that the Government of Sudan has not pursued a policy of genocide but it might be responsible for persecution as a crime against humanity. It also admitted that some individuals, including Government officials, might have been acting with genocidal intent. One may wonder what exactly does this mean. Should we understand that the Government of Sudan did not commit genocide but some individuals or Government officials did commit genocide? But if some Government officials committed genocide while they were in office, does not this mean that the State is also responsible for genocide?[754] The Commission avoided saying that particular persons committed genocide as it considered that only a competent court should make such a determination. If the Commission had said that genocide had been committed, further consequences would have followed, primarily concerning the obligation of Sudan to prevent genocide.[755] In the case of *Bosnia and Herzegovina v. Serbia and Montenegro*,[756] ICJ stated that a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed.[757] It is true that Sudan did not ratify the Convention on the Prevention and Punishment of the Crime of Genocide, but as ICJ showed in the above mentioned case, the Genocide Convention is not the only international instrument providing for an obligation on

[753] Ibid Para. 518.

[754] See Alain Pellet, *Responsabilité de l'État et responsabilité pénale individuelle en droit international,* Romanian Journal of International Law, No.4 (January-June 2007) at 11-20.

[755] See also Gaeta P., *On what Conditions Can a State Be Held Responsible for Genocide?,* European Journal of International Law, No. 18, 2007 at 631-48.

[756] *Bosnia and Herzegovina v. Serbia and Montenegro*, Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, 26 February 2007. The judgement is available at http://www.icj-cij.org/docket/files/91/13685.pdf.

[757] See also Kress, C., *The International Court of Justice and the Elements of the Crime of Genocide,* European Journal of International Law, No. 18, 2007, at 619-29.

the States to take certain steps to prevent genocide. Sudan itself is bound by a number of international treaties on human rights.[758]

The Commission also analyzed if the three tribes in Darfur against whom the crimes were primarily committed, may be qualified as a 'protected group', namely a national, ethnical, racial or religious group, as the Convention of Genocide provides. The Commission noted that apparently, one of the main differences between the militia and the attacked tribes is the character of their occupation: nomadic respectively sedentary. They seem to speak the same language (also the African tribes speak their indigenous languages as well), and embrace the same religion. Apparently there is no ethnical distinction between the Janjaweed and the rebels, but rather a distinction based on sympathy towards the combatants: "those tribes in Darfur who support rebels have increasingly come to be identified as 'African' and those supporting the government as the 'Arabs'."[759] The Commission concluded though, that the victims represent "a permanent and stable group"[760] as found by ICTR in *Akayesu* case[761] and therefore, fall under the protection of the Genocide Convention. The Commission should have relied not on the ICTR finding, to which no other reference has been made by any other ICTR trial or appeal chambers,[762] but rather on the fact that the Janjaweed saw the three tribes as a distinct group.

The Report of the Commission could not escape from criticism. The Commission was accused of substituting "legal reasoning for scientific data", or of using "its authoritative power and control to deny the meaning of the genocidal charge".[763] According to other critics, due to some deficiencies of the Rome Statute, the Report reflects the confusion of collective responsibility and criminal liability of individuals.[764] Apart from these critics, the Commission is quite wise in

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[758] See Commission's Report, supra note 725 paras. 147-171.
[759] Ibid para. 510.
[760] Ibid para 498.
[761] Prosecutor v. Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998.
[762] See William A. Schabas, *Darfur and the 'Odious Scourge': The Commission of Inquiry's Findings on Genocide,* in Leiden Journal of International Law, 18 (2005), at 878.
[763] John Hagan, Wenona Rymond-Richmond, and Patricia Parker, *The Criminology of Genocide: The Death and Rape of Darfur,* in Criminology, Vol.43, No.3, 2005 at 534-5.
[764] George P. Fletcher and Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case,* in Journal of International Criminal Justice, 3 (2005), 539-61.

refusing "to make the quantum leap from the extermination of rival combatants to the intentional destruction of an ethnic group"[765] as this would have a lot of consequences on the international level. As Prof. Schabas suggested, for the US, finding genocide in Darfur it would be for sure "an appealing proposition to tarnish Sudan, which must be on its short list for the vacant Iraqi seat as a member of the 'axis of evil', with the odium of 'genocide'."[766] On the other hand, not recognizing genocide in Darfur, because of the consequences this might have for international law, would mean a victory of politics over justice and most of all, would be a cruel disrespect for the victims.

The Report ends with some recommendations concerning the mechanisms to ensure accountability for the crimes committed in Darfur. The International Criminal Court seemed to be the best organism to deal with the perpetrators, as the Sudanese courts were qualified by the Commission both as "unable and unwilling to prosecute and try the alleged offenders"[767]. Other possibilities like establishing an *Ad Hoc* International Criminal Tribunal or extending the mandate of ICTR or ICTY, as well as creating a mixed court, were also taken into account but these measures seemed to be inappropriate. Therefore, the Commission recommended the Security Council to act under Chapter VII of the UN Charter[768] and, as article 13 (b) of the Rome Statute provides, to refer the situation in Darfur to the ICC.

Further the Commission recommended some other mechanisms which in its opinion should complement the ICC referral. One may question how these mechanisms would complement each other, as apparently, they are rather contradictory. For example, there were recommendations concerning a Truth and Reconciliation Commission, as well as a Compensation Commission to be established in order to ensure the victims' compensation for the wrong they suffered. It seems that the Commission of Inquiry ignored the possibility the ICC opened for the victims to participate into proceedings and to ask for reparation. It is

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[765] Schabas, supra note 762 at 881.
[766] Ibid at 882.
[767] Commission's Report, supra note 725 para. 568.
[768] See also Minogue, E.C., *Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations before the International Criminal Court,* Vanderbilt Law Review, No. 2, 2008, at 647-80.

true that it is very difficult for the ICC to deal with mass victimization, but it is also questionable that the compensation commission would work, as the report suggests that Sudan has a moral duty to compensate the victims because it was on Sudan's behalf that the perpetrators were acting. In my opinion this would be exactly the reason Sudan would not compensate the victims. As long as the Government offered financial and military support to the Janjaweed to commit the crimes against the population of Darfur, I doubt it would provide the victims with reparation.[769] Even if it is questionable how the recommendations are to be put into practice, their goal remains noble.

III.2. 4. Legal responses

Following the Commission recommendations, the Security Council referred the situation in Darfur to the ICC, by passing the Resolution 1593/2005.[770] The Resolution is particularly important as it marks the first SC referral to the ICC. Article 13(b) of the Rome Statute gives the Security Council the power to trigger the jurisdiction of the ICC by acting under Chapter VII of the UN Charter. As argued before, this trigger mechanism,[771] as well as the power of the Prosecutor to initiate an investigation *proprio motu,*[772] were among the most discussed issues at the Rome Conference, as they were seen as a breach to the states sovereignity. India, for example, argued that the SC should have no role concerning the jurisdiction of the ICC because of the distinct nature of the two institutions: the SC is a political organ while ICC is a judicial institution.[773] It argued further that the

[769] See also Aldana-Pindell, R., *An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Spondored Crimes,* Human Rights Quarterly, Vol.26, No. 3. 2004, at 605-86.
[770] S/RES/1593(2005), 30 March 2005. See also Press Release SG/SM/9797, AFR/1132.
[771] See Hector Olásolo, *The triggering procedure of the International Criminal Court, procedural treatment of the principle of complementarity, and the role of Office of the Prosecutor,* 26 March 2004, The Hague, Guest Lecture Series of the Office of the Prosecutor.
[772] See Avril McDonald and Roelof Haveman, *Prosecutorial Discretion – Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC,* 15 April 2003, The Hague, Expert consultation process on general issues relevant to the ICC Office of the Prosecutor.
[773] See also Usha Ramanathan, *India and the ICC,* Journal of International Criminal Justice 3 (2005), at 627-34.

establishment of the two *ad hoc* tribunals was possible because there was no judicial mechanism at that time, and as ICC it was created, there is no need for the SC intervention.[774] However, Chapter VII of the UN Charter gives the SC the power to act as a guardian when it comes for international peace and security and article 13(b) of the Rome Statute only echoes this power.

Concerning the sovereignity issue,[775] as it was shawn already by the doctrine,[776] states entering into treaties become subjects of rights and obligations which often impose restrictions on their freedom of action. By signing the Rome Statute, the states accepted the restrictions on their sovereignty in the same way they accepted the role of the Security Council in maintaining and restoring international peace and security. On the other hand, it might be the collaboration between the ICC and the UN to effectively respond to humanitarian emergencies, as optimistically was suggested by some authors.[777]

The Resolution 1593 passed in the Security Council with eleven votes to none and four abstentions (Algeria, Brazil, China and US). It was likely that China would not vote to refer its business partner Sudan to the ICC. It is a known fact that China imports oil from Sudan and it is its main supplier of weapons.[778] It even publicly announced that it would veto any sanction the SC would try to impose on Sudan.[779] International organizations try to use the Olympics which are to be held in Beijing, 2008 as a proper moment to protest against China's complicity in the Darfur Genocide and its position against Tibet. It is to be seen if China will fall into

[774] See Morten Bergsmo, *Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council,* Nordic Journal of International Law 69, 2000 at 93.
[775] See also Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?,* The European Journal of International Law, Vol.16, No.5, 2005 at 979-1000.
[776] See Daniel D. Ntanda Nsereko, *The International Criminal Court: Jurisdiction and Related Issues,* Criminal Law Forum, 10, 1999 at 110.
[777] Steven C. Roach, *Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and the UN Security Council,* International Studies Perspectives 6, (2005), at 431-46.
[778] See Eric Reeves, supra note 737 at 12.
[779] See Eric Reeves, supra note736 at 21.

the pressure of the 'Genocide Olympics' campaign or will continue to support Sudan.[780]

US abstention to the 1593 Resolution was not a surprise either, giving the fact that it did not accept the jurisdiction of the ICC. A better solution in their opinion would have been a hybrid tribunal in Africa. US recognized that they still object to the fact that ICC may exercise its jurisdiction over the nationals, including government officials, of states not party to the Rome Statute, but they chose to abstain and not vote against the Resolution "because of the need for the international community to work together in order to end the climate of impunity in Sudan."[781] Another reason US did not vote against the Resolution[782] was because it contains a disposition allowing protection from investigation or prosecution for U.S. nationals and members of the armed forces of non-state parties. As Ambassador Patterson said, this should not be regarded as unusual, if we consider the provisions of article 124 of the Rome Statute which allow states parties to refrain from the jurisdiction of the ICC for a period of seven years.[783]

Concerning Sudan, its representative said that, "once more, the Council had persisted in adopting unwise decisions against his country, which only served to further complicate the situation on the ground."[784]

The situation is indeed complicated, not only on the ground but also from the aspect of international law. If a state chooses not to accept the jurisdiction of a Court, that Court should simply not exercise jurisdiction over that state. The

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[780] See Nicholas D. Kristof, *China's Genocide Olympics,* New York Times, 24 January 2008. Available at http://www.nytimes.com/2008/01/24/opinion/24kristof.html.

[781] Explanation of Vote by Ambassador Anne W. Patterson, Acting US Representative to the United Nations, on the Sudan Accountability Resolution, in the Security Council, March 31, 2005. Available at http://www.usunnewyork.usmission.gov/press_releases/20050331_055.html.

[782] See also John R. Crook Ed., *Contemporary Practice of the United States Relating to International Law,* The American Journal of International Law, Vol. 99, No. 3 (July 2005) at 691-93.

[783] Article 124 reads as follows: "Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1."

[784] Elfatih Mohamed Ahmed Erwa, see UN Press Release SC/8351, available at http://www.un.org/News/Press/docs/2005/sc8351.doc.htm.

International Court of Justice exercises its jurisdiction only over the states which are parties to ICJ Statute. Article 35 (2) provides for the conditions in which the Court is open to states non-parties to its Statute, conditions which are to be laid by the Security Council. This disposition must be read together with Article 93 (2) of the Charter which says that "a state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."[785] So the Security Council together with the General Assembly have an important role concerning the exercise of ICJ jurisdiction over non-states parties. When it comes for ICC jurisdiction, it is only the Security Council which may pull the trigger mechanism of exercising jurisdiction over non-states parties to the Rome Statute. This power lies into Chapter VII of the UN Charter. It is true that Sudan it is not obliged under the Rome Statute, but as a UN Member, it is obliged under the Charter. Article 25 of the Charter provides that all member states agree to accept and carry out the decisions of the Security Council. Therefore, if the Security Council acts under Chapter VII and refers the situation in Darfur to ICC, Sudan is obliged to cooperate and let ICC to exercise its jurisdiction. We should also take into account the fact that even if the Security Council pulled the trigger mechanism, the jurisdiction of the ICC is not automatic; it is still based on the principle of complementarity. That means that if Sudan is able and willing to deal with the perpetrators of the most heinous international crimes, ICC would not exercise its jurisdiction.

The action of the Security Council did not escape critics. The text of the Resolution which was seen by some as a "substitute for effective action by the United Nations to end the humanitarian crisis and systematic atrocities being committed in Darfur"[786] contains more problematic and useless dispositions due to the compromise reached by states. For example, in order to get US not to oppose the Resolution, there were included some passages which were not necessary. It

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[785] The text of the UN Charter is available at http://www.n.org/aboutun/charter/ .

[786] See Michael Bohlander, *Darfur, the Security Council and the International Criminal Court,* International and Comparative Law Quarterly, Vol. 55, January 2006, at 226.

starts with a reference to the article 16 of the Rome Statute[787] providing that no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect. Based on this article, appears to be operative paragraph 6 which provides that "nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State."

As suggested in the doctrine[788], there was no need for such a paragraph as it lacks consistency with article 16 of the Rome Statute[789] which was intended to be used only in exceptional circumstances on a case-by-case basis after the Security Council had determined that an investigation or a prosecution could be an obstacle in maintaining international peace and security.[790] Another unnecessary disposition which finds place in the text of the Resolution is that concerning the 'Article 98 Agreements' signed by US with more states which oblige those states to obtain the US consent before referring a US national to the ICC.[791]

Another paragraph which was introduced at the suggestion of the US, also inconsistent with the Rome Statute, is operative paragraph 7 concerning the financial matters: "none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily."

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[787] The history of this article was controversial. See Ruth B. Philips, *The International Criminal Court Statute: Jurisdiction and Admissibility,* Criminal Law Forum, 10, 1999 at 75-76.
[788] Bohlander, supra note 786 at 231-34.
[789] See Robert Cryer, *Sudan, Resolution 1593 and International Criminal Justice,* Leiden Journal of International Law, 19 (2006) at 195-222.
[790] See also Cristopher Keith Hall, *Suggestions concerning the International Criminal Court Prosecutorial Policy and Strategy and External Relations,* 28 March 2003, Expert consultation process on general issues relevant to the ICC Office of the Prosecutor.
[791] See the chapter dedicated to US and Bilateral Agreements in this dissertation.

This seems to be inconsistent with article 115 (b) which provides that costs should be supported by "United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council."[792]

With all these inconsistencies and all the problems this Resolution raises, the Security Council's referral remains though, a positive step. Also, it seems it triggers a less restrictive regime[793], it must be said that the SC referral does not ask for the automatic jurisdiction of the ICC. The exercise of the jurisdiction remains only a possibility until the criteria for the complementarity regime are fulfilled.[794] Therefore, after receiving the referral from the Security Council, the ICC Prosecutor had to check the admissibility of the case and if there was a reasonable basis to commence an investigation in Darfur. He also checked the accountability at the national level in order to respect the principle of complementarity. Despite the fact that there are a lot of mechanisms which are competent to deal with the crimes committed there[795], the Prosecutor drew the conclusion that "it does not appear that the national authorities have investigated or prosecuted, or are investigating and prosecuting, cases that are or will be the focus of OTP attention such as to render those cases inadmissible before the ICC."[796]

In June 2005, the ICC Prosecutor opened the investigation in Darfur[797] and in April 2007 two warrants of arrest were issued, one for a Government official and the other for a Janjaweed militia leader.[798] The Prosecutor proved that "they joined

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[792] See also W. Michael Reisman, *On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court,* The American Journal of International Law, Vol. 99, No.3, (July 2005) at 615-18.

[793] See H. Olásolo, supra note 771 at 20-21.

[794] See C.H. Hall supra note 790 at 15-24.

[795] Darfur Special Court, two additional Courts, *ad hoc* institutions to support the Courts, the judicial Investigations Committee, the Special Prosecutions Commissions, National Commission of Inquiry, Committees against Rape, Special and Specialized Courts. See Annex I to the Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 14 June 2006.

[796] Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 14 June 2006 at 7.

[797] See Press release ICC-OTP-0606-104-En, The Hague, 6 June 2005, available at http://www.icc-cpi.int/pressrelease_details&id=107&l=en.html.

[798] See Warrant of arrest for Ahmad Harun, available at http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2_English.pdf and Warrant of arrest for Ali Kushayb available at http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3_English.pdf.

together to persecute and attack civilians who were not participants in the conflict, based on the rationale that those civilians were rebel supporters."[799] They both are charged with 51 counts for war crimes and crimes against humanity, all of them committed against primarily population of Fur ethnicity. One may wonder how come the committing of 51 crimes against a particular ethnic group does not prove a genocidal intent. How come there is no genocide among the charges? ICC Prosecutor[800] proved to be more careful even than the Commission of Inquiry. The Commission argued there was no policy of genocide from the government side but it admitted that some individuals, including government officials might have been acted with a genocidal intent.

The answer seems to be given by the Prosecutor's Application for a Warrant of Arrest against the Sudanese President, Omar Hassan Ahmad Al Bashir.[801] While Harun and Kushayb were the tools of committing the genocidal acts, the real mastermind behind the stage was Al Bashir, President of Sudan, Head of the National Congress Party, and Commander in Chief of the Sudanese Armed Forces. On 14 July 2008 the ICC Prosecutor opened therefore, the second case in Darfur, the first one in the history of the ICC against a President in office[802], and furthermore against a President of a state not party to the Rome Statute.[803] The Prosecutor asked for a warrant of arrest against Al Bashir for committing ten counts of genocide, crimes against humanity and war crimes.

The Court is to pronounce on the matter in a couple of months. The case is very difficult not only because of the political consequences, but also because the Prosecutor has to prove the intention of genocide by offering a theory of Bashir's

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[799] Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 5 December 2007, Para. 2.

[800] On the role of the Prosecutor, see Héctor Olásolo, *Issues regarding the General Powers of the ICC Prosecutor under Article 42 of the Rome Statute,* Expert consultation process on general issues relevant to the ICC Office of the Prosecutor, 5 December 3003.

[801] Prosecutor's Application for Warrant of Arrest under Article 58 against Omar Hassan Ahmad Al Bashir, available at http://www.icc-cpi.int/library/organs/otp/ICC-OTP-Summary-20081704-ENG.pdf, 14 July 2008.

[802] See also Bruce Baker, *Twilight for Impunity for Africa's Presidential Criminals,* in Third World Quarterly, Vol. 25, No. 8, 2004, at 1488-99.

[803] See ICC Press release, *ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes in Darfur,* ICC-OTP-20080714-PR341-ENG, 14 July 2008, available at http://www.icc-cpi.int/press/pressreleases/406.html.

liability for the physical acts of others, as he did not physically or directly carried out any of the crimes. The Prosecutor has to prove that Al Bashir committed the crimes through members of the state apparatus (Harun), the army and the Militia/Janjaweed (Kushayb), in accordance with Article 25 (3) (a) of the Rome Statute prescribing for indirect perpetration or perpetration by means.

In the jurisprudence of the *ad hoc* tribunals such situations were proved mainly by making use of the joint criminal enterprise or common purpose liability theories.[804] Let us not forget though, that in the case against Thomas Lubanga Dyilo, ICC came with a new theory of liability, that of control over the crime. However, it is unlikely that ICC would use this concept to prove Al Bashir's liability, as this theory is based on the idea that where a criminal offence is committed by a plurality of persons who co-ordinate their contributions in realizing the object elements of a crime, any person can be held responsible for the acts of the others, and therefore, can be considered principal to the whole crime.[805] As long as Harun and Kushayb are charged only with war crimes and crimes against humanity and not with genocide as well, the ICC Prosecutor would have to rely on a different theory to prove Al Bashir's criminal responsibility for the crime of genocide.[806]

Depending on the decision of the Pre Trial Chamber, the consequences will be very important. If the Chamber dismisses the Prosecutor's application for a warrant of arrest on Bashir's name, the action of the Prosecutor will remain very courageous, though. If the Chamber will issue the warrant of arrest, Sudan will have to hand Al Bashir to the ICC which is rather doubtful that will happen, as there is no cooperation from the Government of Sudan. Furthermore, it does not comply with the Security Council's dispositions, so it will definitely not comply with the decisions of a Court whose jurisdiction does not recognize.

[804] See also Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. Int'l Crim. Just. 159 (2007).

[805] Decision on confirmation of charges against Thomas Lubanga Dyilo, Para. 326. The Decision is available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803_French.pdf and http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN_English.pdf.

[806] See also Levine M.J.D., *The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court Have the Correct Standard?,* Military Law Review, No.19, 2007, at 352-96.

The Government not only that does not cooperate with the Court but it is rather hostile. Ahmed Harun, former Minister of Interior was appointed Minister of Humanitarian Affairs and continues to enjoy impunity and a "high profile in the Sudanese media and in public life".[807] He is also co-chair of a committee authorized to deal with human rights complaints, including on Darfur.[808] Another controversial person, who has been appointed as an adviser to Federal Affairs Minister, is Musa Hilal, a "clan leader widely considered to be a top commander of Janjaweed militias responsible for atrocities in Darfur".[809] The other person indicted by ICC, Ali Kushayb, the "Butcher of Darfur",[810] was released from Sudanese custody as there was no evidence against him.

In case a warrant of arrest will be issued on Al Bashir's name, states parties to the Rome Statute will have to cooperate to enforce the warrant. However, Bashir will enjoy the protection of states which condemn the Prosecutor's action.[811] The problem of Al Bashir's personal immunity[812] will also come forward, as Sudan is not a state party to the Court Statute.[813]

Furthermore, if Al Bashir is charged with genocide and is found guilty, considering his official position, Sudan might also be found responsible of genocide by ICJ. The strange thing is that Sudan would be responsible for genocide committed against its own people. Generally, if a person commits a crime under his official capacity, the state is also responsible but always towards another state, not

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[807] Prosecutor's Report, supra note 799 para 24.

[808] See Human Rights Watch Report 2008 at 167, available at http://hrw.org/wr2k8/pdfs/wr2k8_web.pdf.

[809] See International Federation for Human Rights, *FIDH and SOAT Condemn Appointment of Alleged Janjaweed Leader to Senior Government Post,* 21 January 2008, available at http://www.fidh.org/spip.php?article5120.

[810] See Wasil Ali, *Sudan confirms release of Darfur war crimes suspect indicted by ICC,* Sudan Tribune, 2 April 2008, available at http://www.sudantribune.com/spip.php?article26594.

[811] Syria, Iran, Eritrea, Tanzania, Yemen, China. See also, *Africa: Sudanese Ambassador Lauds Eritrea's Support in Sudanese Issue,* All Africa, 22 July 2008 or *Tanzania: Sudan Lauds Dar's Stand on ICC Move,* All Africa, 21 July 2008.

[812] See also Akande, D., *International Law Immunities and the International Criminal Court,* American Journal of International Law, Vol. 98, No. 3, 2004, at 407 or Cassese A., International Criminal Law, supra note 666 at 302-14.

[813] See also Marko Milanovic, *ICC Prosecutor charges President of Sudan with genocide, crimes against humanity and war crimes in Darfur,* ASIL Insight, Vol. 12, Issue 15, 28 July 2008. See also Antonio Cassese, *Why May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case,* in European Journal of International Law, Vol. 14, No.4, 2002, at 853-75.

towards its own people. For example, the case of Milosevic. As suggested in the literature, if he had been found guilty of genocide, Serbia and Montenegro should have also been found responsible for genocide committed against people from Bosnia and Herzegovina.[814]

In any case, if the United States did not succeed enough in getting the attention over the situation in Darfur, when their experts found that genocide was happening there[815], or the Commission of Inquiry which reported that there was no policy of genocide in Darfur, the Prosecutor of the ICC definitely draw the international attention. The African Union and the Arab League fearing that the action of the ICC Prosecutor might endanger the peace process in Sudan, asked the Security Council to make use of Article 16 and to put on hold the action of the ICC.[816] To date it seems that the Security Council[817] does not intend to make use of the controversial article[818], but rather to extend the mandate of UNAMID.[819]

The case of Darfur is more difficult as it represents a particular example of unwillingness at national level in taking the steps which are necessary to end impunity.[820] If the other three situations where ICC opened investigations may be considered as examples of states 'unable' to deal with war crimes and crimes against humanity, the case of Sudan is definitely one of 'unwillingness'. As the practice of the *ad hoc* tribunals showed,[821] the cooperation of the state involved is essential for a successful International Criminal Court. The role of the international community is vital to determine Sudan to cooperate. The Security Council must take all the necessary measures to impose its role as an international guardian of

[814] See A. Pellet supra note 754 at 19.
[815] See Totten and Marcusen, supra note 738. See also Johansen R.C., *The Impact of US Policy toward the International Criminal Court on the Prevention of Genocide, War Crimes and Crimes against Humanity,* Human Rights Quarterly, Vol.28, No. 2, 2006, at 301-31.
[816] See Barry Malone, *AU seeks to block charges against Sudan leader,* Reuters Africa, 21 July 2008. See also Argaw Ashine, *AU seeks to delay Al-Bashir indictment,* Daily Monitor, 23 July 2008.
[817] See also J.H. Marks, *Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council,* in Columbia Journal of Transnational Law, Vol. 42, Issue 2, 2004, at 445-90.
[818] See *Deferral of indictment for Sudan president not on UNSC August agenda,* Sudan Tribune, 5 August 2008.
[819] See Security Council Res. 1828/2008, S/RES/1828(2008), 31 July 2008.
[820] See also Hastrup, A., *Violating Darfur: The Emergent Truth of Categories,* Mediterranean Politics, Vol. 13, No. 2, 2008, at 195-212.
[821] See Informal Expert Paper: *Fact-finding and investigative functions of the office of the Prosecutor, including international cooperation,* ICC-OTP 2003.

peace.[822] It had an important role in referring the situation in Darfur to the ICC but it must not stop here. In case Sudan refuses to cooperate and to comply with its obligations as a UN Member, the Security Council must impose sanctions on it.[823]

[822] See also Samuel Totten, *The United Nations and Genocide,* in Society, Vol. 42, No.4, 2005, at 6-13.

[823] The language of the UN Charter prescribes for 'measures' not for 'sanctions'. However, as Prof Pellet suggests, (supra note 754 at 12) Irak, Afganistan and Lybia were 'punished' for their wrongful acts which may lead to a 'kind of criminal responsibility'. Prof. Pellet is the adept of the theory that the responsibility of a state is neither criminal, neither civil, it is simply international, and therefore 'sui generis'. See also Lipscomb R., *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan,* Columbia Law Review, Vol. 106, No. 1, 2006, at 182-212.

III. 3. The Situation in Central African Republic

III.3. 1. The conflict

Another situation which represents a challenge for the ICC is that in Central African Republic (CAR). After gaining independence from France in 1960, CAR became soon the field of battle for political and economical interests animated by ethnic animosities among the groups of Sara-Kaba and Yakoma.[824] After the ruling of military dictator General André Kolingba, who came in power in 1981 coup, Ange-Félix Patassé became President in free and democratic elections in 1993. However the fight for power continued along the years.

In 1996 rebels revolted against the government and a crisis burst because of the social and economical problems along with non-payment of salary arrears.[825] Part of the peace process, the Bangui Accords were signed in 1997 and African peacekeeping forces were deployed (MISAB).[826] The African mission was replaced not much later by UN peacekeeping forces (MINURCA).[827] After its mandate was ended in 2000 it was succeeded by the UN Peace-building Support Office (BONUCA) whose mission was to "support the Government's efforts to consolidate peace and national reconciliation, strengthen democratic institutions and facilitate the mobilization at the international level of political support and resources for national reconstruction and economic recovery in the country."[828]

In May 2001 an attempted coup led by the former dictator Kolingba took place against President Patassé who was reelected in 1999. Another failed coup was to take place in October 2002 lead by the formal General of the Army, Francois

[824] Jos Havermans, *Central African Republic: Ethnic Strife in Democratic Setting,* in Searching for Peace in Africa, European Centre for Conflict Prevention, 2000.
[825] For a background of the situation see also UN Mission, http://www.un.org/Depts/DPKO/Missions/minurcaB.htm.
[826] Inter-African Mission to Monitor the Implementation of the Bangui Agreements. See UNSC Res. 1155 (1998) and SC Press release SC/6485, 16 March 1998, available at http://www.un.org/news/Press/docs/1998/19980316.SC6485.html.
[827] United Nations Mission to Central African Republic, established by SC Res. 1159 (1998), 27 March 1998, http://daccessdds.un.org/doc/UNDOC/GEN/N98/083/19/PDF/N9808319.pdf?OpenElement.
[828] United Nations and Central African Republic, UN Peace-building Office in CAR, http://www.un.org/peace/africa/pdf/CAR.pdf.

Bozizé. The rebels finally triumphed in March 2003 when Bazizé took power and auto proclaimed himself President of the Republic.[829] The price was paid by the civilian population. In October the rebels were defeated by the troops of Patassé reinforced by Libyan fighters and Congolese mercenaries supported by Jean Pierre Bemba.[830] Some sources maintained that rebels at their turn got some support from Chad although to date there is no proof of direct or indirect Chadian implication.[831] The conflict took a lot of lives and lead to a large number of injured and displaced persons. War crimes of rape, pillaging and killing, torture and cruel treatment were committed on a large scale by both the loyal forces and Bozizé's troops against persons taking no active part in the hostilities.[832]

After almost three years, when Bozizé won the controversial elections in March 2005, there was no accountability at national level for the crimes committed during October 2002 – March 2003.[833] The situation did not improve along the years. BONUCA, which has as a mandate to assist the government of CAR in consolidating peace and reconciliation, is a political rather than a peacekeeping mission and it has no troops at its disposal.[834] Bangui is frequently attacked by highway bandits, criminal gangs and rebel movements. Civilian population is attacked by the Government assuming it supports rebels. UN Secretary General reported in 2007 on the situation in CAR: "the combination of acts of violence perpetrated by rebels, bandits and Government forces frequently leads to the displacement of the civilian communities, and civilians then seek refuge either in the bush and the fields or in neighboring Cameroon and Chad. As a result, the

[829] Fédération Internationale des Ligues des Droits de l'Homme (FIDH), *Quelle justice pour les victimes de crimes de guerre ?,* Rapport no. 382 Février 2004, at 6.
[830] FIDH, *When the elephants fight, the grass suffers,* Report no. 355, February 2003, at 11.
[831] Ibid at 15.
[832] Ibid at 20.
[833] FIDH, *Quelle réponse apportera la Cour Pénale Internationale ?,* Rapport no. 410, Février 2005.
[834] See Rick Neal and Joel Charny, *Central African Republic: Take Steps Now to Head Off Intractable Crisis,* Refugee International, 4 March 2007, http://www.refintl.org/content/article/detail/9962.

humanitarian situation in the country has significantly deteriorated, with nearly a quarter of the entire population of about 4 million said to be affected."[835]

Alarmed by the situation, the Security Council adopted Resolution 1778 (2007)[836] setting a multidimensional presence in Chad and Central African Republic to help create the security conditions conducive to a voluntary, secure and sustainable return of refugees and displaced persons. Operative paragraph 2 of the Resolution provides for a United Nations Mission in the Central African Republic and Chad (MINURCAT) to be included in the multidimensional presence for a period of one year and to protect the civilians. Apart from the UN Mission, the Security Council authorized a European Union Mission to take all the necessary measures in order to protect civilians. Both missions are not to address the domestic conflict in CAR.

III.3. 2. The ICC referral

On 22 December 2004 the Government of CAR referred the situation to the ICC[837] bringing to three the number of states which recognized their inability to deal with the most serious international crimes. Respecting the principle of complementarity, the Prosecutor analyzed the seriousness of the crimes as well as the accountability at the national level. According to the FIDH report in 2005, there were some trials in CAR but no one was convicted despite the fact that more than 150 persons were brought before the Criminal Court for Central Africa.[838]

Most of the accused persons found exile in the neighborhood countries and they were supposed to be tried *in abstentia*. Proceedings started against the former president Ange-Félix Patassé in December 2003 but they were stopped *sine die*. Patassé himself introduced a plaint against the current president Bozizé but no

[835] Report of the Secretary General on the situation in the Central African Republic and the activities of the United Nations Peacebuilding Support Office in the Central African Republic, S/2007/376, 22 June 2007, Para. 15.
[836] UNSC Res. 1778 (2007), S/RES/1778 (2007), 25 September 2007.
[837] See ICC Press release *Prosecutor receives referral concerning Central African Republic,* ICC-OTP-20050107-86-En, 7 January 2005, available at http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html.
[838] FIDH, supra note 833 at 26-36.

measure was taken because of his immunity. The same reason stood for not prosecuting the Vice President of DRC, Jean-Pierre Bemba. Proceedings started against people who helped Patassé in committing the crimes but there was no conviction.

Finally in December 2004 the Chamber of Accusation of Bangui decided that cases against Patassé, Miskine, Barril, Ndoubabe, the 'banyamulengues' of Jean-Pierre Bemba and others should be referred to the ICC. The decision was confirmed by the Cour de Cassation, the country highest judicial body, in April 2006.[839] The Court recognized the inability of the national judicial organs to deal with crimes committed during October 2002 - March 2003.[840] It was after this decision that the Prosecutor of the ICC opened the investigation in CAR.[841]

It seems like the situation is very complex since it took ICC more than two years from the state referral to the opening of the investigation. The decision of the Cour de Cassation has a historical importance because it is not a political organ, but the highest judicial body of a state which recognizes that the national authorities are unable to carry out the complex proceedings necessary to investigate and prosecute the alleged crimes. It is also important that it is not ICC which decides that a state is 'unwilling' or 'unable' to carry out investigations, fact that would make ICC look like an organ of control over the national jurisdictions. It may create a precedent for the other states to declare their inability through a decision of a national court, rather than a decision of the Government. The only danger that it creates is that the ICC Prosecutor may wait for a long time until such a court would declare the 'unwillingness' or 'inability' of the authorities to deal with the crimes, fact that will delay the process of justice.

One may wonder what would have been the consequences if the Cour de Cassation would have found that the national courts were willing and able to deal with the situation, considering that the Government of CAR had already referred

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[839] FIDH rapport no. 457, *Oubliées, stigmatisées : la double peine des victimes de crimes internationaux,* Octobre 2006 at 40.

[840] See the concrete reasons for the inability of the CAR judicial organs to deal with international crimes in FIDH report, ibid at 30-40.

[841] See ICC Press Release, *Prosecutor opens investigation in the Central African Republic,* ICC-OTP-PR-20070522-220_EN, 22 May 2007, available at http://www.icc-cpi.int/pressrelease_details&id=248&l=en.html.

the situation to the ICC. Which power would have been prevailed? The executive or the judicial power? What impact would have had this over ICC? Would the Prosecutor still have opened the investigation in CAR?

Until May 2008 the Prosecutor did not come up with any names of persons who might be responsible for the atrocities committed in CAR. The names which could be found in the decision of the Cour de Cassation are names of the officials of the former regime (e.g. Patassé) or helpers of these persons. However, international organizations gathered proof that people from the current administration of CAR (e.g. Bozizé) or the neighboring DRC (e.g. Bemba) might be responsible.[842] It would be very interesting to see if the Prosecutor would start a case against the current President, Francois Bozizé, considering that it was the Government of the CAR which referred the situation to the ICC. In any case, the Prosecutor's first target in CAR was Jean-Pierre Bemba Gombo, charged with four war crimes and two crimes against humanity.[843] The Court moved very fast. On 16 May 2008 the Prosecutor asked for a warrant of arrest on Bemba's name and a week after the Pre-Trial Chamber III issued the warrant which remained on seal only for one day. On 24 May the warrant was unsealed[844] and Bemba, who found exile in Portugal after he lost the 2006 DRC elections, got arrested in Belgium.[845]

III.3. 3. Crimes within the focus of the ICC

The focus of the Prosecutor seems to be the pattern of massive rapes and other acts of sexual violence that emerged following the failed coup attempt. A high number of victims of rape have been reported in a short period of time (600 victims in five months).[846] The Office of the Prosecutor received reports from international

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[842] See FIDH reports from 2003 supra note 830, 2005 supra note 833, and 2006 supra note 839.

[843] *The Prosecutor v. Jean-Pierre Bemba Gombo,* Warrant of arrest, ICC-01/05-01/08, 23 May 2008, available at http://www.icc-cpi.int/library/cases/ICC-01-05-01-08-1-FRA.pdf.

[844] *The Prosecutor v. Jean-Pierre Bemba Gombo,* Decision de lever les scellés sur le mandat d'arret contre M. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 24 May 2008, available at http://www.icc-cpi.int/library/cases/ICC-01-05-01-08-5-FRA.pdf.

[845] See Joe Bavier, "Bemba arrested for war crimes", The Independent, 26 May 2008, available at http://www.independent.co.uk/news/europe/bemba-arrested-for-war-crimes-834383.html.

[846] See ICC-OTP-BN-20070522-220-A_EN: *Background. Situation in the Central African Republic,* 22 May 2007.

organizations indicating that rape has been committed against civilians including old women, girls and men in aggravating circumstances like by a multiplicity of perpetrators or in front of other persons who usually were members of the victim's family.

ICC has the advantage of being established after the *ad hoc* tribunals and thus, the Rome Statute fills the gaps existing in the ICTY and ICTR Statutes. Unlike ICTY Statute which described rape only as a crime against humanity,[847] and ICTR which addressed rape also as a war crime,[848] the Rome Statute includes rape as both crime against humanity[849] and war crime, assimilated with a grave breach of the Geneva Conventions[850], and explicitly lays down a number of sexual violence crimes without precedent in international criminal law: sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization.[851]

Unlike the *ad hoc* tribunals which had to come up with a definition of rape because there was no such definition in their Statute, the ICC Elements of crimes provide a definition for this crime.[852] The ICC definition is a combination[853] of

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[847] Article 5 (g) of the ICTY Statute.
[848] Articles 3 (g) and 4 (e) of the ICTR Statute.
[849] Article 7 (1) (g) of the Rome Statute reads as follows: "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:… Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." Further, Para. 2 (f) describes what forced pregnancy means: "'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy". For further reading considering forced pregnancy, see Milan Markovic: *Vessels of Reproduction: Forced Pregnancy and the ICC,* Michigan State Journal of International Law, Vol. 16, 2007 at 439-458.
[850] Article 8 Para 2 (e) (vi) reads as follows: "For the purpose of this Statute, 'war crimes' means:…other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:… Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions."
[851] For a detailed characterization of each, see ICC Elements of crimes. See also A.S.J. Park, *'Other Inhuman Acts': Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone,* in Social and Legal Studies, Vol.15, Issue 3, 2006, at 315-37.
[852] "The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by

those that emerged in the ICTY and ICTR jurisprudence. As the elements of crimes are not obligatory because they only "assist the Court in the interpretation and application of the articles 6, 7 and 8"[854], it is to be seen if the Prosecutor is guided by these elements or rather by the jurisprudence of the tribunals.

The definition of rape emerged for the first time in the *Akayesu* case.[855] The judgment in the *Akayesu* made history as it was for the first time that an international tribunal addressed crimes involving sexual violence, and also gave an interpretation for the elements of the crime of genocide. *Akayesu* was condemned for rape even if he did not rape anyone himself but he "had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau communal and sexually violated."[856] He did nothing to prevent these crimes or to punish the perpetrators.[857] Even if rape was not specifically listed as an act of genocide in the ICTR Statute, it has been held that rape and sexual violence can constitute genocide in the same way as any other act, if the required intention is met.[858] Therefore, the Court ruled that rape and sexual violence committed against women of the Tutsi ethnic group with the intention of destroying the Tutsi Group as a whole, constituted genocide under the Genocide Convention's enumerated acts of torture and serious bodily or mental harm. The drafters of the Rome Statute adopted the same direction, including rape among acts of torture and serious bodily or mental harm, which therefore, may constitute the crime of genocide. A footnote to Article 6 (b) of the Elements of Crimes provides that the conduct of causing serious

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taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."

[853] For a critical remark see Catharine A. MacKinnon: *Defining Rape Internationally: A Comment on Akayesu,* Columbia Journal of Transnational Law, 44, 2005-2006, at 957-8.

[854] Article 9 Para 1 of the Rome Statute. For a comment on the nature of the Elements of Crimes and Rules of Evidence and Procedure, see Péter Kovács, *Erreurs ou metamorphoses autour de la personalité juridique et des sources dans le droit international? (A propos des tribunaux internationaux en nombre grandissant…)* in Le droit international au tournant du millénaire – l'approche hongroise, Osiris, Budapest, 2000, at 96-115.

[855] *The Prosecutor v. Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998. The Chamber held that rape is "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".

[856] Ibid Para 452.

[857] For a detailed analyze of the *Akayesu* Judgment, see Catharine A. MacKinnon, supra note 853.

[858] See Navi Pillay, ICC Judge, *The ICC and the Role of Women to Fight Impunity,* speech delivered at the first Marie Curie Top Summer School, Grotius Centre, The Hague, 4 July 2006.

bodily or mental harm to one or more person "may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment."[859]

The definition of rape from *Akayesu* case has been adopted by several trial chambers in the ICTR and ICTY but also adapted by the others. For example, in *Celebici* Judgment,[860] the ICTY Chamber found that rape can constitute torture as it satisfied the criteria set up by the dispositions of articles 2 and 3 of the ICTY Statute: (1) there must be an act of omission causing severe mental or physical pain or suffering, (2) the act must be performed for a specific purpose such as obtaining information or a confession, punishment, intimidation, or discrimination, and (3) the act or omission must be officially sanctioned by one in an official capacity."[861] While the Rome Statute adopted these criteria also, for torture as a war crime, when it comes to crimes against humanity, the drafters were less restrictive in the sense that there is no requirement of a purpose to obtain a confession from the victim or a third party, to punish the person or to intimidate or coerce the victim.[862] Ultimately, the ICC's definition should make it easier to convict rapists of torture.[863] The *Celebici* judgment was also important as it recognized that not only women may be the target of sexually humiliating acts, but also men.[864] The same conclusion may be drawn from the *Tadic* case which was the first trial at ICTY.[865] For the first time a person was accused of rape and sexual violence as crimes against humanity and war crimes. He was convicted for aiding and abetting crimes of sexual violence.

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[859] See ICC Elements of Crimes, article 6. See also Mark Ellis, *Breaking the Silence: Rape as an International Crime,* CASE W. RES. J. INT'L. L., vol. 38, 2006-2007, at 225-47.
[860] *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Judgment No. IT-96-21-T, Nov. 16 1998, also known as *Celebici* Judgment.
[861] Ibid Para. 494. See also Gabrielle Kirk McDonald, *Crimes of Sexual Violence: the experience of the International Criminal Tribunal,* Columbia Journal of Transnational Law, 39, 2000-2001, at 1-17.
[862] See ICC Elements of Crimes, Articles 7 (1) (f) and 8 (2) (a) (ii)-1.
[863] See Mark Ellis, *Breaking the Silence: Rape as an International Crime,* CASE W. RES. J. INT'L. L., vol. 38, 2006-2007, at 241.
[864] Celebici Judgment Para. 1066.
[865] *Prosecutor v. Tadic,* Case No. IT-94-I-T, Judgment, 7 May 1997.

In *Furundzija* case[866] it was adopted a more precise definition of rape.[867] The accused, who was a commander of a special military police unit, was charged with violations of the laws or customs of war for interrogating a woman while she was being raped by another officer. It also recognized that coercion may be directed not only towards the victim but also towards a third person. The problem of consent was specifically addressed in *Prosecutor v. Kunarac et al*,[868] where the Chamber stated that "sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim." The decision thus clarified the dispositions of Rule 96 that read as follows: "in case of sexual assault (i) no corroboration of the victim's testimony shall be required, (ii) consent shall not be allowed as a defence if the victim (a) has been subject to or threatened with or has reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear, (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible, (iv) prior sexual conduct of the victim shall not be admitted into evidence."[869]

The ICC brings a new element of rape as a crime against humanity or war crime, namely the incapacity of giving 'genuine consent'. Paragraph 2 of articles 7 (1) (g)-1, 8 (2) (b) (xxii)-1 and 8 (2) (e) (vi)-1 of the Elements of Crimes provides that: "the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent." A footnote follows this paragraph in all three cases providing further explications: "it is understood that a person may be incapable of

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[866] *Prosecutor v. Anto Furundzija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998.
[867] "(i) The sexual penetration, however slight: a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or b) of the mouth of the victim by the penis of the perpetrator, (ii) by coercion or force or threat of force against the victim or a third person."
[868] *Prosecutor v. Kunarac, Kovac and Vukovik*, Case No. IT-96-23-T, IT-96-23/1-T, 22 February 2001 and 12 June 2002.
[869] Rules of the Evidence and Procedure for the ICTY, R.96, UN.Doc. IT/32/REV.38, 11 February 1994.

giving genuine consent if affected by natural, induced or age-related incapacity."[870] Another explication is provided in footnotes 20, 55 and 67 which come with the elements of crime against humanity and war crime of enforced sterilization: "it is understood that 'genuine consent' does not include consent obtained through deception."

ICC Rule 70 is also a little bit different from ICTY Rule 96 regarding genuine consent[871]:

"In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

(a) Consent cannot be inferred by reason of any words or conduct of a 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;

(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

(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."

Another element of novelty that the Rome Statute brings is the one concerning 'gender'. For the first time in international criminal law sexual violence crimes can be prosecuted under the crime against humanity of persecution on the basis of gender.[872] Article 7 (3) provides for the definition of gender: "for the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above." The definition without a precedent

[870] See footnote 16, 51 and 63 of ICC Elements of Crimes.

[871] For a detailed analyze of genuine consent in international criminal law, see Wolfgang Schomburg and Ines Peterson: *Genuine Consent to Sexual Violence under International Criminal Law,* The American Journal of International Law, Vol. 101, No.1 (Jan. 2007), at 121-40.

[872] On this topic see Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime against Humanity of Gender-Based Persecution,* Duke Journal of Comparative and International Law, 49, 2006-2007 at 49-89.

in international law has received already some criticism based on four main grounds: "the perceived conflation of 'gender' and 'sex', the limitations of the reference to 'context of the society', the potential exclusion of sexual orientation from the definition of 'gender' and the sidelining of gender issues through the inclusion of a definition."[873]

It is to be seen how the Prosecutor of the ICC would interpret the term 'gender' in his future investigations in generally, and in Central African Republic, specifically, if such situation would arise. As I showed, there are some definitions of rape by now, emerged from the jurisprudence of the *ad hoc* tribunals. The Rome Statute tried to provide for a complex definition of rape[874] and in theory it also succeeded. As the first warrant of arrest was already issued against Bemba who seems to be responsible for sexual violence crimes committed in Central African Republic, the mystery will disappear. We will see what direction is to be followed by the ICC Prosecutor and Judges: the path the *ad hoc* tribunals already showed or a completely new way.

[873] Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, Harvard Human Rights Journal, Vol. 18, 2005 at 71.

[874] On the importance of incriminating rape internationally, see David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine,* Duke Journal of Comparative and International Law, Vol. 15, 2004-2005, at 219-57. See also Simeon P. Sungi, *Obligatio Erga Omnes of Rape as a Jus Cogens Norm: Examining the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for the Rwanda and the International Criminal Court,* European Journal of Law Reform, Vol. IX, No. 1, at 113-44.

III. 4. The Situation in Uganda

III.4. 1. The conflict and the Lord's Resistance Army

The first state to apply the principle of complementarity was Uganda when referred the situation concerning the crimes committed by Lord's Resistance Army (LRA) to the ICC. It has been more than twenty years since Uganda is hosting wide-scale violence generated from the Lord's Resistance Army's actions. Unstable political and social environment existed though, even before LRA came into being. British colonialism divided Uganda economically and militarily. The south developed because of the industry and crop production, while the north remained poor and undeveloped. People from the north, mainly from the Acholi population, either went to work in the south, either enrolled in the army.

By 1962, when Milton Obote became the first prime minister of an independent Uganda, people from north acknowledged their identity as born soldiers, as a nation chosen "to be the military backbone of the state".[875] Obote took advantage of this and made a custom from setting political disputes by using his military power. The army was later used against Obote by Idi Amin, commander of military forces, who came into power in 1971. The new ruler failed to make progress towards economic and political development of Uganda as he turned himself into a dictator and acted to exacerbate ethnic divisions within Ugandan population.[876] This was the reason the Ugandan National Liberation Army (UNLA) with Tanzanian support, overthrew Amin from power and elected Obote to lead Uganda.

But Obote government was not a popular one especially after the Operation Bonanza[877], when a lot of persons died, and in 1985 it was overthrown by Tito

[875] Rudy Doom, Koen Vlassenroot: *Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda,* African Affairs, Vol.98, No. 390 (Jan. 1999) at 8.

[876] See F.J. Ravenhill, *Military Rule in Uganda: The Politics of Survival,* African Studies Review, Vol. 17, No.1 (Apr. 1974) at 229-60.

[877] See Sabiiti Mutengesa, *From Pearl to Pariah: The Origin, Unfolding and Termination of State-Inspired Genocidal Persecution in Uganda, 1980-85,* published on 21 December 2006 on Social Science Research Council website, available at http://howgenocidesend.ssrc.org/Mutengesa/. See

Okello Lutwa who became president for a short period of time. In 1986 Yoweri Museveni and his National Resistance Army (NRA) established from 1981, captured Kampala and became the new ruler of Uganda.[878]

What was left from UNLA forces fled to Sudan to reorganize. Together with Obote and Amin supporters, they formed a new armed group called the Uganda People's Defence Army (UPDA). Soon an alliance was formed between UPDA and the Holy Spirit Mobile (HSM) Force, the latter being lead by Alice Auma Lakwena[879], "a self-styled prophetess who claimed to be a spiritual medium with the power to perform miracles".[880] The two forces were defeated by NRM in 1988 and the Gulu Peace Accord was signed with Museveni offering an amnesty to any rebel who stopped fighting.[881] Not all the rebels made peace though, and Joseph Kony, a relative of Alice Lakwena's, succeeded her and formed the Lord's Resistance Army.[882] With LRA lunching attacks on NRA, a new era of violence began.

Kony's mission seems to be to overthrow the government and to install the Ten Commandments in Uganda as he proclaims himself a messianic prophet.[883] His rebel group acts with violence committing serious human rights abuses against civilians in the region, including summary executions, torture and mutilation, recruitment of child soldiers, child sexual abuse, rape, forcible displacement, and looting and destruction of civilian property.[884] It is estimated that more than 20,000

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also Human Rights Watch, 1999 Report available at http://www.hrw.org/reports/1999/uganda/Uganweb-06.htm.

[878] For more information about the president, see the official website of State House, Republic of Uganda, http://www.statehouse.go.ug/president.php?category=The%20President.

[879] See Mohamed M. EL Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC,* International Criminal Law Review, 5, 2005 at 88-89 footnote 31.

[880] Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court,* The American Journal of International Law, Vol. 99, No.2 (Apr. 2005) at 406. For more details on Alice Lakwena see Doom and Vlassenroot, supra note 875 at 16-20.

[881] Doom and Vlassenroot, supra note 875 at 15.

[882] For more information on Joseph Kony, see ibid. at 20-30.

[883] See Kasaija Phillip Apuuli, *The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda,* Criminal Law Forum, (2004), 15 at 394.

[884] See International Criminal Court, Background information on the situation in Uganda.

children have been abducted and used as fighters or sex slaves, while around 2 million people have been internally displaced.[885]

International community reacted to the atrocities committed in Uganda but Museveni allowed only humanitarian aid on the ground that what was happening was an internal affair.[886] United Nations agencies as World Food Programme or the United Nations High Commission for Refugees (UNHCR) were allowed to intervene but they encountered major problems.[887] The Security Council did not intervene directly although adopted some resolutions recognizing the critical situation in Uganda.[888]

As an attempt to make peace, President Museveni, granted an amnesty in 2000[889] to all those who actually participated in combat, collaborated with the perpetrators, or committed any crime during the war or armed rebellion on the condition to stop fighting. The Amnesty was rejected though, by high-ranking LRA leaders who continued to commit atrocities. This made Museveni to call upon the International Criminal Court's jurisdiction in 2003. The situation complicated as the LRA announced they were ready to make peace. A new offer of amnesty was made while ICC issued warrants of arrest on the name of five LRA members. New challenges for international law came up. Should ICC drop the warrants of arrest and let peace triumph over justice? Should the Ugandan government drop the amnesty offer and let the justice to prevail? Is amnesty a legal instrument according to international law? The answers are taken into account next.

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[885] See Manisuli Ssenyonjo, *Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court,* Journal of Conflict and Security Law, 2005, Vol. 10, No. 3 at 407.

[886] Apuuli, supra note 883 at 397.

[887] See *World Food Programme Suspends Uganda Aid After driver Killed,* Environment News Service, 30 May 2007, http://www.ens-newswire.com/ens/may2007/2007-05-30-04.asp.

[888] See UNSC Resolution 1663 (2006), S/RES/1663 (2006), 24 March 2006 available at http://www.globalpolicy.org/security/issues/sudan/2006/0324transition.pdf and Res. 1653 (2006), S/RES/1653 (2006), 27 January 2006, available at http://www.globalpolicy.org/security/issues/uganda/2006/0127greatlakes.pdf or Res. 1812 (2008) available at http://www.reliefweb.int/rw/RWB.NSF/db900SID/MUMA-7E8AYS?OpenDocument.

[889] Amnesty Act 2000, available on Conciliation Resources website.

III.4. 2. The International Criminal Court steps in

In December 2003 President Museveni referred the situation concerning LRA to the ICC.[890] The first referral of the Court was a proof of confidence from a state-party and a chance for the Court to demonstrate its viability and effectiveness.[891] Uganda's state referral was soon followed by those of Democratic Republic of the Congo and Central African Republic. After analyzing the information and ensuring that the Rome Statute requirements were met, the Prosecutor of the ICC decided to open the investigation in Northern Uganda.[892] The Prosecutor considered as reasonable grounds to start an investigation "at least 2,200 killings, and 32,000 abductions recorded in over 850 attacks registered between July 2002 - June 2004, attacking and pillaging communities in Uganda and Southern Sudan, killing without reason thousands of men, women, boys and girls from different communities, destroying villages and camps, burning entire families, abducting thousands of persons, especially children, forcing boys to be killers and girls to be sexual slaves", etc.[893]

In October 2005, after previously the Pre-Trial Chamber issued warrants of arrest for five LRA leaders, the Prosecutor unsealed them, making public their names: Joseph Kony[894], Vincent Otti[895], Okot Odhiambo[896], Dominic Ongwen[897]

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[890] ICC Press release, "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC", ICC-20040129-44-En, 29 January 2004, http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html.
[891] Akhavan, supra note 880 at 404.
[892] ICC Press release "Prosecutor of the International Criminal Court opens an investigation into Northern Uganda", ICC-OTP-20040729-65-En, 29 July 2004, http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html.
[893] The Investigation in Northern Uganda, ICC OTP Press Conference 14 October 2005 available at http://www.icc-cpi.int/library/organs/otp/Uganda-_PPpresentation.pdf.
[894] Warrant of arrest for Joseph Kony, ICC-02/04-01/05, 27 September 2005, http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf.
[895] Warrant of arrest for Vincent Otti, ICC-02-04, 8 July 2005, http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-54_English.pdf.
[896] Warrant of arrest for Okot Odhiambo, ICC- 02-04, 8 July 2005, http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-56_English.pdf.
[897] Warrant of arrest for Dominic Ongwen, ICC-02-04, 8 July 2005, http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-57_English.pdf.

and Raska Lukwiya.[898] Joseph Kony, the leader, chairman and commander of the LRA is charged with 33 counts of crimes, among which 12 counts of crimes against humanity and 21 of war crimes. The alleged crimes include rape, murder, enslavement, sexual enslavement and forced enlisting of children.

According to the ICC Prosecutor,[899] Kony directs all LRA operations from his bases in the Sudan. He personally manages the criminal campaigns of the LRA, by ordering the movements of his forces and by dictating the types of military and civilian targets of the LRA attacks. He abducts children terrorizing them or using them as sex slaves.[900]

The second in command is Vincent Otti. Although there have been some rumors that Otti has been killed,[901] the warrant of arrest on his name is still active, as of May 2008. There are 11 counts of crimes against humanity and 21 counts for war crimes against him, crimes he committed when he personally leaded attacks on civilians in Northern Uganda.[902] The alleged crimes include inducing rape, murder, enslavement, sexual enslavement and forced enlisting of children.

Raska Lukwiya has been Army Commander of the LRA and was responsible for some of the worst attacks committed by LRA. The warrant of arrest on his name contained one charge of crimes against humanity and three counts for war crimes. He was reported dead and the warrant of arrest against him was rendered without effect following the Pre-Trial Chamber's decision to terminate the proceedings.[903]

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[898] Warrant of arrest for Raska Lukwija, ICC-02-04, 8 July 2005, http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-55_English.pdf.

[899] Statement by Luis Moreno Ocampo, Prosecutor of the ICC on Uganda Arrest Warrants 14 October 2005, http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051014_English.pdf.

[900] See Pham P.N., Vinck P., and Stover E., *The Lord's Resistance Army and Forced Conscription in Northern Uganda,* in Human Rights Quarterly, Vol. 30, No. 2, 2008, at 404 - 41.

[901] "Uganda's LRA confirms Otti death", BBC News, 23 January 2008, http://news.bbc.co.uk/2/hi/africa/7204278.stm or
"Kony dares Museveni on Vincent Otti death", Daily Monitor, 23 January 2008 at http://www.monitor.co.ug/artman/publish/news/kony_dares_Museveni_on_Vincent_Otti_death.shtml.

[902] Although the warrant of arrest indicates 33 charges, as a lot of information is redacted, I took as official the Prosecutor's statement from 14 October 2005. The same for the other three charged.

[903] Pre-Trial Chamber's decision to terminate the proceedings against Raska Lukwiya, ICC-02/14-01/05-248 of 11 July 2007.

Okot Odhiambo Deputy Army Commander in the LRA named for 3 counts of crimes against humanity and 7 counts of war crimes commanded the most violent of the four brigades of the LRA. Dominic Ongwen, Brigade Commander in the LRA was charged with 3 counts of crimes against humanity and 4 war crimes. He was reported killed on 2 October 2004 following an attack on an IDP camp.[904] However, as of August 2008 the warrant on arrest on his name is still active.[905]

None of the four persons wanted by the ICC is in custody.[906] They all remain at large hiding in the neighboring countries.[907] A number of UN peacekeeping troops were killed in February 2006 when tried to arrest one of the suspect who was believed to be in eastern Congo.[908] It is only the cooperation of the states that may lead to the surrendering of the suspects. This proves to be very difficult since Sudan, criticized for helping LRA, is not a state-party to the Rome Statute and does not recognize the jurisdiction of the Court. Uganda's offer of amnesty for the LRA members is also making things more difficult for the ICC who believes that once a trigger mechanism is pulled, is its job to seek for justice.[909]

III.4. 3. Peace v. Justice?

After more than a decade of conflict, the President of Uganda tried to put an end to violence in his country by passing the Amnesty Act in 2000. By "amnesty" the document understood "pardon, forgiveness, exemption or discharge from

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[904] Ocampo, supra note 899 at 6. See also "LRA brigadier killed in Teso", The New Vision, 6 October 2005, http://www.newvision.co.ug/PA/8/12/459381. See also Lucy Hannan, "Uganda's boy soldier turned rebel chief is a victim, not a criminal says his family", The Independent, 27 June 2007.

[905] See *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen,* ICC-02/04-01/05.

[906] See also Ssenyonjo M., *Trial Justice: the International Criminal Court and the Lord's Resistance Army,* in International History Review, Vol. 29, 2007, at 685 - 87.

[907] See also Rolandsen O., *The International Criminal Court and the Lord's Resistance Army,* in Journal of Peace Research, Vol. 44, No. 3, 2007, at 367.

[908] William A. Schabas, "First Prosecutions at the International Criminal Court", Human Rights Law Journal, Vol. 27, No.1-4, 2006 at 30.

[909] See Peter Eichstaedt, "ICC Chief Prosecutor Talks Tough", IWPR, 28 April 2008, http://www.iwpr.net/?p=acr&s=f&o=344364&apc_state=henh or Francis Kwera "International court to keep chasing Uganda's rebels", Reuters, 21 February 2008, http://www.reuters.com/article/featuredCrisis/idUSL21679232?sp=true.

criminal prosecution or any other form of punishment" for "any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda" on the condition to stop fighting.

The document offering a blanket amnesty was supposed to be in force for six months. However it has constantly been renewed. By September 2003, 9717 rebels among whom 3824 former LRA members, had surrendered and the number grew by June 2005 to 15000.[910] Despite these numbers, peace was not achieved. In December 2003 as mentioned above, the Ugandan President referred the situation to the ICC. In his referral Museveni has indicated his intention to amend the Amnesty Act so as to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda are brought to justice.

The Act was amended in April 2006 after a fervent discussion in the Ugandan parliament.[911] However, only one month later, President Museveni guaranteed Kony safety if he would renounce rebellion[912] and Kony promptly reacted saying that he also wanted peace.[913] Furthermore, he accepted the Government's amnesty offer in July 2006.[914] Peace talks started in the southern Sudanese town of Juba under Sudanese mediation[915] and a Cessation of Hostilities Agreement was signed in August. However, disagreement over ceasefire led to delay in reaching a peace agreement.[916] After almost a year, a Pact on Accountability and Reconciliation was signed between LRA and the Ugandan

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910 Ssenyonjo, supra note 885 at 421 footnotes 126-128.

911 See "Kony does not deserve amnesty", 17 April 2006, The New Vision, http://www.newvision.co.ug/D/8/14/493394 or "Uganda's rebel leader Kony ineligible for amnesty: official", 20 April 2006 at http://news.xinhuanet.com/english/2006-04/20/content_4453095.htm.

912 See Henry Mukasa, "Museveni gives Joseph Kony final peace offer", 16 May 2006, The New Vision, http://www.newvision.co.ug/D/8/12/498862.

913 See "Ugandan Rebel wants Peace with Government", 25 May 2006, Reuters, at http://www.washingtonpost.com/wp-dyn/content/article/2006/05/24/AR2006052402446.html.

914 "Ugandan rebel chief backs amnesty", 9 July 2006, BBC News, http://news.bbc.co.uk/2/hi/africa/5162556.stm.

915 See Michael Otim and Marieke Wierda, "Justice at Juba: International Obligations and Local Demands in Northern Uganda", in Nicholas Waddell and Phil Clark (Eds.): *Courting Conflict? Justice, Peace and the ICC in Africa,* Royal African Society, March 2008 at 21-28.

916 "Rescue bid for Uganda rebel talks", 10 August 2006, BBC News, http://news.bbc.co.uk/2/hi/africa/4778963.stm.

Government. The Pact recommends alternative traditional justice to the ICC prosecution, seriously challenging article 17 of the Rome Statute concerning the complementarity principle, as this might be interpreted as "shielding" the four LRA leaders from prosecution.[917]

Consequently, Museveni asked ICC to review its warrants of arrest for the four LRA members[918] as Kony menaced to continue peace talks only if ICC drops charges.[919] In response, the ICC Prosecutor insisted that he had overwhelming evidence against the four leaders accused of war crimes and crimes against humanity, that it was impossible for the Court to drop the charges.[920] The conflict of interests between peace and justice made the situation very tensioned. It was only in February 2008 that an Annex to the Agreement on Accountability and Reconciliation was signed, setting out a framework for implementing the Agreement. A couple of days later a new Ceasefire Agreement was signed in Juba.[921] The act stipulated that a Final Peace Agreement would be concluded by the end of February. However, to May 2008 no peace agreement was reached as Kony needed more clarifications on "how Ugandan government planned to use its courts and traditional reconciliation rituals to counter the ICC arrest warrants".[922] It seems that Kony himself realizes that justice and peace do not go always hand in hand.

Amnesty is no longer the price for transition from repression to democracy.[923] Once the ad-hoc tribunals were established, a new direction was created in international law and that was prosecution.[924] Blanket amnesty is not

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[917] Henry Mukasa, "LRA rebels may escape ICC prosecution", 30 June 2007, The Sunday Vision, http://www.sundayvision.co.ug/detail.php?mainNewsCategoryId=7&newsCategoryId=123&newsId=573453.

[918] "Uganda: Government to seek review of ICC indictments against LRA leaders", 21 June 2007, IRIN, http://www.irinnews.org/Report.aspx?ReportId=72861.

[919] See Samuel O. Egadu, Caesar Mukasa, "LRA won't free children in captivity", 29 June 2007, The Monitor, http://www.monitor.co.ug/news/news062914.php.

[920] Felix Osike, "Kony must face trial-ICC", 12 July 2007, The New Vision, http://www.newvision.co.ug/D/8/13/575670.

[921] Isaac Vuni, "Uganda, rebel LRA signs permanent ceasefire agreement in Juba", 24 February 2008, Sudan Tribune, http://www.sudantribune.com/spip.php?article26110.

[922] "Negotiator quits as Uganda rebel talks falter", 10 April 2008, Reuters, http://www.reuters.com/article/worldNews/idUSL1009315920080410.

[923] See John Dugard, "Dealing with Crimes of a Past Regime. Is Amnesty still an Option?", Leiden Journal of International Law, 12, 1999 at 1001.

[924] See Carsten Stahn, "United Nations peace-building, amnesties and alternative forms of justice: A change in practice?", IRRC, March 2002, Vol. 84, No. 845, at 191-205.

accepted in international law.[925] Rome Statute does not foresee amnesty as a defence to prosecution. The jurisprudence of the ICTY clearly pointed out that there is no place for amnesty when we are dealing with crimes like torture, for example.[926] The Special Court for Sierra Leone also rendered a very important decision. On 13 March 2004 the Appeals Chamber of the SCSL ruled that amnesties offered to persons implicated in the civil war do not bar the prosecution of international crimes before international courts.[927]

This was an interesting decision since granting amnesty is an act of sovereignty.[928] It appears it is a conflict between national and international justice. If national law might allow amnesty when it comes to genocide, war crimes or crimes against humanity, it is absolutely sure that international law prohibits amnesty for these crimes.[929] Bearing in mind that ICC is based on the principle of complementarity and not of primacy, the question that arises is who is going to be stronger? The sovereignity of the state or its international obligation to prosecute? On the other hand, the principle of complementarity is based itself on the will of the state as it allows the national state to act first and only if it does not act or act inconsistently with the Rome Statute, the Court may proceed. As the Rome Statute does not allow amnesty as a defence to prosecution, any state-party which would grant amnesty for international crimes would be qualified automatically as unwilling or unable to prosecute. As Uganda prepares an amnesty deal, it risks therefore to not compelling with its international obligations. Uganda might argue though, that traditional justice proposed in the Pact on Accountability and Reconciliation constitutes a genuine investigation. The ICC Prosecutor, at his turn

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[925] See Yasmin Naqvi, "Amnesty for war crimes: Defining the limits of international recognition", IRRC, September 2003, Vol. 85, No. 851, at 583-625.

[926] *Prosecutor v. Furundzija,* Case No. IT-95-17/1-T (10 December 1998) Para. 155.

[927] See Simon M. Meisenberg, "Legality of amnesties in international humanitarian law. The Lomé Amnesty Decision of the Special Court for Sierra Leone", IRRC December, 2004 Vol. 86, No. 856, at 837-51.

[928] See Jessica Gavron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court", ICQL, Vol. 51, January 2002 at 94.

[929] See Office of the United Nations High Commissioner for Human Rights, Options for Accountability and Reconciliation in Uganda, February 2007.

might interpret article 17 (2) of the Rome Statute[930] as requiring criminal proceedings.[931]

While blanket amnesty is not recognized by international law, the conditional amnesty may be accepted. Usually, this kind of amnesty is the result of an investigation realized by a Truth and Reconciliation Commission[932] whose role is to determine people to tell the truth without fearing penal repression.[933] The key actors are the victims who have to forgive those who committed the crimes. As stressed in the doctrine, individual reconciliation is more difficult to achieve than national or political reconciliation.[934] The best known Truth and Reconciliation Commissions (TRC) are probably those of Chile, Argentina, South Africa, El Salvador or Guatemala.[935] But Truth and Reconciliation Commissions are very different from ICC. While the primary purpose of a truth commission is to find what happened, that of ICC is to "put an end to impunity".[936] However, in case Uganda would change its blanket amnesty with a conditional one offered at the end of a possible TRC's mandate, there might be a chance that it would not be qualified as unwilling or unable to prosecute.

III.4. 4. Possible solutions

In any case, I believe Uganda deserves a chance to deal with its own situation. Weather the measures which will be taken according to the

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[930] Subsection (2) of Article 17 suggests that the standard for determining that an investigation is not genuine is whether the proceedings are "inconsistent with an intent to bring the person concerned to justice".

[931] See Michael Scharf, *From the xFiles: An Essay on Trading Justice for Peace*, at 373.

[932] See Yasmin Sooka, *Dealing with the past and transitional justice: building peace through accountability*, IRRC, Vol. 88, No. 862, June 2006 at 311-325.

[933] See Eszter Kirs, "Contours of the mandate of truth commissions", MJIL, Vol. 4 (2007), No. 1 at 107-112.

[934] Laura M. Olson, "Provoking the dragon on the patio. Matters of transitional justice: penal repression vs. amnesties", IRRC, Vol. 88, No. 862, June 2006, at 277.

[935] See Richard J. Goldstone and Nicole Fritz, "'In the Interest of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers", LJIL, 13, 2000 at 664 or Jessica Gavron supra note 928 at 96-98.

[936] On the differences between TRC and ICC, see Declan Roche, "Truth Commission, Amnesties and the International Criminal Court", Brit. J. Criminol. (2005) 45, at 565-81.

Accountability and Reconciliation Act as well as in its Annexure, are the most appropriate or not, remains a question of debate.

As I argued when I analyzed the principle of complementarity, it has two aspects which must be taken into account: the positive and the negative one. Article 14 of the Rome Statute provides only for the positive aspect of this principle, by foreseeing the possibility of a state to refer its situation to the ICC. There is nowhere in the Rome Statute a disposition concerning the negative aspect of the principle of complementarity, meaning the option of the same state to withdraw its referral as the conditions under which referred its situation to the ICC have changed. I strongly believe that such a disposition should exist. In the Rome Statute, complementarity means that ICC complements the national courts but national courts do not complement ICC.

If a state is not able to deal with a situation, it may refer it to the ICC. If afterwards, the situation has changed, the state should have the right to take it back and deal with it. After all, the principle of complementarity is based on the will of the state. Therefore, I believe that Uganda should have the right to take its situation back from the ICC and deal with the perpetrators of the crimes committed there. If Uganda will not come with the proper mechanisms and the ones responsible for the heinous crimes will go unpunished, there will always be the possibility for the Prosecutor to consider Uganda as "unable" or "unwilling" to prosecute.

As it was suggested in the doctrine[937], problems could arise if members of the government were under ICC arrest warrants but there is no such worry as the situation stands. Uganda should be let to do its justice but according to international standards. After ascertaining this fact, another problem arises: how should the situation be referred back to Uganda if there is no disposition in the Rome Statute concerning the negative aspect of the principle of complementarity? One of the articles which may be used as a tool to do that is the much discussed article 16. The Security Council may ask the ICC Prosecutor to stop the proceedings for one year. Thus, Uganda would have a chance to prove that it is willing and able to deal with

[937] Schabas, supra note 908 at 31.

its situation. A year should be enough for Uganda to prove that its mechanisms are working and perpetrators are being held accountable. The term may be renewed.

Making use of article 16 is not one of the preferred solutions, though. It involves the Security Council which has to act under Chapter VII and this might not be easy. International organisations already expressed their concerned[938] that it would represent a political interference with the independence of the ICC prosecutor.

Another disposition which might be used is that of article 19 (2).[939] This article would allow Uganda to challenge the admissibility of the case by the ICC on the ground that it is investigating or prosecuting the case. Usually a state may challenge the admissibility of a case only once and prior to or at the commencement of the trial. Paragraph 4 of article 19 provides though, for the possibility that in exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Uganda could challenge therefore, the admissibility of its situation before ICC, at a late stage of the proceedings, considering its exceptional circumstances. The Court would admit the request and Uganda would go on with its own proceedings. If later on, the Ugandan justice system would prove to be unable to conduct proceeding or the Ugandan authorities to be unwilling to punish the perpetrators of the international crimes, the Prosecutor of the ICC could start a new investigation, this time *proprio motu.*

As suggested above, weather the mechanisms described by the Accountability and Reconciliation Act as well as its Annexure, are the most appropriate to bring to justice the perpetrators and make peace, remains a question of debate. The Pact between the Government of Uganda and LRA[940] signed at 29 June 2007 provides for the establishment of formal and non formal institutions to

[938] Amnesty International, Letter to Security Council, 1 April 2008, AI Index: AFR 59/003/2008.
[939] Article 19 (2) reads as follows: "Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:….. a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted….".
[940] For the text of the Agreement see Amnesty International: "Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short of a Comprehensive Plan to End Impunity", March 2008, AI Index AFR 59/001/2008.

ensure justice and reconciliation with respect to the conflict. A central part of the framework for accountability and reconciliation will be occupied by traditional justice mechanisms such as *Culo Kwor, Mato Oput, Kayo Cuk, Ailuc* and *Tonu ci Koka* and others.[941] Further, the document foresees that formal criminal and civil justice measures will be applied to any individual who is alleged to have committed serious crimes during the conflict. Alternative justice mechanisms are also taken into account by including traditional justice processes, alternative sentences, reparations and any other formal institutions or mechanisms. An important role in the implementation of the Agreement will be fulfilled by the Uganda Human Rights Commission and the Uganda Amnesty Commission. Further, truth-seeking and truth-telling processes and mechanism will be established.

Details concerning the implementation of the Accountability and Reconciliation Pact were put down in the Annexure signed on 19 February 2008. It provides for the establishment of a body to be conferred with all the necessary powers and immunities, whose functions shall include:

"(a) to consider and analyze any relevant matters including the history of the conflict;

(b) to inquire into the manifestations of the conflict;

(c) to inquire into human rights violations committed during the conflict, giving particular attention to the experiences of women and children;

(d) to hold hearings and sessions in public and private;

(e) to make provision for witness protection, especially for children and women;

(f) to make special provision for cases involving gender based violence;

(g) to promote truth-telling in communities and in this respect to liaise with any traditional or other community reconciliation interlocutors;

(h) to promote and encourage the preservation of the memory of the events and victims of the conflict through memorials, archives, commemorations and other forms of preservation;

[941] For the definition of each, see the Agreement at "Definitions" (in the above document at 28).

(i) to gather and analyze information on those who have disappeared during the conflict;

(j) to make recommendations for the most appropriate modalities for implementing a regime of reparations, taking into account the principles set out in the principal agreement;

(k) to make recommendations for preventing any future outbreak of conflict;

(l) to publish its findings as a public document;

(m) to undertake any other functions relevant to the principles set out in this agreement."

Apart from this body, the Annexure provides for the establishment of a special division of the High Court of Uganda to try individuals who are alleged to have committed serious crimes during the conflict. A special unit for carrying out investigations and prosecutions will be set up to focus on individuals alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or having committed grave breaches of the Geneva Conventions. As specified also in the Agreement, traditional justice mechanisms will have a very important role in the process of reconciliation. Communal dispute settlement institutions such as family and clan courts will also be established.

However it is disputable the extent to which traditional justice mechanisms would be effective. Usually they rely on apology, negotiation, compensation and forgiveness but it seems they lost their popularity among people and some argue that they could not handle the LRA's massive crimes.[942] The resolutions guiding traditional dispute mechanisms lack provisions concerning crimes that LRA commit mostly: rape, mutilation, torture. Even the Ugandan criminal code does not contain dispositions concerning all the international crimes prescribed by the Rome Statute. This is why Ugandan courts have no experience in dealing with war crimes and crimes against humanity. The rules of these traditional mechanisms are often supporting another goal than making justice. For example, a rule of Acholi *mato*

[942] See Scott Worden, "The Justice Dilemma in Uganda", USIPeace Briefing, February 2008 at 11.

oput[943] is that "once the case has been addressed through the traditional process, the matter is put to rest and it is forbidden to speak of it again."[944]

The Agreement also provides for truth-telling mechanisms, but rules like the above would be contradictory to the role of a Truth Commission which usually ends by perpetrators testifying with respect to the crimes committed. Other concerns were also raised by international organizations. Amnesty International for example, criticized some provisions of the two documents signed by the Ugandan Government and LRA as they "seek to avoid Uganda's legal obligation to arrest and surrender the LRA leaders to the ICC".[945] In the same time, death penalty continues to exist in the Ugandan criminal system, fact that represents a major concern. According to the organization, the existing national courts should try the perpetrators, not a new created division of the High Court which "may have little impact in addressing the lack of access to justice in Northern Uganda". Also, the documents leave some gaps about the relationship between the special division, traditional mechanisms and other mechanisms. This might create a resemblance with the Gacaca system in Rwanda, which unfortunately were not too successful.[946]

For all these reasons, it seems like the Ugandan proposal for making peace does not really correspond to international standards of justice. New agreements should be concluded to provide for better measures to put an end to impunity. Uganda should be given a chance to deal with its own situation, but in a way according to international standards.[947] The Ugandan authorities should arrest and punish the LRA leaders and other perpetrators of war crimes or crimes against humanity, and grant conditional amnesty for the ones responsible of less grave crimes. If it fails to do that, the Prosecutor of the ICC should make use of his *proprio motu* powers and restart the investigation.

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[943] According to the definition in the agreement (Amnesty international, supra note 940 at 28), *mato oput* "refers to the traditional rituals performed by the Acholi to reconcile parties formerly in conflict, after full accountability."

[944] Amnesty international, supra note 940 at 12.

[945] Ibid at 6.

[946] See Eszter Kirs, "Introduction and critical remarks regarding the *gacaca* system in Rwanda", MJIL, Vol. 5 (2008), No.1 at 50-56.

[947] See also Branch A., *International Justice, Local Injustice – The International Criminal Court in Northern Uganda,* Dissent, 51, (3), 2004 at 22-26.

Conclusions

The International Criminal Court has a difficult task in proving it is an independent, impartial court and not a politically manipulated institution. This task is even more difficult as ICC is a creation of both justice and politics. It was the will of states and the need for criminal justice that contributed to the establishment of the first permanent international criminal court. ICC is somewhere in the middle balancing the principle of legality and the political reality.

Currently 108 states ratified the Rome Statute.[948] The number will be larger once ICC has established credibility among the international community. As it has been suggested, ICC success depends "on the breadth of ratifications outside Europe."[949] Furthermore, the International Criminal Court is weakened without the participation of the three permanent members of the SC (US, China and Russia)[950] or major countries as India and Pakistan.[951] The Court would be much stronger with the support of these countries and staff with the stature of Justice Jackson, for example.[952] The ratification of Japan[953] may be considered a major success for the ICC, though.

As the interests of states and the academic goals do not always overlap[954], trying to please the great powers led to some problematical articles in the Rome Statute. For example, including the crime of aggression among the crimes over which ICC has jurisdiction, but not defining it, lead to a crime without punishment. In the article 12, concerning the preconditions to the exercise of jurisdiction, there is a lack of balance. As shown by Prof. Meron, "the treaty lets off tyrants of non-party states, who kill their own people on their own territory" which "might make

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[948] As the situation in August 2008, after 10 years from the signature of the Rome Statute and 6 years since its entry into force.
[949] Theodor Meron, *The Humanization of International Law,* Martinus Nijhoff Publishers, Leiden, 2006 at 156.
[950] Russia signed the Rome Statute on 13 September 2000 but has not ratified yet the Statute.
[951] Meron, supra note 949 at 156-157.
[952] Kaul, Hans-Peter. *The International Criminal Court: Current Challenges and Perspectives.* Washington University Global Studies Law Review, Vol. 6, 2007 at 582.
[953] Japan formally deposited its instrument of accession to the Statute on 17 July 2007.
[954] Péter Kovács, *Nemzetközi Jog,* Budapest, Osiris Kiadó, 2006, at 751, 1183-84.

the Court ineffective in dealing with rogue regimes that choose not to be part of the Rome Statute, with the exception when Security Council acts under Chapter VII".[955] The situation in Darfur, the Sudan, shows unfortunately that the Security Council's acting under Chapter VII is not enough without state's cooperation. The situation is therefore very complicated when it comes for states non-parties to the Rome Statute. The need for criminal justice confronts with the most important concept in international law: sovereignty of state.

Article 16 concerning the deferral of investigation or prosecution, was also seen as a trap in the Rome Statute, as well as all the other articles where the SC is involved. The ICC – SC relation is a very difficult issue. As Judge Politi said[956], sometimes the signals from the SC are positive, sometimes are mixed. The case of Sudan is a good example of cooperation between the Court and the SC. The case of Uganda, where the SC may consider blocking the ICC investigation for one year, based on article 16, is not the best example of cooperation, especially from the Court's point of view. Besides, this would imply a kind of ICC subordination to the SC, as the Court could not go on with the proceedings until the SC would allow that.

Another delicate aspect of this relation arises when considering the crime of aggression. There can be no crime of aggression, if there is no act of aggression and the organ to determine that an act of aggression occurred is the Security Council. In other words, if the SC does not determine that an act of aggression occurred, the Prosecutor of the ICC can not go on with the investigation. The fear that exists is that politics might triumph over justice. Unfortunately, you can not separate politics of justice, especially when it comes for the crime of aggression. If the SC would not have an important role in this regard in the Rome Statute, the ICC would probably not exist.

As the first permanent international criminal court, ICC confronts with a lot of difficulties of different nature. First, and the most difficult task, is to transform

[955] Theodor Meron, supra note 949 at 155.

[956] With the occasion of the conference "Fighting Impunity in a Fragmented World – New Challenges for the International Criminal Court", European University Institute, Florence, 23-24 May 2008.

an idea into a reality. As stressed above, more states are probably waiting to see how ICC works in practice before signing and ratifying the Rome Statute. It has to gain the credibility of the international community, the trust of the states, in other words, it has to really work, “to put an end to impunity”.

Then there are difficulties of practical and technical nature. As Judge Kaul pointed out, on the 1st of July 2002, the first five members of the ICC staff entered into an empty building aiming to build-up a Court from a scratch to a one hundred percent, fully functioning institution[957]. By 9 October 2007 the Court’s staff comprised 485 persons from 80 states[958] and the number is in a continuous growing. It is also difficult to build-up a team of the best professionals who come from both common-law and civil-law systems. The Rome Statute is very special in this regard being a mixture of these two large families of law.[959]

But as ICC Deputy Prosecutor Fatou Bensouda said[960], the real difficulties they meet are not in the courtroom but outside of it. They are a team of the best practitioners and academics; they are doing very well in the courtroom. The challenge is outside. All the four countries they are investigating in are involved in armed conflict. The ICC Prosecutor faces logistical and technical problems without precedent. Besides that, every situation presents a different legal challenge for the Court. The focus in the Democratic Republic of the Congo is on child soldiers while the one in Central African Republic is on sexual crimes. Uganda is special considering the conflict between peace and justice, while Darfur, the Sudan is challenging as it concerns a state non-party to the Rome Statute, and the first indictment against a President in office.

[957] Judge Kaul, supra note 952 at 575-6.

[958] ICC, Assembly of States Parties, 6th Session, New York, 30 Nov-14 December 2007, ICC-ASP/6/18, Report on the activities of the Court, at 1, para.2, 18 October 2007.

[959] For an analysis of the civil-law and common-law elements in both the Rome Statute and ICTY’s Statute, see Victor Ponta, Daniela Coman, *Curtea Penala Internationala. Consacrarea juridică a statutului primei instanțe penale permanente din istoria justiției internaționale*. Lumina Lex, Bucureşti, 2004 at 96-130.

[960] With the occasion of the conference “Fighting Impunity in a Fragmented World – New Challenges for the International Criminal Court”, European University Institute, Florence, 23-24 May 2008 – concluding remarks.

Another problem of the ICC is that when it comes for implementation, it totally depends on states' cooperation. They issued twelve warrants of arrest but only four of them were carried out. The rest depends on the states' willingness and ability to execute them. ICC has no police of its own. Unlike the case of ICTY where NATO and coalition forces carried out almost every warrant of arrest and ICTR where the neighbouring countries were of a great help, ICC depends on the states parties to the Rome Statute and the members in the SC to cooperate in implementing its decisions. As it was said, "ICC can be only as strong as the states parties make it".[961]

Before characterizing ICC as a major success for the international legal order, there are more questions which need to be answered. How come all the situations ICC is dealing with, are all in Africa? Why not United States? Why not Iraq? Why not Afghanistan? How come the first trial of the ICC is build-up on the issue of child soldiers concerning crimes that does not involve any killings? How come aggression is among the crimes within the jurisdiction of the ICC, also there is no definition yet? Why not the same solution for terrorism? Is ICC a politically manipulated organ?

At first sight it might be at least curious that the ICC had opened investigations only in four situations and all of them are in Africa. The number of communications ICC is getting is very high and continuously increasing. For example, in the first year of activity, between July 2002 and 8 July 2003, ICC received 473 communications from all over the world.[962] By 1 February 2006 the number of communications coming from 103 countries increased at 1,732. Among them 80% were found to be manifestly outside jurisdiction after initial review while 10 situations have been subjected to intensive analysis. Of these three were proceeded to investigation, two were dismissed and five are still on going.[963] The

[961] Judge Kaul, supra note 952 at 580.
[962] See Communications received by the Prosecutor since July 2002, posted on 24 July 2003, available at http://www.icc-cpi.int/library/press/mediaalert/160703press_conf_presentation.pdf.
[963] Update on communications received by the office of the Prosecutor of the ICC, 10 February 2006, available at http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf.

complaints reached the number 2,889 by October 2007.[964] The limited number of investigations is due to the temporal limitation, as ICC has jurisdiction over the crimes committed only after 1 July 2002, as well as to the other limitations set in articles 5 and 12 concerning the gravity of crimes and the nationality of the perpetrators or the place the crimes were committed.

The situations in Africa draw the attention of the Prosecutor, not only by the gravity of the crimes, but also by the large number of victims. All these situations involve thousands of wilful killings, intentional and large-scale sexual violence and abductions and more than 5 million internally displaced person.[965] In contrast with these large numbers of victims, the situation in Iraq seemed to pale, as the Prosecutor concluded that the crimes which would fall under the ICC's jurisdiction would total less than 20 persons.[966] The small number of crimes committed in Iraq by nationals of states parties to the Rome Statute did not fulfil the general gravity requirement under article 53(1)(b). While "sharing regret over the loss of life caused by the war and its aftermath", the Prosecutor pointed out that ICC has no jurisdiction over the situation in Iraq as it "is not a State Party to the Rome Statute" and "has not lodged a declaration of acceptance under article 12(3), thereby accepting the jurisdiction of the Court".[967] Furthermore, I would add that the SC did not refer the situation in Iraq to the ICC acting under Chapter VII of the UN Charter. The measure it took was to authorize a multinational force to take the measures to restore security in Iraq.[968]

The sensitive issue in Iraq is the legality of the armed conflict. Was the US and the UK invasion of Iraq aggression or not? If we consider that when the invasion took place, there was no SC authorization to use force and there was no collective self-defence, we may argue that according to international law, it was an act of aggression. The fact that the SC authorized a multinational force afterwards is not a contra-argument, as it would not be for the first time when the SC

[964] ICC Report, supra note 958 Para. 35.
[965] OTP, Letter to senders concerning the situation in Iraq, 9 February 2006, at 9, available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.
[966] Ibid at 8.
[967] Ibid at 1, 3.
[968] SC Res. 1511/2003, 16 October 2003, operative paragraph 13, available at http://daccessdds.un.org/doc/UNDOC/GEN/N03/563/91/PDF/N0356391.pdf?OpenElement.

authorized states to resort to force after a state had engaged in acts of aggression against another state. As pointed out in the chapter concerning the crime of aggression, in 1950 the SC authorized member states to assist Korea "to rebuff by force the aggression of North Korea" and in 1990 the force was authorized "to repel the Iraqi aggression against Kuwait". [969] As the ICC has no jurisdiction over the crime of aggression yet, the Prosecutor pointed out that he has no mandate to address the arguments on the legality of the use of force or the crime of aggression. ICC's job is only "to examine the conduct during the conflict, but not weather the decision to engage in armed conflict was legal".[970]

That decision should be made by the SC, but as the US and the UK are permanent members, this would never happen, and therefore I answered to the other question concerning why acts committed by US citizens are not investigated by the ICC. It would be very interesting to see what will happen after the crime of aggression would be defined at the Review Conference in 2009 or 2010, if the acts of the US and the UK could be characterized as acts of aggression. Even so, ICC could exercise its jurisdiction over the crime of aggression starting from that point, according to the non-retroactivity principle, so the issue of Iraq would not be on the ICC's table.

Unlike Iraq which is not a state party to the Rome Statute, Venezuela ratified the Act on 7 June 2000. The ICC Prosecutor received twelve communications concerning the crimes that took place in Venezuela. After analyzing the situation, the Prosecutor concluded that the criteria for opening an investigation have not been met. Most of the crimes were committed outside the temporal jurisdiction of the ICC and the few crimes committed after 1st of July 2002 did not fit in any of the category of crimes within article 5 of the Rome Statute.[971]

Another sensitive issue which seems to draw the attention of the ICC is the one concerning the situation in Afghanistan. After the 9/11 events, US declared the

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[969] A. Cassese, *International Law,* 2nd Ed., Oxford University Press, 2005 at 346.
[970] Letter to senders from Iraq, supra note 965 at 4.
[971] See Letter of the Prosecutor to senders concerning the situation in Venezuela, 9 February 2006, available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf.

"war on terror", especially against the Taliban regime in Afghanistan which was supporting Osama bin Laden and al-Qaeda. The SC authorised the International Security Assistance Force (ISAF)[972] to assist the Afghan Interim Authority to maintain the security in Kabul and its surrounding areas. Till June 2008 forty nations sent troops to Afghanistan[973] and as a lot of them are States Parties to the Rome Statute, ICC is also watching the conduct during the hostilities. To date, no investigation has been opened yet. Other situations like those in Columbia, Kenya and Cote D'Ivoire are also taken into account by the ICC Prosecutor.

In the chapter concerning the situations and cases which ICC is dealing with, I tried to find an explanation for the particular focus of the Prosecutor on the issue of child soldiers. While nobody denies the gravity of the war crimes of enlisting, conscripting and using children into hostilities, we can not avoid wondering how come Lubanga was not charged with other crimes, as well. I tend to believe there were practical reasons, that the most astonishing evidence the Prosecutor had against him was concerning these crimes and he wanted a quick trial. Unfortunately, it has been more than two years since Lubanga is in ICC pre trial detention and it seems that ICC is still not ready to start its first trial.[974] Another reason the Prosecutor focused only on these crimes might be that he wanted to draw the attention of this particular issue which became a large practice in Africa.

Concerning the crime of aggression, including it in the Statute without defining it, represents a new practice in international law which might prove a dangerous precedent. If you want to look willing to punish a crime, you may put it into an agreement without defining it and let the time pass by without doing too much on the grounds that you can not agree on its elements. Meanwhile, the crime is committed without being punished. One may also wonder how come terrorism is not among the crimes ICC has jurisdiction over. During the travaux préparatoires

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[972] SC Res. 1386/2001, 20 December 2001, available at http://www.undemocracy.com/S-RES-1386(2001).pdf.

[973] See ISAF expansion, 10 June 2008, available at http://www.nato.int/isaf/docu/epub/pdf/isaf_placemat.pdf.

[974] See ICC Press release, ICC-CPI-20080611-PR322-ENG, *The Trial in the case of Thomas Lubanga Dyilo will not start on 23 June 2008,* 11 June 2008, available at http://www.icc-cpi.int/press/pressreleases/379.html.

there were discussions on including the crime of terrorism in the Rome Statute. In the end it was excluded as there was no international definition for this crime. But nor it was for the crime of aggression, and still, it was included. Why not the same tactic for the terrorism? It seems like the drafters preferred to include elements of this crime among those of war crimes and crimes against humanity.

Considering all these issues, we cannot ignore the political tools the drafters used. The Statute contains more dispositions which were the results of compromises reached by the states. We cannot say that the ICC is a politically manipulated institution, but some political influences may be seen. As I pointed out on a couple of occasions, we can not totally separate justice of politics especially that ICC is a treaty-based Court, an institution established by the will of states. ICC exists within the context of our society, it is not an isolated institution.

De lege lata ICC brought a lot of elements of novelty for the international criminal order, both from a substantive and procedural perspective. The Rome Statute provides for the first treaty definition of crimes against humanity and explicitly lays down a number of sexual violence crimes without precedent in international criminal law: sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization. For the first time in international criminal law these crimes can be prosecuted under the crime against humanity of persecution on the basis of gender. The incapacity of giving 'genuine consent' represents a new element of rape as both, war crime and crime against humanity. A new definition for the crime of aggression is in progress while a new principle of law has been promoted: the principle of complementarity. Participation of victims in the proceedings and their compensation is unprecedented in international law, as well.

De lege ferenda there are still some issues which might be improved and the Review Conference in 2009 or 2010 is a good occasion. Firstly, I believe that the drafters have to rethink the principle of complementarity. While I appreciate its positive aspect, consisting in the option of a state to defer its own situation to the ICC if it is 'unwilling' or 'unable' to deal with it, I do believe the negative aspect of the principle has to be also taken into consideration. By the negative aspect of the principle of complementarity I mean the possibility for a state which referred its

own situation to the Court to take it back if the circumstances under which it made the referral have changed. The case of Uganda is a very good example of how this aspect of the principle could find application. In the new context in Uganda, it could take its referral back, offer a conditional amnesty for the perpetrators of less grave crimes and put into trial the four LRA members as well as the other perpetrators of war crimes and crimes against humanity.

Secondly, I strongly recommend the adoption of a definition of the crime of aggression, together with its elements of crime and the conditions in which ICC can exercise jurisdiction over it. More proposals have been made in this regard and the SWGCA seems to be ready to complete its work. Trying to find a solution to fill the gap left by including a crime in the Statute without defining it, the chapter concerning the crime of aggression contains also a proposal of my own.

Lastly, I believe the category of crimes under ICC's jurisdiction may be broadened.[975] The crime of terrorism should be included as a distinct crime.[976] Not only that it is one of "the most serious crimes of concern to the international community as a whole", but it might also be a way of attracting the ratification of the US, so dedicated to the fight against terrorism.

Only after the first trial at the International Criminal Court will end, we may say if the Court is a success or not. Until then, we certainly may agree that ICC represents a great step on the long way of "putting an end to impunity".

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[975] See also Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC,* in Penn State International Law Review, Vol. 23, No. 4, 2004-2005, at 857-896.

[976] See Christian Much, *The International Criminal Court (ICC) and Terrorism as an International Crime,* in Michigan State Journal of International Law, Nr. 14, 2006, at 121-138.

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