

**GOING IT ALONE? AN EVALUATION OF AMERICAN
CONCERNS ABOUT THE INTERNATIONAL CRIMINAL
COURT**



**THESIS PRESENTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE MASTER OF ARTS (INTERNATIONAL STUDIES) AT
THE UNIVERSITY OF STELLENBOSCH.**

AUTHOR: G.A. ENGELBRECHT
SUPERVISOR: PROFESSOR P.R. NEL
DATE: DECEMBER 2002

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

ABSTRACT

The International Criminal Court (ICC) is an exciting new development in the international system. It is not without its detractors, however, amongst others the United States. The fact that the United States takes a strong stance against the ICC creates uncertainty in the international system. This uncertainty is linked to the role of the United States as the only remaining superpower in this system.

The main concern of the United States about the ICC is that an American might be brought before the court in terms of politically motivated charges. To illustrate this concern, the United States offers five basic arguments. These five are condensed into three arguments that form the main body of this thesis. They are the questions related to the jurisdiction of the ICC, the role of the United Nations Security Council in the functioning of the ICC, and the influence that the United States constitution might have on the ICC. Close attention is also paid to the political implications of the stance taken by the United States, both in terms of the specific arguments, and in general.

The different arguments are tested against certain criteria, which include the stipulations of the ICC Statute and other counter arguments. From these comparisons, certain evaluations can be made, from which conclusions are drawn.

For various reasons, none of the arguments put forward have merit when tested against the stipulations of the ICC Statute. What this implies is that the United States does not have real evidence to back its main concern about the ICC. Even though the possibility exists that an American could be charged before the court, there are sufficient safeguards to protect such a person from actually appearing before the court.

The very real political implication then becomes that the United States is undermining its position and relative power in the international system by taking such a unilateral stance in relation to the ICC. This point could have other very widespread implications.

OPSOMMING

Die Internasionale Kriminele Hof (IKH) is 'n opwindende ontwikkeling in die internasionale sisteem. Dit is egter nie sonder opponente nie, wat onder andere die Verenigde State van Amerika insluit. Die feit dat Amerika so sterk standpunt teen die hof inneem, skep onsekerheid in die internasionale sisteem. Die onsekerheid hou verband met Amerika se rol as die enigste oorblywende supermoontheid binne die sisteem.

Amerika se hoof besorgdheid met die IKH is dat 'n Amerikaner dalk in terme van polities-gemotiveerde aanklagte voor die hof gedaag sal word. Hierdie besorgdheid word geïllustreer deur vyf basiese argumente wat geopper word. Hierdie argumente word in drie spesifieke argumente wat die basis van die tesis vorm, gefokus. Die argumente is die vrae in terms van die jurisdiksie van die IKH, die rol van die Veiligheidsraad van die Verenigde Nasies in die funksionering van die IKH, en die invloed wat die Amerikaanse grondwet op die IKH het. Daar word ook gekyk na die politieke implikasies van die Amerikaanse standpunt, beide in terme van die spesifieke argumente en in die algemeen.

Die verskillende argumente word teen sekere kriteria getoets, wat die stipulasies van die IKH Statuut en ander teenargumente behels. Vanaf hierdie vergelykings kan evaluering gedoen word, waarvan daar gevolgtrekkings gemaak word.

Vir verskeie redes het nie een van die spesifieke argumente meriete as dit teen die bepalings van die IKH Statuut getoets word nie. Dit impliseer dat Amerika nie werklik bewyse vir hul hoof besorgdheid met betrekking tot die IKH het nie. Selfs al is die moontlikheid daar dat 'n Amerikaner wel voor die hof gedaag kan word, is daar voldoende waarborge om so persoon teen 'n verskyning voor die hof te beskerm.

Die werklike politieke implikasie is nou dat Amerika sy posisie en relatiewe mag in die internasionale sisteem met sy eensydige standpunt teen die IKH ondermyn. Hierdie punt kan ook verdere uitgebreide implikasies hê.

ACKNOWLEDGEMENTS

ACKNOWLEDGEMENTS

This thesis would never have been possible without the love and support of my mother. Despite the fact that she might not always have agreed with the choices I've made, her faith in me never wavered (I think!). I would like to thank her for all of these things, and also for the wonderful example she has set for me both personally and professionally.

My supervisor, Professor Nel, helped me a great deal at the outset in choosing this topic. Without his patient guidance I would also probably not have been able to finish in the time I did. I also want to thank him for making the whole process of writing this thesis in hindsight such an enjoyable challenge.

Since my knowledge of the law is rusty to say the least, I would like to thank Mr. Gerhard Kemp at the Law Faculty for giving me some wonderful insights from a law perspective. I would not have been able to locate many of the sources in this thesis if it weren't for his help in finding them.

Lastly I would like to thank Dr. Martha Bridgman for helping in pinpointing the specific arguments and concerns of the United States in terms of the International Criminal Court. Without her help, I would not have been able to focus my thesis on specific arguments, which would have made the whole process much more difficult.

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CHAPTER 1: INTRODUCTION*BACKGROUND TO THE INTERNATIONAL CRIMINAL COURT*

The International Criminal Court (ICC) is a major development in the international system. It establishes the first permanent judicial body exclusively committed to prosecuting “the most serious crimes of concern to the international community as a whole”, as set out in the Preamble to the Statute of the ICC. In this regard, it is aimed squarely at addressing some of the terrible examples of human rights violations and, worse, the examples of genocide that became all too familiar during the latter half of the 20th century. These are lofty and ambitious goals, which make it important to be certain that the ICC as an institution is built on a solid foundation.

The ICC came into being on the 1st of July 2002. The history of the conception of this institution goes back much further than this, however. There was interest in establishing an ICC as far back as during the aftermath of the First World War, but this interest was never seriously entertained (Sadat, 2000: 34). The idea progressed after the Second World War, but, in this instance, the Tribunals for Nuremberg and the Far East were instituted in favour of an ICC (Sadat, 2000: 34).

After the Tribunals of Nuremberg and the Far East, and especially after the adoption of the Genocide Convention soon after, interest in an ICC was rekindled by the United Nations, but the Cold War put the idea on ice (Sadat, 2000: 36). It was only after the Cold War ended, in 1989, that the United Nations General Assembly gave the International Law Commission (ILC) permission to assemble a draft document for the establishment of the ICC (Sadat, 2000: 36).

The Draft Document of the ILC was finished in 1994, after which several Preparatory Committee sessions were held to discuss and develop this document into a draft Statute (Sadat, 2000: 39). The discussion and development of the final Statute for the ICC took place at the Diplomatic Conference of Rome, from 15 June to 17 July 1998 (Sadat, 2000: 39), after which the Statute, known as the Rome Statute, was adopted.

Even though most of the states present were in favour of this Statute, not all of them were. The notable exceptions that voted against the Rome Statute were the United States and China (Weschler, 2000: 108). The reasons for the decision of the United States will form the basis of this thesis, and will be discussed and evaluated in the following sections of this chapter, as well as in the following chapters of this thesis.

The overwhelming majority of the states present at the Conference did vote in favour of the Rome Statute, however, including Britain, France and Russia, the other three permanent members of the United Nations Security Council (Weschler, 2000: 108). In fact, the vote was 120 states in favour of the Rome Statute, with seven states against and 21 abstentions (Weschler, 2000: 108). This would indicate the tremendous optimism that was focussed on the Rome Statute.

After this conference, it was only a matter of time before the ICC was to be formally established. In terms of Article 126 of the Statute of the ICC, the Statute itself will enter into force on the first day of the month after the 60th day from the date that the 60th state has ratified the Statute. On the 11th of April 2002, the 60th state ratified the Rome Statute, which made the 1st of July 2002 the date of the establishment of the ICC (Coalition for the ICC, 2002: 1). The ICC will not, however, be able to formally start hearing cases until at least 12 months after this date, since its functional structures, such as the prosecutor and judges, are not yet in place (Coalition for the ICC, 2002: 1).

Just as an interesting final note to this section, it should be mentioned that even though the United States voted against the Rome Statute, President Clinton signed the ICC treaty just before he left office at the end of 2000 (Lewis, 2002: 1). The United States has not ratified the treaty, however, since it feels that the treaty contains serious problems. These problems, in the form of arguments, will be discussed in the following section of this chapter.

WHAT IS THE PROBLEM AND WHAT QUESTIONS FLOW FROM THIS?

In terms of the role of the United States as the only superpower in the international system, especially with regards to its participation in international institutions, some points are worth mentioning. The United States seems to be unwilling to always (immediately) commit itself to international institutions or conventions. This unwillingness may be the result of the balance between a unilateral and a multilateral approach in the foreign policy of the United States (Nye, 2000: 4). In this regard, the unilateral approach implies acting alone, without taking other states and international institutions into consideration. The multilateral approach implies acting within an institutional framework alongside different actors that include states and international institutions.

Another reason for its reluctance may simply be that the United States is reluctant to take measures that appear to possibly diminish its sovereignty (American Journal of International Law, 2000: 352). With regard to this second reason, one could look at two specific conventions that are relevant in terms of the ICC.

In the first place, one could look at the Genocide Convention of 1948 (Power, 2000: 165 – 173). This convention was aimed at addressing the horrible acts committed during the Second World War. The United States was reluctant to ratify the convention, since there was a fear that the convention could intrude on the sovereignty of the state and that it would not be enforced effectively and consistently. These arguments overlap the concerns with regard to the ICC (as set out on pages 4 – 5) to a certain degree. The final ratification of the Genocide Convention was eventually concluded in 1986, and then only in a watered down version.

Secondly, the United States has never ratified the Vienna Convention on the Law of Treaties (Lewis, 2002: 1). In terms of Article 18 of the Vienna Convention¹ (United

¹ **Article 18**

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

Nations, 2002), states that sign treaties may not take steps to undermine such treaties, even when they have not ratified such treaties (Lewis, 2002: 1). If the United States is not a party to the Vienna Convention, there will be no formal way to sanction it if it did try to undermine the ICC Treaty.

The problem is that the United States is thus far not participating in the ICC, which has serious implications for this institution. It might even have implications in terms of the success of the ICC as an international judicial body. Will the ICC be able to function as is intended in its Statute? It has been suggested that the ICC would need the United States for the effective enforcement of its judgements (Wedgwood, 1999: 93). Since the ICC is not a functioning institution as yet, however, any assessment as to its success in prosecuting suspects and enforcing its judgements will be mere speculation and conjecture.

The fact that the United States is not a member is significant, but, as has already been mentioned, it cannot sway the question of success either way at the moment. By way of comparison, one could look at the failure in the 1930s of the League of Nations, which also did not have the United States as a member. However, there were reasons other than universal membership that led to its failure. One of these was that the League lacked the capacity to enforce its decisions, especially towards its more powerful members (Edgar, 2002: 144). This might also become a problem for the ICC, but an investigation of this issue falls outside the scope of this thesis. What is clear, however, is that the ICC did not need the United States to be established or to be in existence (ISC-ICC, 2002: 7).

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (*continued at the bottom of page 4*)
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

The USA feels that the ICC and the treaty on which it is based are fundamentally flawed (Grossman, 2002: 1). The representatives of the United States government, the Congress and their academic supporters put forth five different arguments to illustrate their position (Elsea, 2002). It would appear, however, that these arguments are subordinate to one main concern. This concern is that an American will be prosecuted before the ICC on politically motivated charges that are aimed squarely at embarrassing the United States (Weschler, 2000: 110 – 111).

This main concern can only be evaluated by looking at the different specific arguments that were put forward by the United States. These arguments, as taken from Elsea (2002), Grossman (2002) and the United States Department of State (2002), are the following: In the first place, the United States is concerned that the ICC might have jurisdiction over nationals of non-party states. In the second place, the United States is concerned about possible politicised prosecutions by the ICC. Thirdly, the United States is concerned about the fact that the prosecutor of the ICC might not be accountable. In the fourth place, the United States is concerned that the ICC might usurp the role of the United Nations Security Council. Finally, the United States feels that the Statute of the ICC lacks due process guarantees to protect a person charged before the ICC.

These five arguments or concerns are too wide for an effective evaluation to be made of all of them. For this reason, the arguments will be reduced to three more focussed arguments. The question of politicised prosecutions will be discarded, since it does not fall within the scope of this thesis (see the section on limitations below).

For the scope of this thesis, the first important argument will be in terms of the jurisdiction of the ICC, since that would determine whether an American would actually ever be charged before the ICC. This question will be combined with the issue of whether the prosecutor of the ICC is accountable or not. Secondly, the United States has been able to protect itself in the international system by using its veto power in the United Nations Security Council. Would the Statute of the ICC end this protection?

Thirdly, it is important to look at the procedural guarantees in the United States Constitution. The United States has always set an example in the international system

with the important procedural guarantees in its criminal justice system. If the guarantees in the Statute of the ICC are weaker than those in the United States Constitution, it will be difficult for Americans to reconcile themselves with the Statute of the ICC.

The first question relates to the extent to which these arguments of the United States have merit or not. Each of these arguments will have to be evaluated in turn to ascertain its merits. The second question simply refers to the political implications that these arguments might have. One could then look to the conclusions that might be drawn from the different arguments, as well as at the different implications.

One could go further by asking how the United States will convince others (states and institutions) of the merits of its arguments. How will the United States react if these arguments are rejected? How will it use its relative power in the international system to accomplish its goals? Will the United States work towards undermining the ICC, or will it exercise some sort of discretion in terms of this issue? All of these questions will be answered in the following chapters.

HOW WILL THESE QUESTIONS BE ANSWERED?

It will be necessary to identify the methodology to be employed in answering these questions. After the methodology has been discussed, it will be important to explain the layout of the different chapters of the thesis. The chapters will each include a specific argument or concern put forward by the United States. This argument will be followed by a counter argument, after which an evaluation of the points made in the chapter will be done.

The overall assumption of this thesis is that, because the United States is taking such a strong position against the ICC, uncertainty is created in the international system. This system consists not only of states, but also of international institutions such as the United Nations and the ICC. This uncertainty necessitates a look at the arguments made against the ICC by the United States, as well as an evaluation of the possible merits of these arguments.

One would not be able to approach this assumption from a strictly realist perspective (in international relations). The reason for this is that, according to the realists, the international system is anarchical for the reason that there is no overall “world government” that could make rules for all states to obey (Nel & McGowan, 1999: 55). Furthermore, realism places enormous importance on the role of the state as the most important actor in the international system, since the state has much more powerful coercive and regulatory powers than other actors in the system, such as international organisations (Nel & McGowan, 1999: 56 – 57).

Rather, it would be preferable to look at this assumption from a liberal institutionalist perspective. The liberal perspective itself still accepts the anarchical nature of the international system and the importance of the state, but places more emphasis on the role of other actors in the system (Nel & McGowan, 1999: 60 – 61). The overall importance of the specific actor, whether it is a state, a multilateral initiative or an international organisation, would be dependent in each instance on the specific issue at stake (Nel & McGowan, 1999: 61). The basis of this thesis will be to look at the normative role of the ICC as an international institution in the international system, and how it could perhaps shape or change the system alongside the role played states. Hence the decision to use the liberal institutionalism approach.

The possible uncertainty referred to above is based on the concept of hegemonic stability. This concept suggests that the role of the hegemonist is to promote openness in the system for its own political and economic reasons (Keohane, 1997: 159). Such openness is accomplished, for example, by promoting multilateral initiatives and institutions (Nye, 2002: 1). By rejecting the ICC, as it has other multilateral institutions, the United States as hegemonist is creating the perception that it is moving towards closure in the system (Keohane, 1997: 154), which will have a negative impact on many states in the world in terms of political and economic development.

The methodology that will be followed will be qualitative and evaluative in nature, using both primary data, such as the Statute of the ICC and the Charter of the United Nations,

as well as secondary data, in the form of articles and opinions of writers on the primary data. The arguments themselves could be taken from either primary or secondary data, depending on the specific source.

The evaluation of the arguments and concerns about the ICC could be seen as a case study (Babbie & Mouton, 2001: 281), in the sense that it presents one prominent example from a series of the unilateral behaviour by the United States, particularly if one looks at the normative level of analysis. It is on this level that one will look at both the arguments for and against the ICC, as well as what the Statute of the ICC actually stipulates. This makes this study case specific. The position of the United States on the ICC is an example of its rejection of an international institution or multilateral initiative. Other examples include the Kyoto Protocol, the Genocide Convention and the Land Mine Convention.

There are some important considerations with regard to the case study. The conceptualisation of the research is important, since it will be developed as the data is analysed (Neuman, 1999: 420). The purpose of the study has already been mentioned, as well as the principles guiding the study and the concepts involved (Babbie & Mouton, 2001: 282). This study will, in any case, be based on a literature review, following an inductive approach.

In terms of the review, as has been mentioned, a number of sources of data will be used, and all of these will be placed in context in terms of the ICC and the Statute of the ICC (Babbie & Mouton, 2001: 282). A problem in this regard would be bias in terms of one point of view or another. Selecting sources of data against the position of the United States that are produced in the United States itself, as well as elsewhere, would move towards eliminating such bias. However, it would not be possible to find sources in favour of the position of the United States that come from outside the United States. This could be a potential weakness in the thesis, but it should not prohibit a fairly comprehensive conclusion from being reached.

The evaluation itself will be in the form of a judgement-orientated evaluation (Babbie & Mouton, 2001: 337). This type of evaluation is aimed at establishing the merit or worth of the subject of the research (Babbie & Mouton, 2001: 337), which in this case would be a collection of arguments and concerns about the ICC.

The inductive pattern followed in this type of evaluation is to select criteria of merit, to set standards for the performance in terms of this, to measure the performance in terms of the arguments for and against the specific point, and then to draw certain conclusions in terms of the measured performance (Babbie & Mouton, 2001: 338).

On the normative level, this inductive evaluation therefore seems to be in the form of an analytical comparison. The relevant functions and the scope of the ICC in terms of its Statute will be summarised in each chapter in order to develop a mechanism for evaluating the arguments for and against the ICC (Neuman, 1999: 427 – 428). The arguments for the ICC would form the method of agreement, whilst the arguments against the ICC would form the method of difference in this regard (Neuman, 1999: 428). The negative evidence gathered in this way should reinforce all the information that has been researched (Neuman, 1999: 428) in order to come to some sort of a logical conclusion on the merits of the American arguments.

Other relevant normative questions that could be asked are the following: Do moral considerations play a role in the arguments of the United States? Does the ICC really represent a development in International Law? Would the ICC undermine the hegemonist (the United States)? Is there an intrinsic fairness to the scope and procedures of the ICC? A combination of these questions should, in any case, contribute to making a more informed evaluation of the American arguments against the ICC.

To sum up, this study will make an inductive, qualitative evaluation of the merits of the arguments of the United States against the ICC, which is a case of American unilateral behaviour. The evaluation will be in the form of an analytical comparison that would take

the stipulations of the Statute of the ICC, as well as the arguments for and against the ICC, into consideration.

This thesis will look at three sets of arguments put forward by the United States in chapters 2 – 4. These are the questions concerning the jurisdiction of the ICC, the role of the United Nations Security Council, and arguments in terms of the Constitution of the United States. In each of these chapters, a background to the issue at hand will be given. After this is done, the specific American arguments will be discussed in detail. The counter arguments against the American position will then be examined. Only after these two views have been contrasted with each other will an evaluation be made as to the merits (or not) in terms the normative levels of analysis that might be relevant in this regard.

After the arguments have been discussed and evaluated, a few specific political implications of the American viewpoints and arguments will be looked at in chapter 5. This will be done on the basis of whether the arguments have merit or not. The implications, in any case, could be divided into two broad sections. The first would be those implications in terms of the arguments discussed and evaluated in chapters 2 – 4 of this thesis. The second would be more general political implications that are linked to the fact that the United States chose to reject the ICC. A conclusion based on the discussion of the arguments and the political implications will then be made. Two appendixes will be attached at the end of the thesis, each covering the relevant articles of the ICC Statute and of the Charter of the United Nations that are used in this thesis.

LIMITATIONS

While the United States has some very specific arguments directed against the ICC, there are other arguments, both against the role of the ICC itself and against its Statute, that are directed by other states. These arguments do not fall within the purview of this thesis and will not be discussed and evaluated.

These other arguments include the ambiguity and uncertainty in the Statute with regard to cases in front of the ICC when it has to decide whether justice or peace should prevail (Scharf, 2000: 179). In this regard, it is unclear how the ICC will handle amnesties granted in terms of peace accords to persons who committed crimes as set out in the Statute of the ICC (Scharf, 2000: 179). In such cases, there might be the perception that, in granting amnesty, the specific state is 'unwilling or unable' to prosecute these criminals as specified by Article 17 of the Statute of the ICC (see chapter 2). Examples in this regard are the truth commissions that were instituted in both South Africa and Chile, where amnesties were granted to some of the human rights offenders.

With regard to the arguments put forward by the United States, there is one specific argument that will fall outside the purview of this thesis. The United States fears that the ICC has the potential to start carrying out politicised prosecutions (Elsea, 2002: 5), especially in terms of their servicemen and servicewomen stationed abroad. In this regard it is felt that trumped-up charges will be made against American citizens and, given the prominent role of the United States in world affairs, this is a very plausible risk (Elsea, 2002: 5).

It would be very difficult to evaluate this argument, however, simply because the ICC has not as yet started to hear any cases. In fact, the ICC does not even have judges or a prosecutor as yet, as was mentioned on page 2. There therefore is no measure as yet against which to test this argument. If one looked at the strict criteria that are set for appointing the judges and the prosecutor of the ICC (Part IV of the Statute of the ICC), one could perhaps venture a guess in this regard, but that will not be good enough in terms of this thesis.

This thesis is focussed on making an evaluation of the arguments by the United States against the ICC, from which certain conclusions could be drawn. It will not be within the scope of this thesis to find possible solutions for the problems encountered in this regard. It is also not the intention of the writer to make a value judgement on the stance of the United States on the ICC. The evaluations and conclusions will be nothing more than

opinions based on the facts as they are found in all the sources consulted in writing this thesis.

Connected to the issue of possible solutions to the arguments and problems of the United States are the other possible positions that the United States might have taken in terms of the ICC. At the moment it is rejecting the ICC. The other two options would be that the United States can simply accept the ICC Statute and ratify the ICC Treaty to become part of American domestic law, or that the United States could not ratify the ICC Treaty, but stay within the ICC framework by working actively towards rectifying the problems it has with the Statute of the ICC (Council for Foreign Relations, 2002: 5 – 6).

Both of these options have their own merits, advantages and disadvantages. A discussion and evaluation of these alternative options will not form part of this thesis, as it is not within the scope of the thesis. No suggestions therefore will be made about the best option available to the United States for handling the ICC.

CHAPTER 2: A QUESTION OF JURISDICTION*JURISDICTION IN GENERAL*

Jurisdiction, in terms of the law, entails the extent of the authority of the court to decide matters before it (Hardy Ivamy, 1988: 251). This authority could be in terms of people, specific crimes or a specific territory, and can be limited by the Statute under which the court is constituted (Hardy Ivamy, 1988: 251). A court such as the ICC would therefore have jurisdiction to try only specific people, in terms of specific crimes, which were committed in a specific place. These three are interconnected, as will be explained as the discussion progresses.

Disputed jurisdiction of any court implies that the court does not have, or should not have, the authority to prosecute an accused. This can either be because the court cannot claim jurisdiction over the person of the accused, or because the crime falls outside the scope of the court, or because the crime was committed in an area where the court is not entitled to jurisdiction. Such issues are usually settled in terms of what is stipulated by the Statute in terms of which the court is constituted. In the ICC Statute, the limits of this jurisdiction are set out in Article 12.

The specific crimes over which the ICC has jurisdiction are crimes against humanity and war crimes (Article 5 of the Statute of the ICC). In terms of the Statute of the ICC, the court would have jurisdiction to investigate crimes in three situations. In the first place, the court would investigate crimes if a member state of the ICC refers the crime to the court (Article 13 (a) of the ICC Statute). In the second place, it will investigate a crime when the United Nations Security Council has referred a case to the court (Article 13 (b) of the ICC Statute). The role of the Security Council will be discussed in detail in chapter 3. In the third place, the prosecutor could investigate a crime in accordance with the stipulations of Article 15 of the ICC Statute (Article 13 (c) and Article 15 of the ICC Statute).

It is important to know that all the authority of the ICC is found in the Statute of the ICC. There is no inherent jurisdiction for the ICC. However, it could be speculated that the court will follow some aspects of customary international law, especially in terms of the jurisdiction of the court over nationals of non-member states (see the discussion from page 17 onwards). It must be mentioned at the outset that the prosecution of any citizen of a particular state by the ICC is not dependent on that state having ratified the ICC Statute (Van der Vyver, 1999: 107).

The American Position:

One of the strongest stands taken by the United States at the Rome Conference, where the final version of the ICC Treaty was drawn up, was in connection with the jurisdiction of the Court (United States Department of State, 2002: 1). The United States did not, and still does not, ever want any of its soldiers (or citizens, for that matter) to be investigated and charged by the court.

This stance was reflected in the fact that the Republican Head of the Foreign Relations Committee at the time, Senator Jesse Helms, indicated that a treaty that had the slightest possibility of ever prosecuting an American would be “dead on arrival” at his committee (Weschler, 2000: 91). This could indicate that the chances of the treaty ever being ratified by the United States are not good. What Senator Helms wanted was a clear veto in the favour of the United States in terms of prosecutions by the ICC (Van der Vyver, 1999: 108). Such a veto, however, would only lead to ad hoc justice based on political expediency (Human Rights Watch, 2002: 1).

The United States maintained throughout the duration of the Rome Conference that the Court should not have jurisdiction in any case over citizens of countries that did not sign the Treaty. According to the United States, this would violate the principles of the Vienna Convention on Treaties, which stipulates that treaties cannot bind non-party states (Scharf, 2000: 220). Indeed, it is a principle of the International Customary Law of Treaties that no state can be burdened with obligations from any treaty to which it is not a member (Scharf, 2000: 220).

If the jurisdiction of the ICC was totally dependent on the referral of cases to it by the United Nations Security Council (see chapter 3), the United States, in all likelihood, would have been able to block any investigation of an American soldier or citizen by the court by way of its veto in the Security Council. The fact that the Statute of the ICC provides for an independent prosecutor in specific circumstances presents the United States with a problem in this regard, since it takes away the explicit role of the United Nations. It therefore would be possible, although unlikely, that an American could eventually be charged by the ICC.

In terms of the problem that the United States has in terms of jurisdiction, there are two possible positions that can be taken in this instance. The first position is in terms of the jurisdiction that the court might have over persons, both directly over them as individuals as well as in terms of the place where they committed the alleged crime. The second position deals with the specific crimes over which the court has jurisdiction. These two possibilities will be examined separately in order to highlight the problems in this regard.

It is also important to note that these arguments in terms of jurisdiction are connected to the view that the ICC will have a negative impact on the sovereignty of the United States. Senator Helms again expressed this view when he addressed the United Nations Security Council in 1998 (*American Journal of International Law*, 1998: 351). This will be made clear as the arguments in terms of jurisdiction are explained together with their counter arguments.

The sovereignty in question here would be the external sovereignty of a state that deals with the place of a state in the international order and the right of that state to act independently and autonomously, especially in relation to its citizens (Heywood, 1997: 143). It is a matter of great concern to any state, and to the United States in particular in this instance, that it might lose this ability to exercise control over its citizens at the insistence of an independent body that is not itself a sovereign state. There is also the feeling that the fact that the ICC is not a democratically elected body representing the

American people is further infringement on the sovereignty of the United States (Dempsey, 1998: 1).

Greater still would be the concern over the fact that the ICC would come into being without the express blessing of the United States, insofar as the United States did not ratify the ICC Treaty. This goes back to the issue of the role of the United States as a hegemonist, as was discussed in chapter 1. It might even be a harbinger of greater changes in the international system in terms of the sovereignty of states, although its impact most likely will be limited only to a moderate reformative practice (Edgar, 2002: 135).

It would seem that the ICC therefore is moving towards the establishment of universal jurisdiction in terms of the crimes and persons over which it gains authority. The assumption in favour of successful universal jurisdiction is that the individuals and cases involved should at least be clearly identifiable, as was the case with the Nuremberg precedents (Kissinger, 2001: 93). However, it also is a fact that many of the cases taken as examples today are vague and depend on a knowledge of the context of the situation, both historically and politically (Kissinger, 2001: 93). Such vagueness will do no more than risk arbitrariness on the part of the court (Kissinger, 2001: 93).

The Counter Argument:

It must be pointed out that the United States has not ratified the Vienna Convention on the Law of Treaties (Lewis, 2002: 1). In spite of this, it is true that no treaty can place obligations on states that are not a party to the treaty. The United States, however, is confusing the obligations placed by the Treaty of the ICC on (member) states with the jurisdiction that the treaty has over the citizens of all the states, whether they are members of the treaty or not. The fact that the ICC gains jurisdiction over non-member states does not put any obligations on these states.

The obligations that the treaty places on its member states include the following: they should provide funding to the ICC; they should assist in the transfer of persons indicted

by the court; and they should cooperate with the court further by providing evidence in cases before the court (Scharf, 2000: 220). The United States, by not becoming a party to the ICC, is therefore not obliged to provide funding to the ICC or to provide assistance in applications for the transfer of someone to the ICC if such a request is made.

The fact that the ICC treaty gains jurisdiction over the civilians of non-member states confirms the recognised principle that individuals who travel to other states are subject to the substantive and procedural criminal laws applicable in those states, which would include laws that arose from treaty obligations (Scharf, 2000: 220). In terms of the Vienna Convention on Consular Relations of 1963, if an American (for example) is arrested abroad for committing a crime, an official from the consulate could visit him or her (Wedgwood, 2000: 123). However, the trial will still be conducted in accordance with the criminal law of the country in which the trial takes place, and not according to the domestic criminal law of the country of the accused.

Even though the United States feels that the ICC treaty contravenes treaty law in this regard, there are a few examples when universal jurisdiction is gained over the citizens of non-member states through treaty law. The United States also is a party to some of these treaties. These treaties include the Geneva Conventions (1949), the Law of the Sea Convention (1958), the Hijacking Convention (1970), the Aircraft Sabotage Convention (1971), together with its Airport Security Protocol (1988), the Internationally Protected Person Convention (1973), the Hostage Taking Convention (1979), the Torture Convention (1984) and the Maritime Terrorism Convention (1988) (Scharf, 2000: 220). The United States has also signed, but not yet ratified, the Convention on the Safety of United Nations Peacekeepers (1994) and the International Convention for the Suppression of Terrorist Bombings (1998) (Scharf, 2000: 220).

There are also a few examples where the United States has exercised universal jurisdiction over citizens of non-member states to some of these treaties, and even where the crime itself was not previously recognised as being subject to universal jurisdiction in terms of the international customary law (Scharf, 2000: 221). In terms of the Hostage

Taking Convention, the United States prosecuted a Lebanese man who hijacked a Jordanian Airliner with two Americans on board at Beirut Airport in the case of *United States v. Yunis* (1991) (Scharf, 2000: 221). Lebanon was not a party to this treaty and did not consent to Yunis being tried in the United States (Scharf, 2000: 221). This stance was confirmed in 1998 in the case of *United States v. Ali Rezaq*, when the accused, a Palestinian, was found guilty of hijacking an Egyptian airliner, even though Palestine is not party to the Hague Hijacking Convention (Scharf, 2000: 221).

In spite of this reference to universal jurisdiction, the ICC does not, in fact, wield universal jurisdiction over persons (Hafner et al, 1999: 116). It was felt that the concept of universal jurisdiction would be unacceptable to many states and that it would in any case be outside the bounds of current international law (Hafner et al, 1999: 116). The fact that Article 12 of the ICC Statute places restrictions on the jurisdiction of the ICC illustrates this point (Human Rights Watch, 2002: 2). By universal jurisdiction in this regard is understood that no consent is required from any state for the prosecutor to investigate a case. The only relation that the ICC might have to universal jurisdiction over persons is in cases referred to it by the United Nations Security Council (see chapter 3).

It must be noted, however, that the crimes over which the ICC has jurisdiction are derived from customary international law and are all subject to universal jurisdiction (Van der Vyver, 1999: 107 – 108). The crimes under the jurisdiction of the ICC all qualify as violations *erga omnes* (against everyone), which explains this assertion (Van der Vyver, 1999: 108). Crimes such as these are not necessarily dependent on territorial jurisdiction and can therefore be punished by any state that has custody of the offender (Van der Vyver, 1999: 114 – 115). This provides another explanation for the discussion on pages 15 – 16.

During the Rome Conference for the establishment of the ICC, one of the more popular proposals in terms of the jurisdictional authority of the prosecutor was put forward by South Korea (Hafner et al, 1999: 116). This proposal had it that the prosecutor could

investigate cases if consent was given by any of four states, namely the state of the nationality of the accused, the state on whose territory the alleged crime took place, the state that holds the accused captive, or the state of the nationality of the victim.

This proposal was not acceptable to many states, who felt that it went too far with regard to the competency of the ICC prosecutor (Hafner et al, 1999: 116). The compromise was that the presiding body had to have the consent of the state of nationality of the accused, or the state on whose territory the alleged crime took place. This places the ICC treaty in step with international criminal law, which stipulates that a state may prosecute its citizens for crimes committed elsewhere in the world, or that the state may prosecute any person who has committed a crime on its territory (Hafner et al, 1999: 117). There is no concept that prohibits the transfer of such trials to an international body.

In terms of the consent of the specific states, the following should be mentioned. By becoming a member of the ICC, any such state is deemed to have given consent to the ICC for prosecuting crimes committed by its citizens or on its territory. The concept of complementarity will play a role in this regard. Non-member states can also consent to the jurisdiction of the ICC in specific cases.

What this means for the United States is that, barring an investigation initiated by the ICC in terms of Article 13 of the ICC Statute, Americans who commit ICC crimes in non-member states will not be charged by the ICC, unless that other non-member state consents to the jurisdiction of the ICC. If there was universal jurisdiction, the ICC would have been able to investigate any occurrence of an ICC crime anywhere in the world.

JURISDICTION OVER PERSONS

The American Position:

The fear of the United States is that US soldiers or citizens will be charged before the ICC court in some frivolous and politically-charged process, and that the ICC might, in fact, become some sort of “jurisdictional leviathan” that only has political ends, and not justice, in sight (Dempsey, 1998: 1). The United States fears that an independent

prosecutor will become uncontrollable, as there might not be effective oversight of the actions of such a prosecutor.

Such a fear is possibly based, in part, on the effect that the independent prosecutor, Kenneth Starr, had during his investigations of former President Clinton (Weschler, 2000: 94 – 95). An independent prosecutor potentially could have a grave effect on the whole judiciary process of the ICC and tarnish the image of the court to the extent that states might be reluctant to join the ICC. This would especially be true if the prosecutor became a politicised figure with his or her own agenda, as was the case with Starr (Kissinger, 2001: 94).

In this regard, the United States has voiced the concern that an American might, for example, be charged by an Iranian prosecutor or appear in front of an Iranian judge. Such a situation would indeed be a highly politicised event. On the flip side, though, it appears that Iran has the same fear of one of its citizens being charged by an American prosecutor or appearing in front of an American judge!

The United States set out at the Rome Conference to limit the extent of the jurisdiction of an independent prosecutor. It wanted the prosecutor only to be able to investigate cases in which the suspect was a citizen of a member state of the ICC. What this meant was that if the United States were not a member of the ICC, the prosecutor would not be able to investigate the crime, except if it was referred to it by the Security Council or another member state.

The impact of a prosecutor with such independent authority would, in the opinion of the United States, make it very difficult for it to keep up its role as the “global policeman”. The possibility that American soldiers could be in danger of being prosecuted for occurrences that might happen in a hostile situation was difficult to accept. The Pentagon felt that such a situation would make it very difficult to effectively complete the assigned mission. However, the implication of this viewpoint would be that, in order to (successfully) complete a certain mission, war crimes would have to be committed.

This would be especially true of peacekeeping operations, where the situation often is such that there is difficulty in effectively controlling the situation, making occurrences of acts falling within the scope of war crimes more likely. An example in this regard would be the Operation “Restore Hope” in Somalia in 1993, when the general anarchy in the country led to a number of unfortunate incidents.

What would happen to soldiers who shot civilians who were (perhaps voluntarily) used as human shields? Would they be arrested, even though they had only reacted to a hostile situation? David Scheffer, the leader of the American delegation at the Rome Conference, felt that the danger in such situations was that the focus would only be on the war crimes of the peacekeepers, and not on the atrocities that necessitated their being there in the first place (Van der Vyver, 1999: 111). This type of scenario will only be relevant, however, if the acts of the peacekeepers are consistent with the requirements of the ICC Statute in terms of war crimes (Article 8 of the ICC Statute). The seriousness of the atrocities will definitely be investigated by the ICC, however, since any peacekeeping mission has to be authorised by the United Nations and the United Nations would initiate an ICC investigation into the circumstances (Van der Vyver, 1999: 111).

Another problem related to who exactly would be charged with war crimes. The United States felt that its ordinary citizens would have to be exempted from war crimes, even though they still could be charged with genocide or crimes against humanity. This did not include soldiers, however. Civilian commanders of the armed forces could then, by implication, not be charged with war crimes.

As to the actions of soldiers, there are a few other concerns as well. The court will try to establish a link between the commander and the actions of his troops. The possibility that a high-ranking official could be brought before the court is not something the United States even wants to contemplate. These possibilities might further undermine the authority of the ICC.

It is in any case certain that the United States, or any other state for that matter, will not voluntarily give up any high-ranking official. In this regard, the United States is currently trying to exempt the former United States Ambassador to the United Nations, Richard Holbrook, from testifying before the International Criminal Tribunal for the former Yugoslavia in the trial of Slobodan Milosovic, since that would set a precedent of senior United States officials testifying before international tribunals (Coalition for the ICC, 2002).

Even Slobodan Milosovic was only brought before the Tribunal for the former Yugoslavia after promises of aid to Serbia. The case of the Chilean dictator, Pinochet, who was nearly extradited from Great Britain to Spain, only went as far as it did because Pinochet was in Britain at the time and not in his native Chile (Kissinger, 2001: 90). The House of Lords rejected the extradition request as it found that a head of state cannot be sued for acts committed in the performance of official duties, even if such acts were in fact criminal actions (Van der Vyver, 1999: 121).

The Counter Argument:

The strongest counter argument against the fear of the United States that any of its soldiers or citizens could be charged before the ICC by an independent prosecutor is the concept of complementarity. This concept entails that, in all circumstances, the court will defer to the domestic courts of the country of origin of the person charged with the specific crime. The court will do so unless the country of origin is “unwilling or unable” to proceed with an investigation or prosecution (Article 17 (1)(a) of the ICC Statute). Therefore, the jurisdiction of the ICC will run concurrently with that of the domestic court (Morris, 2000: 198).

Before expanding on complementarity, it is first necessary to look at the fear of the United States about the possibility of a politically-motivated prosecutor. In terms of the Statute of the ICC, the judges and the prosecutor of the court have to be elected by an assembly of the member states of the ICC by a process of nominating persons with the

correct characteristics by secret ballot. These steps for the election of judges are formulated in Article 36 of the Statute of the ICC.

Only people who qualify as having a high moral character, with impartiality and integrity, and who would qualify as judges in their own countries, would be accepted (Article 36 (3)(a) of the Statute of the ICC). Potential candidates will have to have competence and experience in criminal law and procedure, as well as in international humanitarian law and human rights law (Article 36 (3)(b) of the Statute of the ICC). These requirements should indicate that the people who would be elected as judges would appear to be beyond political agendas, even though this might end up not being the case.

The requirements set for the prosecutor follow the same lines for that of the judges, in that only people with a high moral character and legal experience will be elected to the post (Article 42 (3) of the Statute of the ICC). Furthermore, the prosecutor and his or her deputy prosecutors may not be of the same nationality (Article 42 (2) of the Statute of the ICC). These steps are again aimed at eliminating a politicised prosecutor. Theoretically however, such a prosecutor might be appointed, although it is highly unlikely.

Even before the ICC prosecutor can initiate any investigation, he or she would have to submit all the evidence at hand to a so-called pre-trial chamber, consisting of three judges (Article 15 (3) of the ICC Statute). The integrity of these judges should be beyond approach, as was mentioned before. Only if there seem to be sufficient grounds to merit proceeding with an investigation, will the pre-trial chamber give the prosecutor permission to proceed. The pre-trial chamber therefore might halt any investigation if it appears that there is insufficient evidence, or if other problems are experienced with the specific case. It seems unlikely that trials based on frivolous evidence would proceed, as is feared by the United States. However, it does not rule out the possibility that an American could be charged by the ICC.

The ICC therefore would not be able to prosecute anyone if the country of origin of the accused investigates the case and if that person is brought to trial in that country for those crimes. In terms of Article 20 (3) of the ICC Statute, the court will respect the verdict of such another court in relation to the accused. There is also no indication that the ICC would not accept the verdict of the country's courts, even if a verdict of not guilty is rendered.

Again, the fear that the ICC would interfere seems unfounded, but, if it appears that the country is only putting on a show trial to shield the accused (Article 17 (2)(a) of the ICC Statute), it might influence the ICC into not accepting the outcome of the trial and proceeding with its original investigation. Other examples of when the ICC might decide that the state is unwilling to proceed with a particular case is if there is undue delay in prosecuting the accused (Article 17 (2)(b) of the ICC Statute) or if the trial was not independent or impartial (Article 17 (2)(b) of the ICC Statute).

The words "unwilling or unable" would indicate that, if the country of origin did not proceed with such an investigation or trial, the ICC prosecutor would continue investigating and prosecuting the accused. It also appears that the ICC therefore has the final say in determining whether justice was done.

In relation to the word "unable", it would seem obvious that the ICC would investigate cases in which the judicial system of a country has broken down to such an extent that it is no longer possible for the system to prosecute criminals or to enforce the decisions of the court (Article 17 (3) of the ICC Statute). This would not be the case in the judicial system of the United States, which is admired for its efficiency and integrity. This might be more applicable to a country like Somalia, where all government services have broken down or are unable to function properly.

There is, however, another side to the issue of being "unable" to investigate a crime. That would be circumstances in which the crime as specified by the ICC Statute does not constitute a crime in terms of the domestic law of the country of the suspect. If a person

commits a crime outside his or her country that is not a crime inside of their country, that person could not be charged with a crime in their country.

An example could be the War Crime of Outrages upon Personal Dignity (Article 8 (2)(b)(xxi) of the ICC Statute). If an American is accused of this crime in terms of the ICC Statute, then the domestic courts of the United States would be powerless (unable) to prosecute the suspect. The same could be true of a crime of aggression, if such a crime includes something that is not a crime in the United States.

Changing the domestic laws of a state to reflect international legal trends would surely not be a reflection of weakness, but rather of the moral strength to accept a new system that is for the better. The problem as set out in the two paragraphs above would, in any case, only be relevant if the state, like the United States, does not ratify the treaty. Once it is ratified, it in any case becomes part of the domestic law of the state and the state then would be able to investigate and prosecute that crime.

The problem lies rather with the word “unwilling”. As was stated before, the United States feel that it should not be made to investigate any occurrence that it does not regard as a criminal offence. It must be pointed out, however, that the International Community would see such situations as being of such seriousness that they should be investigated, just to clear up any ambiguities. This would place the United States in a bit of a quandary.

However, the unwillingness might not only be in terms of the nature or the definition of the crime, but also in terms of the process that might be followed for the case. Therefore, unwillingness might not only be in terms of substantive law, but also in terms of the unwillingness to prosecute. It might happen that it is decided not to prosecute the accused because he or she might get immunity for the action, or there could be political reasons not to proceed. It therefore will be interesting to see what the ICC would interpret as constituting “unwillingness” on the part of the country of origin of the accused.

The fact that the United States argues that to bind a country to a treaty that it has not signed is against International Law does not take certain precedents in International Law into consideration, as was mentioned on page 15. It appears, however, that despite complementarity, the final verdict on the prosecution of an accused still remains with the ICC, since it is the ICC that would ultimately determine whether the state was willing and able to prosecute the accused. It would appear that the position of the ICC would depend greatly on the motives of the state's efforts at justice in this regard (Morris, 2000: 205).

The question as to what happens to the superiors of soldiers who commit crimes over which the ICC has jurisdiction is handled by Article 28 of the Statute of the ICC. This article states that a military commander, or the person who effectively acts as military commander, shall be criminally responsible for the crimes within the jurisdiction of the court that are committed by the soldiers under their command, if they knew or should have known about these crimes and did not do anything to prevent them.

This article therefore places a responsibility on the military commanders to prevent such crimes. It also implies that civilian commanders could also be held responsible if they were in charge of the soldiers. It makes clear, however, that any possible mistakes by soldiers, for example in inflicting excessive collateral damage on the civilian population of the enemy in terms of property damage or the loss of life, would not be held against the commanders of those soldiers if they had no way of knowing about such damage.

Another possible instance in which an American could be charged before the ICC would be in cases where another member state refers the case to the ICC in terms of Article 14 of the ICC Statute. The same situation would occur if the United Nations Security Council were to refer a case to the ICC in terms of Article 13 (b) of the ICC Statute. For political reasons, the possibility of such a reference by another member state or the United Nations Security Council would be highly unlikely. The United States could simply use their veto in the Security Council to stop such an investigation (see chapter 3), or could place diplomatic pressure on the other state not to refer the case to the ICC. Even though this last possibility would still exist, it would be highly unlikely that it would be

forthcoming. See chapter 5 for a discussion of the diplomatic power that the United States would have at their disposal in this regard.

The United States still maintains that the final say remains with the ICC in terms of determining if justice was upheld. Even though it has been asserted that this is indeed the case, it does, however, place a political slant on the meaning of the words “unwilling or unable”. This argument tends to place emphasis on the possibility that the domestic judicial system of a country such as the United States does not function as it should. This argument suggests that the states will not be able to properly control the prosecution of its nationals for ICC crimes. It also assigns too large a degree of power to the ICC, which should be corrected if one looks at the checks and balances that are built into the treaty.

Another method of protecting American servicemen and servicewomen from prosecution in other states are the so-called Status of Forces Agreements (SOFAs). The SOFAs came into being after the Second World War, when it became clear that many thousands of American servicemen and their dependants would spend extended periods of time in countries in Europe and Asia as part of a deployment of military personnel (Everett, 2000:137).

What these agreements entail is that the United States claims jurisdiction, as the sending state, to prosecute any member of its armed services stationed abroad for any crime committed as part of their official duties (Wedgwood, 2000: 124). If the crime that was committed by the serviceman or servicewoman is so far outside the scope of their official duties as to not constitute an official act, they can still be tried by the state that they are in, since the SOFA will dissolve or it can be waived (Wedgwood, 2000: 124). The United States would also not have jurisdiction if the crime committed were a crime in the other state, but not a crime in terms of American military law (Everett, 2000: 138).

There are, in fact, precedents where the United States waived the jurisdiction gained in terms of the SOFA to allow a serviceman to be prosecuted in another country by its own domestic criminal law system. An example is the case of *Wilson v. Girard*, during which

an American was tried in Japan for the murder of a Japanese civilian (Wedgwood, 2000: 124).

The United States would prosecute servicemen in front of a military tribunal where there is jurisdiction in terms of a SOFA (Everett, 2000: 138). It must be pointed out, however, that for this reason the SOFA is only enforced against members of the armed forces. It cannot be used in terms of the civilian dependants of the armed forces, since such military tribunals do not confer all the normal constitutional protection as would be done in a normal trial by the judicial system of the United States (Everett, 2000: 139). What this means is that the civilian dependants therefore would be tried in the courts of the host country, and not by the United States.

There was a striking example of the SOFA in action during the Rome Conference (Weschler, 2000: 96). A United States Marine A6 Intruder Jet flew too low over the Italian Alps and sheared the cable of a ski lift at a resort, which resulted in the death of twenty people. The Italian government initially charged the crew with manslaughter in its domestic courts, but the United States enforced the SOFA with Italy and the crew was court martialled by the United States military.

In terms of the rights of American civilians, it might be prudent to look at the extradition agreements that the United States has with other states. This comes into effect in cases in which another state requests the extradition of an American for a crime committed in that state. The American judge, in ruling on the request, will look at whether there is an extradition treaty with this other country, whether the offence is part of the treaty, whether this offence is also an offence in the United States and whether there is reason to believe that the individual did in fact commit the offence (Wedgwood, 2000: 124). These agreements or treaties therefore give some protection to American citizens to possibly protect them from an unfair judicial situation, and would apply just as effectively if the ICC requests the transfer of an American for an offence under its jurisdiction.

*JURISDICTION OVER THE SPECIFIED CRIMES***The American Position:**

The Statute of the ICC states in Article 5 that the court will have jurisdiction over the crime of genocide, crimes against humanity, war crimes and the (as yet undefined) crime of aggression. The problem in this regard lies within the description of some of these specified crimes.

There was even talk of including the crimes of drug trafficking and something as vague as “damage to the environment” or “outrages upon personal dignity” in the list of crimes over which the ICC would have jurisdiction (Dempsey, 1998: 1). This talk creates uncertainty, as it leaves the court with too many options, which would flood it with cases that could not be handled with the due diligence they deserves. It would also deflect the court away from the essence of what it was created for, namely that “the most serious crimes of concern to the international community as a whole must not go unpunished” (Statute of the International Criminal Court, 1998).

In the first instance, the scope of what would be defined as a crime of aggression is still unclear. In this regard, read the section on the role of the United Nations Security Council in Chapter 3. The United States feels that, since aggression is not as yet defined, it will have a negative impact on the states that are not a party to the ICC Treaty. When and if a definition of aggression is agreed upon, it will be done within the confines of the parties to the ICC Treaty. Such a definition will then be arbitrarily enforced on the non-party states by an independent prosecutor, which would have a negative impact on the sovereignty of these states.

The other problem that the United States has with aggression is that it might include actions its feels might be necessary to protect their national security interests. In this regard, the concept of a pre-emptive strike against a country like Iraq might be construed as an act of aggression. The United States feels that this might put it in an unfortunate situation where it might be forced by the ICC to investigate an occurrence that it does not

view as a crime, and which therefore would not be punishable in the domestic courts of the United States.

Article 8 of the Statute of the ICC regulates War Crimes. In terms of Article 8 (2)(b)(iv), an element of proportionality is required when military attacks are launched with the knowledge that such attacks might lead to collateral damage (for example the death of civilians, damage to infrastructure or property etc.). Such collateral damage should not be excessive to the anticipated military advantage of the specific action.

The question to be asked now is, simply, what is proportional, or what would be deemed to be proportional? Is there a monetary value that should be kept in mind in terms of the damage, or maybe a magic number of dead that would still be acceptable? These are questions that cannot be answered readily, since it would be impossible to set an absolute value on collateral damage.

During the NATO bombing campaign in the former Yugoslavia, some NGOs even requested the International Tribunal for Yugoslavia to investigate what it felt was the excessive use of force in some of these NATO missions (Wedgwood, 2000: 122). Even though no action was taken on this request, this has unfortunately set a precedent that the United States feels might undermine any future actions taken for humanitarian reasons if the commanders and soldiers fear that any mistake they might make on the battlefield would result in prosecution before such a court.

Another problem faced by the United States in terms of this question relates to the impact that any so-called “friendly fire” incidences might have. This might be directly linked to the point in the previous paragraph, since such incidences occurred during the bombing of Yugoslavia. The best example in this regard was the bombing of the Chinese Embassy in Belgrade. There was also much criticism of the bombing of the infrastructure of the country, which could have had a disproportionately negative effect on the civilian population of the country, especially in terms of electricity and water supplies.

In terms of the Statute of the ICC, member states to the Treaty can “opt out” of crimes added by amendment to the ICC crimes for seven years from the time the state became party to the treaty (Article 121 of the Statute of the ICC). However, this option is not open to the states that are not members of the ICC. In the opinion of the United States, this is a significant problem with the ICC treaty (United States Department of State, 2002: 1). The reason that this would be a problem is that it weakens the position of non-member states in relation to the ICC by making them liable for crimes that are not applicable to the member states themselves.

The Counter Argument:

The definitions of some of the crimes are problematic. The main reason that the State of Israel, for example, voted against the Statute of the ICC was the stipulation in terms of War Crimes that included the transfer of part of the civilian population of the occupying force into the occupied territory (Statute of the ICC, Article 8 (2)(b)(viii)). In terms of the requirement of proportionality, the United States noted the same. There do not, however, seem to be any easy answers in this regard.

The court would have to decide by itself on the scope it would give to the proportionality principle. It would be difficult to set a guideline in this regard. Furthermore, it would not be advisable to handle cases such as these on an ad hoc basis, since it would further increase the uncertainty. It must be pointed out, however, that courts all over the world make decisions regarding the evaluation of concepts such as proportionality every day, which makes it very likely that the ICC will be able to maintain a high standard in decisions on this principle.

The compromise that was decided upon at the Rome Conference in terms of the impact that the specific crimes could have on the citizens of the member states entitled the citizens and soldiers of member states to the ICC to be excluded for a period of seven years from any prosecutions for war crimes (Article 121 of the ICC Statute). This stipulation was placed in the Statute at the insistence of France, which felt that perhaps their Foreign Legion might be vulnerable to such prosecutions. Unfortunately for the

United States, this exclusion is only extended to member states of the ICC. By not becoming a party to the statute, the United States is therefore excluded from this.

EVALUATION

Jurisdiction in General:

It seems strange that the United States insisted throughout the Rome Conference that the ICC should not have any jurisdiction over any citizen of a country that does not become a party to the ICC Treaty. Surely it could not mean that the United States never intended to sign the treaty? Why did it then attend the Rome Conference in the first place? All of the safeguards in the ICC treaty, as well as mechanisms such as the Status of Forces Agreements that the United States has with its allies, make any potential breach of the sovereignty of the United States, as they understand it, unlikely. This is also the case with the extradition agreements that the United States has with many of the states in the world.

In any case, would such a stance not encourage the very countries that might harbour the genocidal monsters that the ICC wants to prosecute to simply not sign the treaty, and thereby block some of the possible indictments against them? The counter to this point is that the ICC would still be able to investigate such a country if the United Nations Security Council refers the case to it. The problem, in this instance, is that the Security Council is often hampered by the political indecision of its members, which could cause such cases not to be referred at all. If such a country were then barred from the jurisdiction of the ICC by reason of not having signed the treaty, the court would be powerless to act.

The fact that there are precedents in terms of which the United States prosecuted the citizens of non-member states to some treaties seems to further weaken its position. Surely the parties that were found guilty in the *Yunis* and *Ali Rezaq* cases might feel that the United States enforced a principle on them that it (the United States) did not feel the need to be bound to? This could provide grounds for an appeal of their sentences by both Yunis and Ali Rezaq, as they would have been found guilty by a court that did not have the jurisdiction to prosecute them for their actions.

Jurisdiction over Persons:

It would appear that the concept of complementarity addresses this problem to some extent. Most, if not all, of the crimes specified by the Treaty will be crimes in terms of the domestic law system of the states of the world. By ratifying the ICC Treaty, all of the ICC crimes would become part of the domestic law system of the state. It therefore should not be a problem to investigate any such instance, should the specific country become aware of it.

Since the concept of complementarity has the ICC yielding to the domestic courts of all the states, it would seem that any claim that the ICC infringes on the sovereignty of the United States is totally unfounded. It is important, however, that this principle is exercised with great care and diligence, since it does have the potential for great injustice towards both states and individuals, especially if it were to impede state proceedings or interfere in them (Morris, 2000: 208). Such concerns will only be addressed once the ICC is fully functional.

The SOFAs that the United States has with its allies in Europe and Asia also supply a further level of control in terms of jurisdiction over its armed forces. If the United States still fears that its soldiers are vulnerable to politicised prosecutions before the ICC, it should at least strengthen such agreements with all the countries in which it deploys troops in order to ensure that, in those circumstances, its soldiers would be protected from the ICC. It would still be a problem in countries such as Somalia or Afghanistan, where there is no government in the normal sense of the word. The problem might also arise where American soldiers are captured in hostile countries that might want to charge the soldiers before the ICC.

The same could be said in terms of civilians and extradition treaties. However, it would only be necessary to check and strengthen such treaties, as well to minimise the impact that the ICC might have. By doing so, the United States would not undermine the ICC as such, since the SOFAs and the extradition treaties are merely a means of ensuring that

there could be no uncertainties in terms of the extent of the jurisdiction of the United States over both its soldiers and its citizens. This would ensure that there is no doubt that the United States acted inside of the accepted norms of international law. The United States would, in any case, not have such agreements with hostile states, so this should not really present any problems.

Jurisdiction over the Specified Crimes:

The fact that the Statute of the ICC has jurisdiction over the undefined crime of aggression creates a lot of uncertainty. But despite this uncertainty, it seems very likely that there will not be a definite definition of this crime in the foreseeable future, especially if one looks at the very stringent requirements to accomplish this. Furthermore, the requirement of ratification of such an amendment makes it clear that the United States needs not concern itself with this crime as yet. The fact that only member states to the ICC will be party to the definition of aggression is one of the unfortunate disadvantages of not being a member state of the ICC.

Any potential military actions by the United States, such as the use of pre-emptive strikes against countries like Iraq, will therefore not be defined by looking at the crime of aggression, at least not yet. This would rather fall under the scope of the United Nations Security Council (see chapter 3). Such actions might, however, still be brought under the scope of war crimes, depending on what actions were taken by the United States.

In terms of the requirement of proportionality as defined in Article 8 (2)(b)(iv) of the Statute of the ICC, it is true that some definitions or descriptions could be vague and ambiguous, since there might be uncertainty as to how to limit and shape such crimes. Surely there cannot be a clear guideline to follow to determine what is proportional or not? The experience of the (future) judges of the ICC in dealing with such issues will be very important once such a problem is confronted.

What could in any case be viewed as acceptable collateral damage by the United States might not be viewed as such by the people or country that suffered that damage, or, more

importantly, by the ICC. It therefore would appear, for the time being, that the argument by the United States as to the uncertainty that is created by the requirement of proportionality in terms of the damage and/or loss of life that accrues due to military action is valid.

The fact that the Statute of the ICC grants the member states the opportunity to opt out of the war crimes is a good compromise for states that are sceptical about the impact of the treaty on their soldiers serving abroad, which perhaps also is a way to gain more states as members of the ICC.

It would, in conclusion, appear that most of the arguments of the United States in terms of the jurisdiction of the ICC are not very strong. The political implications of the American stance will be evaluated in depth in chapter 5.

CHAPTER 3: THE ROLE OF THE UNITED NATIONS SECURITY COUNCIL*BACKGROUND*

In order to understand the relationship between the ICC and the United Nations Security Council better, it is important to know what the Security Council is, what it does, and how it will link with the ICC. For these reasons, a brief overview of the Security Council will be given, before looking at the arguments of the United States in terms of the Security Council, as well as the counter arguments.

The United Nations Security Council is the organ of the United Nations that is responsible for the maintenance of international peace and security (Article 24 (1) of The Charter of the United Nations). The powers of the Security Council are set out in Chapters VI, VII, VIII and XII of the Charter. In the pursuit of peace and security, the Council is entitled to make use of methods of pacific settlement of disputes (Chapter VI of the Charter of the United Nations) or to take more assertive action with respect to threats to the peace, breaches of the peace and acts of aggression (Chapter VII of the Charter of the United Nations).

Chapter VI of the Charter formulates the ways in which the Security Council could try to resolve (possible) conflicts in a peaceful manner, without resorting to the use of force. In terms of article 34 of the Charter, the Security Council may investigate any dispute that may lead to a threat to international peace and security. Furthermore, the Security Council has the authority to negotiate or mediate disputes, or to use any other peaceful means necessary to achieve this (Article 33 (1) of the Charter of the United Nations).

Therefore, in terms of this Chapter of the Charter, the Security Council might, for instance, negotiate with different parties in potentially threatening situations, and this might lead to the granting of amnesties or other incentives in order to facilitate the success of such negotiations. It might indicate that, in the pursuit of peace and security, the Security Council would be open to the fact that people who committed some of the crimes outlined in the Statute of the ICC might not be punished for such crimes.

It therefore would not be very conducive to the peace process if the Prosecutor of the ICC were to investigate persons involved in such negotiations for crimes committed in terms of the ICC Statute (Weschler, 2000: 92). For this reason, it was felt that the Security Council should have the means to stop such investigations if they should interfere with such negotiations (Weschler, 2000: 92). This is one of the arguments against the ICC that points out the problem of dealing with situations that have a conflict between justice and peace at their base (see page 10).

It is important, at this point, to reiterate that the ICC does not fall under the express control of the Security Council. Should this have been the case, the Security Council would have been able to stop any actions of the ICC permanently, whether an investigation or a prosecution. Such a scenario would have taken away the independence of the court, which would have defeated the purpose of having such a permanent body. The ICC would then have been bound to the political whims of the permanent members of the Security Council.

Chapter VII of the Charter allows the Security Council to authorise the use of force in order to react to acts of aggression or threats to peace (Article 39, 41 and 42 of the Charter of the United Nations). This force, for example can be either military force or the use of economic sanctions. Examples in this regard would be Operation Desert Storm in the early 1990s, by which Kuwait was liberated from an invasion by Iraq, as well as the sanctions maintained against Iraq ever since. This is the sharp end of the abilities of the Security Council and is very relevant to the ICC, since referrals to the ICC by the Security Council, as well as deferrals, are done in terms of this Chapter (see page 42 – 44 below).

The establishment of the International Tribunals for the Former Yugoslavia (1993) and for Rwanda (1994) was also done with the use of Chapter VII (Bailey and Daws, 1998: 592). The efforts of the United States greatly contributed to the establishment of the Tribunal for Yugoslavia (Malone, 1998: 27).

During the 1990s, the Security Council moved towards interventionism and a more prominent humanitarian role in the international system to prevent the suffering of the civilian victims of conflicts, whether these were internal or external conflicts (Malone, 2002: 43). The establishment of these tribunals, as well as the actions of the United Nations in Somalia, are illustrations of this move by the United Nations.

These tribunals serve as an example and model (in essence) for the ICC insofar as the principles of International Law employed by it. The one big difference is that the ICC did not come into being at the behest of the Security Council, but in terms of the ICC Statute that was negotiated at the Rome Conference for the Establishment of the ICC. The other big difference is that the ICC has jurisdiction that is not limited to a specific area, such as the former Yugoslavia or Rwanda.

Some of the problems that dogged both these tribunals will serve as examples to the ICC, not only in terms of the workings of the ICC, but also in the political will that the member states of the ICC will have to display if they want the ICC to be a success. These problems, in the first place, are the difficulty that the Tribunal for Yugoslavia had in persuading the NATO forces in Bosnia to arrest indicted criminals (Malone, 1998: 28). The other problem was the disagreements in the United Nations in terms of the financing of these tribunals (Malone, 1998: 28).

It is an important fact that the United States played a large part in the establishment of both these tribunals (Wedgwood, 2000: 122). The United States worked diligently in the Security Council in formulating the procedure for the tribunals, which was approved by Congress as well (Wedgwood, 2000: 122). There even was an American judge who served as president of the Tribunal for Yugoslavia from 1997 till 1999, namely Judge Gabrielle Kirk Macdonald (Wedgwood, 2000: 122).

However, there was some controversy in terms of the Tribunal for Yugoslavia when the tribunal determined that it had the authority to investigate claims of misconduct by the

NATO forces responsible for the bombing campaign of Yugoslavia, as well as by the peacekeepers involved afterwards (Wedgwood, 2000: 122). The Russian foreign minister initially called for the United States and NATO leaders to be held accountable in terms of international law for the bombing of Kosovo (Council of Foreign Relations, 2002: 5). This controversy concerned not only the use of force by NATO in Kosovo, but also the question whether the NATO actions were in fact 'legal' in terms of the United Nations Charter (Edgar, 2002: 142 – 143). The Tribunal did not, however, pursue the matter further.

THE AMERICAN POSITION

The United States wants the Security Council to play a greater role in the workings of the ICC. The United States does not have a problem with the fact that the ICC Statute states very clearly that the court has the jurisdiction to investigate and prosecute situations that are referred to it by the Security Council, acting under Chapter VII of the United Nations Charter (Article 13 (b) of the ICC Statute).

The United States, however, was of the opinion that the ICC should have the authorisation of the Security Council for every case that it prosecuted (Brown, 2000: 75). One of the reasons that the United States voted against the ICC Treaty was that it wanted a Security Council-controlled ICC (McGoldrick, 1999: 644). In practice, this would mean that the United States, or any one of the other permanent members of the Security Council, could use their vetoes to stop an ICC prosecution.

The United States believes that the ICC undermines the Security Council in the maintenance of international peace and security (Grossman, 2002: 1), as it dilutes the vision of the framers of the UN in terms of peace and security (Grossman, 2002: 2). There is no explicit oversight by the Security Council on these issues in terms of using the veto, for example, as will be explained.

Another point of contention is that the UN Charter authorises only the Security Council to decide on what constitutes an act of aggression (Elsea, 2002: 6), which might place the

ICC in conflict with the Security Council should it ever be in a position to decide on whether an act of aggression was committed (Office of War Crimes Issues, 2002: 1). At this time, since the act of aggression is not yet defined in terms of the ICC Statute, this should not be a problem.

Another concern for the United States is the fact that the ICC Statute does not have sufficient checks and balances, and that it therefore projects an unchecked power (Grossman, 2002: 1). In this regard, one can look at the fact that any request for a deferral of an investigation or prosecution by the ICC prosecutor can be vetoed (in terms of Article 16 of the ICC Statute, which stipulates that such a deferral should be in terms of Chapter VII of the United Nations Charter), while such investigations themselves cannot be vetoed. This would be a highly political issue, however, which will be discussed in detail in chapter 5.

Another sentiment about the United Nations and the ICC was expressed by Senator Jesse Helms in 2000. Senator Helms, the chairman of the Senate Foreign Relations Committee at the time, said that the American people saw the UN only as an investment which should not have the right to act contrary to the interests of the United States, which would include the ICC in cases that would involve Americans (American Journal of International Law, 2000: 350 – 352).

Would this mean that the United States sees the UN Security Council as a tool that could not have any function other than to promote the interests of the US? Senator Helms feels that, since the US contributes so much to the budget of the UN, the UN should not act against it (American Journal of International Law, 2000: 350). One could ask whether this would mean that any state that pays its UN dues could expect the same from the UN? Does the size of the US contribution matter? What is the magic number in terms of contributions to make the country immune to intervention by the UN?

It should be noted, however, that the senator did not speak for the United States government (American Journal of International Law, 2000: 354). The issue also has

political implications, as well as constitutional significance, since the Senate has to ratify any international treaties in order for them to become domestic law in the United States (American Journal of International Law, 2000: 354). These political implications will be discussed in greater detail in chapter 5.

Another aspect touched upon by Senator Helms is the legal status of treaties that have been ratified by the United States Senate. Treaties that have been ratified become domestic law in the United States, which means that they could be replaced by any new act passed by the Congress (American Journal of International Law, 2000: 352). The United States would therefore be bound by such a treaty only for as long as it is still domestic law and not contrary to the country's Constitution (American Journal of International Law, 2000: 352).

THE COUNTER ARGUMENT

As was stated before, in terms of Chapter VII of the Charter it is the role of the Security Council to decide on what measures need to be taken in an event that might be a threat to international peace and security. It would appear that the ICC does not aim to undermine this situation, nor that it takes it upon itself to maintain international peace and security (Hafner et al, 1999: 113).

This is spelled out clearly in the preamble to the Statute of the ICC, where it is stated that "*nothing in this Statute shall be taken as authorising any State Party to intervene in an armed conflict or in the internal affairs of any State*". This is precisely what is authorised by Article 42 of the Charter of the United Nations, which stipulates that the Security Council may take such actions that it deems necessary to maintain international peace and security, including the use of force. This article also authorises the Security Council to intervene in the internal affairs of a state, should such specific situation be interpreted as a threat to international peace and security.

The fact that the Statute of the ICC provides for an independent prosecutor could, in any case, be seen as a welcome development on the usual position of the Security Council,

where the permanent members are allowed to decide on matters that might influence their own interests. In this regard, it is interesting that Article 27 (3) of the Charter of the United Nations specifies that, under certain circumstances, members should abstain from voting if they are parties to a dispute. However, this Article has never been enforced (Malone, 1998: 29).

The aim of the ICC is merely to “*exercise its jurisdiction over persons for the most serious crimes of international concern*” (Article 1 of the Statute of the ICC). Article 1 also places the ICC in a subordinate position in relation to the national criminal jurisdiction of states through the concept of complementarity. In terms of Article 24 (1) of the Charter of the United Nations, the member states of the United Nations confer the duty of the maintenance of international peace and security on the Security Council, which places the states in a subordinate position to the Security Council.

When the Statute of the ICC was compiled, it was felt that the use of the veto power in the Security Council would severely limit the effectiveness of the ICC (Brown, 2000: 75). The reasoning behind this was that a political organisation such as the United Nations should not be in the position to approve every action of the ICC (Brown, 2000: 75). It was felt that the independence of the ICC should be maintained (Brown, 2000: 76). It does not, however, take away the significance of the role of the Security Council in terms of the ICC (Hafner et al, 1999: 113).

It is perhaps ironic that the fear of the role of a politicised Security Council is the exact opposite of the fear of the United States that the ICC might, in their opinion, become politicised as well. It does, however, not fall in the purview of this thesis to decide on the possibility of the ICC becoming a politicised institution (see chapter 1).

The ICC Statute specifies two occasions in which the Security Council can have a direct influence on the ICC (Oosthuizen, 1999: 315). These will be discussed in turn. The first is the case when the Security Council refers a case to the ICC. The second is the situation

in which the Security Council makes a request for the deferral of a case in terms of an investigation or prosecution to the ICC.

In terms of Article 13 (b) of the Statute of the ICC, the Security Council may refer a case to the Prosecutor of the ICC if it appears that one or more of the crimes in terms of which the ICC has jurisdiction has been committed. The important aspect of this article is that, in referring the case to the ICC, the Security Council has to be acting in terms of Chapter VII of the United Nations Charter.

In terms of Chapter VII of the Charter, the referral has to be in terms of cases that are threats to peace, breaches of the peace and acts of aggression (Oosthuizen, 1999: 317), as set out in Articles 39 to 51 of the Charter. This also means that any such resolutions to refer the case to the ICC can be defeated by the veto of any of the permanent members of the Security Council.

The other implication of Article 13 (b) is that the referral from the Security Council can be in terms of perpetrators who are citizens of non-state parties (Oosthuizen, 1999: 317). In short, this means that the referrals by the Security Council are one way of broadening the jurisdiction of the ICC (for a more detailed discussion of jurisdiction, see chapter 2).

Another important factor in this regard is the effect that such referrals will have on the other member states of the United Nations (Oosthuizen, 1999: 327 - 329). The problem in this instance is in terms of Article 17 (1) of the ICC Statute, which determines that the case would be inadmissible before the ICC if the state in question has already begun with an investigation, or when such an investigation and prosecution have already been concluded. This is the so-called complementarity principle.

There are some articles in the United Nations Charter that might have an influence in such cases. For instance, in terms of the Charter of the United Nations, Article 25 (which specifies that the member states of the United Nations agree to accept and carry out the decisions of the Security Council), Article 48 (which specifies that the member states will

carry out the decisions of the Security Council as the Council determines it) and Article 103 (which specifies that the Charter will reign supreme should there be conflict with other international agreements) are relevant (Oosthuizen, 1999: 328). Should all these Articles be read together, the implication could be that the Security Council may override the complementarity principle in order to have a situation investigated and prosecuted by the ICC (Oosthuizen, 1999: 329). This would obviously be in cases where the relevant state is a member of the United Nations.

The circumstances that would lead to the request for a deferral by the Security Council of a case under investigation of or prosecution by the ICC are set out in Article 16 of the ICC Statute. This Article stipulates that no investigation or prosecution by the ICC may proceed for a period of 12 months after the Security Council has adopted a resolution under Chapter VII of the United Nations Charter in this regard. This period may be extended for another 12 months under the same conditions (Article 16 of the ICC Statute).

This article gives the Security Council a great measure of control over the ICC (Oosthuizen, 1999: 330). If an investigation of a situation is perhaps embarrassing to a permanent member of the Council, or if it is felt that the situation is of a sufficiently sensitive nature, it could be halted. It is important to note, however, that any such resolution for a deferral could be defeated by the veto of a permanent member of the Security Council, since it is done under Chapter VII of the Charter.

Any effort by the United States to have such a resolution passed therefore could be defeated by the other permanent members of the Council. Such a resolution could also be defeated if fewer than the necessary number of members vote in favour of it. In this case, it would have to be at least nine votes in favour of such a resolution, including all the permanent members (Article 27 of the UN Charter).

The other problem with this Article is also in terms of the procedures of Chapter VII (Oosthuizen, 1999: 331). For a situation to be classified in terms of Chapter VII, it has to

be clear that any such investigation or prosecution by the ICC is a threat to peace, a breach of peace or an act of aggression. Only then can the Security Council act. The question then simply becomes, could it be possible for ICC investigations and prosecutions to meet such requirements? Surely this could not be the case.

When reading Article 16 of the ICC Statute together with Article 15 (2) of the Statute (which indicates that the Prosecutor of the ICC may analyse the seriousness of any information received regarding ICC crimes), it is quite possible to hypothesise that the Prosecutor may continue to gather information about a specific case, even though the Security Council may have deferred such a case (Oosthuizen, 1999: 336). The fact that it is sometimes unclear as to what exactly constitutes an investigation or is viewed as simply gathering information will probably contribute to this (Oosthuizen, 1999: 336). The implication is clearly that the Security Council will not really be able to completely stop any interest of the ICC in a specific case.

In terms of the possibility that the ICC might, at some future date, be able to exercise jurisdiction over the crime of aggression, this is not something that should pose any problems as yet, as has already been mentioned. There has never been a specific definition of aggression used by the Security Council in deciding on such cases (Elsea, 2002: 6 – 7). In this regard, the determination lies with the Security Council itself as to what constitutes aggression (Elsea, 2002: 7). It therefore is unlikely that such a definition will be outlined for the ICC.

It also is important to remember that the United Nations Charter is a treaty. If one looks at this situation in terms of what Senator Helms said about the legal status, it is possible that the United States places the United Nations Charter on a different level to other treaties, which is contrary to the way in which such ratified treaties should be treated as part of the domestic law of the United States.

EVALUATION

The referrals that can be made by the Security Council to the ICC are merely one way in which cases can be brought before the court. This points to the fact that the overall role of the Security Council in the workings of the ICC, even though significant, is not that great (O'Shea, 1999: 248). What is very important, however, is the fact that a political body, such as the Security Council, obtains a measure of control over a judicial body such as the ICC (O'Shea, 1999: 249).

It is true that the United Nations Security Council has not been that successful in its maintenance of international peace and security. The Security Council, even though it established the Tribunals for Yugoslavia and Rwanda, also does not have a very good record in terms of prosecuting other mass murderers and violators of human rights, such as Saddam Hussein or Pol Pot, before such tribunals (Roth, 1998: 5). This is precisely why the ICC will be necessary.

There can be many other reasons for the importance of the ICC in the UN system. The most prominent would be that the permanent members of the Security Council are not prepared to place their own interests secondary to the pursuit of peace and security. The other problem may be that the effort involved in this quest for peace and security places an unacceptable political and economic burden on the permanent members. However, it is not within the purview of this chapter to analyse and criticise the workings of the Security Council. The issue to be looked at is rather the success or failure of the American arguments with regard to the possible undermining of the Security Council by the ICC.

There have been efforts to reform the United Nations, including the Security Council (Bailey & Daws, 1998: 379). The veto is the one provision in the Charter of the United Nations that is criticised the most (Bailey & Daws, 1998: 379). In order for the veto to possibly be taken away, all the permanent members would have to agree upon such a course of action, and that is highly unlikely (Bailey & Daws, 1998: 379).

The United States has, to a large extent, confirmed this stance by wanting to unconditionally maintain its power in the United Nations Security Council in terms of the veto. It did this by insisting on the use of the veto to block any ICC investigations or prosecutions that might be against American interests (Council on Foreign Relations, 2002: 11). The United States therefore seems intent on not compromising, in any way, in terms of the role of the Security Council.

The United States would not lose the power of the veto absolutely, but since the ICC Statute places some constraints upon it, it would have to rely more on the use of other means to accomplish its goals in terms of any possible ICC investigations that it might find undesirable. The means at its disposal in this regard are primarily political, however, and will be discussed in greater depth in chapter 5.

The question now is whether it would be at all necessary for the United States, or any other country for that matter, to apply to the Security Council for a resolution to suspend such an ICC investigation or prosecution. The reason is that the concept of complementarity will place the particular state in a position to investigate and prosecute the crime itself.

The fact is that it would rather appear that the Security Council and the ICC complement each other. The Security Council would refer cases to the ICC, since it would be in the interests of the maintenance of peace to do so (United Nations, 2002: 4). For the same reason, the Security Council would request the ICC to defer from any specific investigations or prosecutions.

For the reasons set out above, it would appear that the United States does not have very strong or persuasive arguments in terms of the role of the United Nations Security Council under the ICC Statute.

CHAPTER 4: ARGUMENTS IN TERMS OF THE UNITED STATES CONSTITUTION*BACKGROUND*

For the Americans, their Constitution is a sacred document (American Journal of International Law, 2000: 352). For this reason, it would be very important to understand the relevant factors in terms of this document if one were to compare it to specific stipulations of the ICC Statute. The impact of the Constitution, and the rights it grants to all Americans, including members of the armed forces, should not be underestimated.

It must be emphasised that the Constitution is the supreme law of the United States. All other domestic laws therefore are subordinate to it. In terms of United States domestic law, all treaties, for example, become part of the domestic law of the United States once they have been ratified (American Journal of International Law, 2000: 352). In terms of the Constitution, Congress may, in fact, replace any domestic law with another, and this would also include treaties (American Journal of International Law, 2000: 352). This is especially true in relation to criminal law (Wedgwood, 2000: 129).

What this means for the ICC is that, even if the United States had ratified the ICC Treaty, they would only be bound to it until such time that Congress decides to replace it with another law. It could also mean that the United States might refuse to ratify the ICC treaty if it was felt that the ICC Statute contained stipulations that ran contrary to what was guaranteed by the Constitution.

The discussion of the American position will focus primarily on the due process guarantees enjoyed by Americans in terms of their Constitution. These guarantees must be distinguished from those that are enjoyed by an accused who is charged before the ICC, including American citizens.

The discussion of the counter arguments will broadly follow two different paths. The first path is to briefly look for any specific stipulations in the Constitution that would or could prevent the United States from joining an international institution such as the ICC. The

second path is to look at the ICC Statute itself in order to ascertain whether there are, in fact, any stipulations that might be contrary to what the Constitution formulates in terms of Procedural Law, and then to make an evaluation of the merits of such a situation.

THE AMERICAN POSITION

The position of the United States can be stated by looking not only at the position of the government, but also at that of certain writers who criticise the due process guarantees of the ICC. It therefore is important to look briefly at some of the guarantees set out in the Constitution and to identify those that are not in the Statute of the ICC. In this regard, the guarantees of the Fifth¹ and Sixth² Amendments of the Constitution (United States Congress, 2002: 1) are the most important. One could also look at attempts that were made in the ICC Statute to combine the Anglo-American adversarial judicial model with the continental inquisitorial model to see which Constitutional guarantees possibly were neglected.

There is a feeling in the United States that, since the ICC would gain jurisdiction over non-parties, it would encroach on American constitutional safeguards (Council on Foreign Relations, 2002: 6). See chapter 2 for a more in-depth discussion of the issue of jurisdiction. In any case, the constitutional safeguards provide some checks and balances in terms of the United States criminal procedure that do not appear to be totally represented in the ICC Statute (Grossman, 2002: 1). This same problem with procedural

¹ **Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

² **Amendment VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

guarantees was also identified in terms of the ad hoc criminal tribunals for Rwanda and Yugoslavia.

There are specific parts of the ICC Statute that are not compatible with both the Fifth and Sixth Amendments. The ICC Statute has no formulation in terms of which an accused has to be indicted by a grand jury. Instead, the ICC Statute makes provision for the use of a so-called pre-trial chamber, consisting of three judges, which may decide that a specific investigation by the prosecutor may proceed (Articles 15 (1) – (3) of the ICC Statute). This is an example of the inquisitorial system, which gives a judge the authority to order the start of an investigation (Cassese, 1999: 169).

The Fifth Amendment provides that no accused could be tried twice for the same crime (the double jeopardy principle). The ICC Statute provides such a principle only conditionally (Dempsey, 2002: 10). In fact, there might be a danger that the ICC Statute makes it possible that a person could be tried more than once for the same crime. Article 17 (1)(b) of the ICC Statute provides some form of protection from being prosecuted more than once, but places certain conditions on this in terms of Article 20 (3).

This Article gives the ICC Prosecutor permission to proceed with an investigation if it is felt that the accused was freed to shield him or her from prosecution, or that the trial was not conducted independently or impartially. The danger, in this instance, is that the final verdict in terms of Article 20 (3) lies with the ICC, which might make a finding against a state such as the United States for political reasons.

In terms of the Sixth Amendment, any person shall have the right to be tried by an impartial jury. There is no such right in terms of the ICC Statute (Elsea, 2002: 7). In fact, the accused will have to appear before a panel of no fewer than six judges, with no jury (Article 39 of the ICC Statute). This is another attempt to graft some elements of the inquisitorial model onto the adversarial model of criminal procedure, whereby the judges play a more active role in the course of the trial (Cassese, 1999: 169).

However, the United States federal government can also not enter into treaties that are not compatible with the constitution, specifically if the treaty would deny American citizens their constitutional rights (Dempsey, 2002: 12). For this reason, any ICC judgement against an American would probably not succeed a constitutional challenge in terms of both the Fifth and Sixth Amendments (Dempsey, 2002: 12). This issue will however remain open until such time that there is a constitutional challenge against the ICC Statute.

THE COUNTER ARGUMENT

The counter argument will look at six different principles that will be followed in answering some of the American concerns in terms of their Constitution. These principles are taken from an article by Wedgwood (2000: 119 - 136) and provide an all-encompassing view on the issue. The discussion will follow the arguments of Wedgwood, unless stated otherwise.

Each one of the principles will be discussed in detail before moving to a discussion of the next one. The principles will summarise the two paths that can be taken, as explained above. A conclusion will follow in the next section, where an evaluation will be made.

The first principle is that the United States has used its treaty power in the past to take part in other international tribunals that could have affected the lives and property of American citizens. These tribunals and courts had procedures that differed from those of the United States domestic judicial system, even though the United States was actively involved in the formulation and execution of the rules. In each of the instances that will be discussed, the United States Congress approved the use of the tribunals, and even implemented legislation that made possible the handing over of suspects found in the United States. However, the procedures of these tribunals will not be discussed in depth. However, the differences between the procedures of these tribunals and the procedural guarantees of the United States constitution will be mentioned.

The United States has participated in a number of international tribunals, not only criminal tribunals, but also commercial and trade tribunals arising from foreign policy crises and foreign policy issues. It must be stated at the onset, however, that the degree of participation in such tribunals differed from being part of the mechanism of such a tribunal, i.e. serving as prosecutors, defence councils and judges, to being the parties laying claims before the tribunals. This last point will be illustrated by looking at specific examples.

The United States participated in the Military Tribunals of Nuremberg and the Far East after the Second World War. In terms of the rules of these tribunals, which were partly formulated by the United States, there were, for example, limited rights to cross-examination, while some of the proof was accepted as affidavits. The United States only served as part of the mechanism in terms of these tribunals (Goldstone & Bass, 2000: 51). These two tribunals have been accused of serving “shotgun justice”, however, which is something to be avoided in setting the procedural rules for any new criminal tribunal (Goldstone & Bass, 2000: 55 – 56).

The United States also played an important role in establishing the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) in terms of the United Nations Security Council, taking the lessons of Nuremberg and Tokyo into consideration. In fact, the ICTY profited greatly from the support shown towards it by the United States (Goldstone & Bass, 2000: 52). An American Judge, Judge Gabrielle Kirk Macdonald, even served as president of the ICTY from 1997 to 1999.

In fact, Judge MacDonald, together with the chief prosecutors of the tribunals, Judges Richard Goldstone of South Africa and Louise Arbour of Canada, all insisted on the highest standards of due process (Roth, 2001: 4). This was reflected in the fact that both these tribunals experienced many delays and frustrations that could be traced directly to the exercise of true due process (Goldstone & Bass, 2000: 56). There would be no reason to believe, at this stage, that the judges and prosecutor of the ICC would not act in the exact same manner.

In terms of commercial and trade tribunals, the United States has participated in the Iran-United States Tribunal established in terms of the Algiers accord of 1981, which was aimed at remedying the seizure of American business assets in Iran. This tribunal, together with the Iraqi Claims Commission, which was aimed at the situation after the invasion of Kuwait, used innovative methods of proof to obtain compensation for injuries. The United Nations Security Council established the Iraqi Commission.

Other trade tribunals that might impact on American businesses would be those that were established in terms of the North American Free Trade Agreement (NAFTA) and the dispute resolution mechanism of the World Trade Organisation (WTO). The dispute resolution mechanism of the WTO grants any of the member states of the WTO the opportunity to resolve trade-related disputes by having the case reviewed by a panel consisting of representatives of other member states not party to the dispute (WTO, 2002). These panels judge the case in terms of the rules of the General Agreement on Trade and Tariffs (GATT) governing trade between WTO member states (WTO, 2002). Appeals on the findings of the panels are also possible. No judges or juries therefore are involved.

It is very important to distinguish between crimes or incidents committed outside of the United States in which its citizens might have been involved, and instances in which these crimes were committed by citizens within the United States itself. In cases in which crimes were committed in terms of the ICC Statute on the soil of the United States by any of its citizens, the Constitution definitely will be applied, since the United States has direct jurisdiction (for a more in-depth discussion on jurisdiction, see Chapter 2), even in terms of genocide and war crimes. This is also an instance in which complementarity will be of great importance.

The second principle is that the ICC Statute does, in fact, incorporate many of the guarantees and procedural safeguards that form part of the American Bill of Rights, as well as of other liberal constitutional systems. The major differences are those that were

discussed in the previous section. In fact, the stipulations of the ICC Statute in terms of procedural guarantees are simply a blend of the Common Law judicial system, as found in countries such as the United States and Great Britain, and the Civil Law judicial system, as found in countries such as France and Germany (Cassese, 1999: 169).

The specific rights that a defendant before the ICC has in terms of due process, as negotiated by the United States, are the following: a timely notice of the charges against him or her (Article 60 (1) of the ICC Statute), the presumption of innocence (Article 66 (1) and 66 (2) of the ICC Statute), the right against self-incrimination, which includes that no negative inferences will be drawn (Article 55 (1) of the ICC Statute), the right to assistance of council (Article 67 (1)(b) of the ICC Statute), and the right to an interpreter (Articles 55 (2)(c) and 67 (1)(f) of the ICC Statute).

Then there are also the right to bail (Articles 58 (1) and 60 (2) of the ICC Statute), the right to a speedy trial (Article 67 (1)(c) of the ICC Statute), the right to defend oneself (Article 67 (1)(d) of the ICC Statute), the right to cross examine witnesses against oneself, as well as calling one's own witnesses (Article 67 (1)(e) of the ICC Statute), the right of disclosure of any exculpatory evidence (Article 55 (1) of the ICC Statute), the right not to bear the burden of proof but to have to be proven guilty beyond reasonable doubt (Article 66 (3) of the ICC Statute), the right not to be subjected to coercion or duress (Article 55 (1)(b) of the ICC Statute), and the right not to be subjected to any cruel, inhuman or degrading punishment (Article 55 (1)(b) of the ICC Statute).

There even is the right to be advised of one's rights, such as was established in the United States in the case of *Miranda v. Arizona* (384 U.S. 436 (1966)). The ICC Statute goes even further by informing possible defendants whenever there are grounds to believe that he or she might have committed a crime (Article 55 (2)(a) - (d) of the ICC Statute).

The big difference between the ICC Statute and the United States Constitution, however, is that there is no trial by jury before the ICC. There rather is a so-called fact-finding panel of three judges, of whom at least two have to agree on the verdict. There also is the

possibility of an appeal against such a verdict, which would also be heard by a panel of judges.

The third principle is that the American common law trial procedure would not be applicable to American citizens in some cases in which crimes were committed in terms of the ICC Statute, such as war crimes. The reason for this is that the courts that would have jurisdiction in such cases would be military court martials, which have a different procedure from that of ordinary courts. In fact, the court martial does not provide some of the procedural safeguards that are available in civil courts (Everett, 2000: 137). An example in this regard would be that persons serving in the land or naval forces do not have to be indicted by a grand jury, as is guaranteed by the Fifth Amendment.

The military standards differ considerably from those applied in civilian courts. In terms of the Uniform Code of Military Justice, as summarised in the manual for court martial in the United States, a soldier accused of harming a civilian or a prisoner of war is subject to a (general) court martial by a military judge and five members. The soldier therefore is not entitled to a 'normal' trial by jury, as would be the case in civilian courts.

There are two further elements that define the significance of court martials. The first element is that such court martials may be used even when the soldier is a member of a foreign military. In this regard, a Swiss military court tried suspects of both the Bosnian Serbs in Yugoslavia and the Hutu Militia in Rwanda in terms of the Swiss Military Penal Code.

The second element is that the nature of the crime committed by the soldier, rather than the identity of the defendant, may actually set the limits of the jurisdiction of the military court martial. What this means is that, in extraordinary circumstances, the military court martial may try persons who are not soldiers. In the case of *ex parte Quirin*, the United States Supreme Court confirmed that a civilian may be tried and condemned to death by a military court for sabotage (317 U.S. 1 (1942)). This was during the Second World War,

however, and was contrary to the earlier case of *ex parte Milligan* (71 U.S. (4 Wall) 2 (1866)), which held that civilians could not be tried before military courts.

In terms of being extradited or being arrested on the territory of another state, the United States Supreme Court has held that the Constitution does not travel abroad with any American. The requirements for extradition are set out on page 27 of chapter 2. However, a distinction needs to be made between these cases and cases in which the United States government is acting directly against its citizens abroad. In such cases, the United States government is compelled to comply with the constitution when it acts.

Furthermore, if an American were to be extradited to another state for a crime committed on that state's territory, that person would also not be entitled to the American common law trial procedure. The same situation would apply if that American was arrested in the territory of the other state and then tried for that crime. In such cases, the American would be tried in terms of the trial procedures of that state, regardless of the fact that such a procedure may differ from the one used in the United States.

The fourth principle is whether the concerns that stemmed from the procedures of the ad hoc tribunals of Rwanda (ICTR) and the former Yugoslavia (ICTY), to which the United States made a great contribution, are addressed by the ICC Statute. In this regard, it becomes important to look at these tribunals critically to see whether they delivered on the guarantees set out in their statutes. There also are other, general concerns that might become relevant in this regard.

Problems arose at the ICTR when certain procedural guarantees were ignored. These included the right of an accused to have council of choice for the trial, and the fact that some of the accused did not receive a speedy trial. An example of this is the case of Jean-Bosco Barayagwiza, who was ordered to be set free after the ICTR found that he had spent too much time in custody awaiting trial (Goldstone & Bass, 2000: 56). These concerns are quite explicitly addressed in Articles 67 (1)(b) and 67 (1)(c) of the Statute of the ICC.

At the ICTY there was a case in which the accused was confronted by an anonymous witness, which is contrary to the Constitutional guarantee that Americans have to confront any witnesses against them. This issue is not addressed by the ICC Statute and it might be tested at some stage if the court has to decide on some of its own procedures.

It may become important for a defendant being tried before the ICC to have access to sensitive information to corroborate his or her case. States may be reluctant to provide such information for the very reason of its sensitivity, which would place the defendant at a disadvantage. With regard to such a scenario, the ICC Statute provides in Article 72 (7)(a)(ii) and 72(7)(b)(ii) that an inference in favour of the defendant will be made at the trial if such evidence is not forthcoming. An example in this regard was the reluctance of Croatia to provide records in the trial of Tihomir Blaskic that had an important bearing on the case against him (Goldstone & Bass, 2000: 56).

Other points of concern are the place of incarceration of any persons found guilty before the ICC. In Article 103 (3)(b), the ICC Statute provides that international standards for the treatment of prisoners be observed. Furthermore, the accused can apply to be transferred to serve the sentence in another state in terms of Article 104 (2) of the Statute of the ICC.

The fifth principle is that the SOFAs (Status of Forces Agreements) that are in existence between the United States and its allies will protect American military personnel stationed in those states. For a more detailed discussion on the issue of SOFAs as discussed by Everett (2000), see chapter 2.

The sixth principle concerns the concept of complementarity (Cassese, 1999: 158). To recap, in terms of this principle the ICC would defer any investigation to the state of the accused, except if such a state is unwilling or unable to investigate and prosecute the case (Articles 17 and 18 of the Statute of the ICC) (see chapter 2 for a more in-depth discussion of this principle). The primary responsibility to prosecute criminals therefore

lies with the national criminal law system (Council of Europe, 2002: 1), which ensures the protection granted by the Constitution of the United States.

EVALUATION

From looking at the two paths that were followed in terms of the counter arguments, it is obvious that there are clear conclusions that can be made. In the first place, it is quite clear that there are no specific stipulations in the Constitution of the United States that may prohibit the United States from becoming a party to an international institution such as the ICC. If that were the case, the United States would not have been party to the tribunals that were mentioned in the previous section.

In the second place, it is clear that some of the guarantees in the Constitution are not stated explicitly in the Statute of the ICC. These guarantees were not deleted, however, but merely substituted for some of the procedures of the inquisitorial judicial systems. There therefore are no substantial procedural differences between the Statute of the ICC and the United States Constitution. It would, however, be important to see how this will pan out in practice, but if the ICTY is any indication, procedural guarantees will be enforced strictly.

This argument against the ICC in terms of the Constitution of the United States is perhaps the weakest of the three discussed so far. So many arguments are available to counteract this argument that it is not really necessary to go into them at great length.

CHAPTER 5: POLITICAL IMPLICATIONS

SPECIFIC IMPLICATIONS

The United States, as has been made clear in the previous three chapters, takes a very specific stance in rejecting the ICC. This stance, together with the specific arguments levelled at the ICC by the United States, will have political implications for the state and for the global system as a whole. For the sake of this chapter, these implications will be divided into two sections. The first section will comprise a brief look at the political implications of the arguments against the ICC on the basis of the jurisdiction of the court, the role of the United Nations Security Council and the Constitutional concerns. The second section, which will be the longer, will look at more general political implications.

The general political implications can be divided into five different categories. The first includes the implications of the stance of the United States on the different organs of the government, and in particular the legislature in the form of the Congress (the House of Representatives and the Senate).

The role and influence of the Pentagon, as the body responsible for implementing the deployment of American military forces (Nash, 2000: 154), might play an important part not only in the stance of the United States, but also in terms of the implications of its role with regards to the ICC. In the third place, the reactions of the general American public could also have political implications. The behaviour and reactions of human rights organisations and non-governmental organisations will have an important political impact, as well as implications for the United States.

Finally, there will be definite political implications with regard to the relations of the United States with its key allies, since most, if not all, of them are strong supporters of the ICC. These implications could have an influence on the standing of the United States in the international community, as well as on its relations with other countries in Europe and the rest of the World. This might even be significant in the war on terror that the United States is involved in at the moment.

The way that the United States can, or should, use its military, economic and political power in the international system is of importance. It could well determine the future role of the United States in the international system (Nash, 2000: 155). It could also provide a better explanation for the behaviour of the United States towards the ICC. The approach in this regard looks at the so-called 'hard power' and 'soft power' options for the United States, as formulated by Joseph Nye.

Hard power is the power of coercion (Nye, 2002: 2). This type of power is exercised through the use of military or economic power (Nye, 2000: 1) and is often, but not exclusively, used in a unilateral manner. This type of power, as connected with the role of the hegemonist, usually implies that the state (the United States in this case) can act without any checks and balances (Nye, 2000: 1). In terms of its military, the United States is clearly the hegemonist in the world today, but, in terms of its economic strength, it is somewhat on an equal footing with Europe and Japan (Nye, 2002: 2).

Soft power is the power to get others to do what you want them to do through attraction rather than coercion (Nye, 2000: 1). Examples of such attraction can be found in values, such as human rights and democracy, in cultural exports, such as films and art, and in providing normative leadership in international organisations (Nye, 2000: 1). Such power would enable the United States to establish widely acceptable norms and a consensus in the international system that is a reflection of their values (Nye, 2002: 3). This would include the values of finding consensus through compromise, fairness and equitable treatment.

It is important that the hard power options should not be allowed to undermine the normative advantages of soft power (Nye, 2002: 2). By using hard power to act unilaterally, for example, the United States could squander its soft power advantages by taking away the attraction it creates for other states (Nye, 2002: 4). Such unilateralism can, for example, be the rejection of widely accepted international agreements or understandings, such as the Kyoto Protocol, the convention on the use of landmines, or even the ICC.

It must be pointed out that both hard and soft power can function within unilateral and multilateral frameworks. The United States can, for example, use its hard (military) power within the framework of NATO, as it did in Kosovo, or within the framework of the actions of the United Nations Security Council, as it did during the Gulf War. Soft power can be exercised unilaterally if the United States acts only towards a single state in order to move that state to act the way the United States wants it to.

Political Implications based on Chapters 2 – 4

The fact that the United States has argued against the ICC on the basis of the concept of jurisdiction may have important implications for the role of the United States in the development of international law (Chayes & Slaughter, 2000: 238). By deciding not to accept these developments and standing aside from the ICC Statute, the United States will be restricted in its potential future contributions to the evolution of the international legal system (Chayes & Slaughter, 2000: 239). This would include the ability of the United States to influence the development of the law of war (Elsea, 2002: 22).

It would appear that the trend is towards a situation in which national jurisdiction is not exclusive anymore, even though it is still primary (Chayes & Slaughter, 2000: 241). This is illustrated by the concept of complementarity in the ICC Statute. The United States appears unwilling to accept this development and, in so doing, may undermine its soft power.

The political implications in this regard are quite staggering, simply because the United States places itself, by implication, in the position of not feeling itself bound by the (legal) rules and standards it sets for the rest of the world (Sewall et al, 2000: 4 – 5). The United States has worked hard to try to define a concept of a global legal system for the new millennium, but now it does not want to be part of it (Chayes & Slaughter, 2000: 238). This could cause the United States to lose some of its (soft power) influence in the international system, as well as the moral high ground (Elsea, 2002: 22).

In relation to the United Nations Security Council, there are interesting scenarios that can become quite significant should they ever materialise. The first would be if the United States was to table a resolution to request the ICC to suspend an investigation or prosecution. Since such a resolution can be defeated by the veto of another permanent member of the Security Council, the United States would find itself in a delicate situation. If such a veto was used, the United States would not be able to stop such an investigation or prosecution, whether the accused is a citizen of the United States or not. It also should be remembered that such a resolution could also be defeated if fewer than nine states vote for it (see Article 27 of the United Nations Charter). This resolution would also have to be worded to incorporate the stipulations of Chapter VII of the United Nations Charter.

As a caveat it would be important to draw a link between cases in which the person in question is a citizen of the United States and those when the person is not, as well as the reason why the United States would not be able to do anything. The United States may formulate such a resolution on behalf of a citizen of a state that is seen as an ally. This would be done if the state in question is unwilling or unable to proceed with the investigation of that person. In these cases, complementarity would not be an issue, since this other state would not rely on this principle. The United States might therefore be acting in its own interests by trying to pass the resolution.

If an American citizen were under investigation by the ICC, the United States would simply be able to make use of the principle of complementarity. The ICC might, however, proceed with the investigation if it determines that the United States undertook a token investigation and prosecution that led to the release of the guilty party. The situation in which the ICC might not accept the verdict of the domestic courts of the United States is the scenario that the United States fears the most. The possibility that such a case would ever materialise is virtually zero, however. This oversight capacity of the ICC in terms of the results of due process in domestic courts is most likely aimed at states with dubious judicial systems. The United States definitely is not one of them.

The question, however, is whether any one of the other permanent members would dare to veto such a resolution? However, the United States would most likely make the consequences of such an action very clear. In this regard, the United States may use its hard and soft powers in conjunction with one another. What is quite clear, though, as was pointed out in chapter 3 (see page 44 – 46), is that the United States, as a permanent member of the Security Council, is very much against losing its veto power. This will have major political implications should there be moves to reform the way in which the Security Council works.

As was pointed out in chapter 4 (see page 57), the arguments in relation to the Constitution are not very convincing. By placing so much emphasis on the workings of its domestic legal system, the United States has merely confirmed that the concept of complementarity should not become a problem in prosecuting Americans for war crimes, genocide or crimes against humanity in the United States.

However, the issue of extradition and the SOFAs remains. A possible political implication could be that the United States may feel itself less inclined to honour such (possibly) longstanding treaties simply because it now feels that, because the legal system of the other state differs from the United States Constitution, the extradition is unacceptable. Such a scenario surely would undermine the very basis of the commitment of the United States to established international law.

General Political Implications

The reaction of the United States Congress to Bush Administration's rejection of the ICC is important (Council on Foreign Relations, 2002: 12). At the moment, both the Congress and the Senate are in favour of this stance, as is illustrated by the Liberty Committee (2002) and the Senate Foreign Relations Committee chaired by Senator Jesse Helms (Weschler, 2000: 110 – 111).

The Liberty Committee is a conservative section of the Congress that has as its goal the protection of what it sees as the values that the United States holds dear, as well as the

protection of the sovereignty of the United States from outside influences (The Liberty Committee, 2002: 1). Congress aims not only at precluding funds to support the ICC, but also at setting structures in place that might be used against any possible actions taken by the ICC against Americans (Elsea, 2002: 8).

Such structures include the American Servicemembers' Protection Act passed by Congress, giving the president the authority to use any means necessary to rescue American soldiers held in other states (The Liberty Committee, 2002: 1). It prohibits cooperation with the ICC and places restrictions on American participation in future United Nations peacekeeping missions (Elsea, 2002: 9). The actions it authorises might even include, by implication, invading The Hague to rescue American soldiers held for trial before the ICC. Such hard power action taken by the United States might just bolster the perception that the United States is taking a more unilateral approach to world affairs (Elsea, 2002: 22).

There also is a new anti-terrorism law aimed more at forcing as many states as possible to sign bilateral agreements not to extradite Americans to the ICC (Becker, 2002: 1). This law will place the United States in a position to threaten the withdrawal of military aid to certain countries should their demands on the ICC not be met (Becker, 2002: 1). This law enjoyed reasonable bipartisan support in Congress (Becker, 2002: 1).

It is quite possible that Congress and the Senate might use this stance towards the ICC to justify other cases in which the United States is taking a contrary view towards other multilateral initiatives or institutions that enjoy world-wide support (Council on Foreign Relations, 2002: 12). Since it is also the function of the Senate to ratify treaties signed by the executive, the attitude towards the ICC might even be used to block initiatives backed by the executive (Council on Foreign Relations, 2002: 12). This could be another signal that the United States is moving towards a more unilateral approach to its international relations (Prestowitz, 2002: 25).

There are a few examples when the legislature took a firm step in rejecting such multilateral initiatives were supported by the executive. When the executive did not support such initiatives, those initiatives enjoyed the support of the major allies of the United States. Examples of these include the Convention on the Rights of the Child (Weschler, 2000: 100), the Landmines Convention (Malone, 2002: 42) and the Kyoto Protocol. Only two countries in the world have not ratified the Convention on the Rights of the Child (Weschler, 2000: 100). They are the United States and Somalia. The only reason Somalia has not ratified the convention is that it does not have a functioning government (Weschler, 2000: 100).

In all of these cases, President Clinton was in favour of the initiatives and he went so far as to sign both the Convention on the Rights of the Child as well as the ICC Treaty before he left office (Edgar, 2002: 143 – 144). President Bush, however, has explicitly rejected the Kyoto Protocol, as well as the ICC Treaty (Lewis, 2002: 1), while the Convention on the Rights of the Child seems to be going nowhere as far as the Congress is concerned.

The Pentagon may play a role in determining the stance of the Congress on some of these multilateral initiatives. In terms of the Convention on the Rights of the Child, it seems that the Pentagon is not happy with the stipulation that no person under the age of 18 years may be recruited as a soldier (Van der Merwe & Malan, 2002: 233). It would appear that the Pentagon is still keen to recruit 17-year-olds for its forces (Roth, 2001: 1 – 2).

The Pentagon will be in favour of not supporting the ICC, since the military leaders will fear putting their soldiers at risk of a distant court, especially when these troops serve as peacekeepers for the United Nations (Council on Foreign Relations, 2002: 12). Coupled with this fear will be a reluctance to risk deploying soldiers in regions where the “threat” of the ICC may be stronger (Elsea, 2002: 9). If there perhaps were guarantees that American soldiers would be exempted from the jurisdiction of the ICC, the Pentagon may feel less inclined to support the current strong stance of the United States towards the

ICC (Council on Foreign Relations, 2002: 12). Such guarantees could include immunity from the ICC for American soldiers serving as UN peacekeepers (Elsea, 2002: 22).

Another factor that is intimately linked with the possibility of charging American soldiers is the fact that the ICC might even go further by not only charging the soldiers in the field with war crimes or other crimes, but also indicting the military commanders responsible for these soldiers, or, in extreme cases, the civilian commanders of the military, which could include members of the administration, such as the Secretary of Defence. This would lead to the court perhaps questioning the legality of the military actions taken by the United States (Weschler, 2000: 111), which would be unacceptable.

There have been extensive efforts by the United States to gain exemption for their soldiers from the jurisdiction of the ICC, beginning with lobbying efforts to exempt United States peacekeepers from prosecution by the ICC (Marquis, 2002: 1). The Security Council has in fact agreed that US peacekeepers are entitled to one year's exemption from the ICC (Marquis, 2002: 1). This was done after the United States threatened to veto the authorisation of the peacekeeping missions in Bosnia and Croatia (Marquis, 2002: 2).

One of the other reasons why the Pentagon might be more tolerant towards the ICC if these guarantees are in place is the relationship it has with all its strategic allies. This is especially true in terms of the War on Terror, for which the aid and cooperation of its allies are very important. It would not be in the interests of the United States to alienate its allies to the extent where they might be reluctant to reciprocate in the War on Terror.

The United States has added another facet to the American Service Members' Protection Act (ASPA), which deals with the provision of military aid to other states (Elsea, 2002: 10 – 11). From 1 July 2003, the ASPA prohibits military assistance to any state that is a member of the ICC, except NATO states and other major allies. The president can waive such a prohibition. This is another measure that would surely have a negative influence

on the soft power of the United States, since it forces states to follow the United States on the ICC, even though they might wish to be part of it.

The ICC Statute, however, grants the United States some measure of control in determining how it could, for example, extend the Status of Forces Agreements it has with other states. These agreements, which regulate the jurisdiction of American forces stationed in other countries (see chapter 2), could be extended under Article 98 of the ICC Statute. This article states that the ICC cannot ask for the extradition of the citizens of a third state from a specific state if such an extradition is contrary to an agreement between such states (ICC Statute, 1998).

The United States is at the moment in the process of updating these SOFAs to incorporate the ICC, as well as signing new agreements with the same content with other states (Malinowski, 2002: 1). It could, however, be guessed that this process would be in terms of coercion rather than free will and attraction.

There seems to be a tremendous sense of patriotism in the United States since the tragic events of September the 11th 2001. In this regard, many of the fears and mistrust of international institutions and multinational initiatives might be brought into the public spotlight. Opposition to the United Nations, for example, is one aspect that could play a part in the way that the public might perceive the ICC (Council on Foreign Relations, 2002: 12). This would in any case be linked to the balancing of multilateralism and unilateralism in the foreign policy of the United States (Nye, 2000: 2). In any case, it seems that most Americans are not in favour of a unilateral approach towards the rest of the world (Nye, 2000: 4).

The impact that the public could have will be limited to the extent that the ICC forms part of some form of public debate (Council on Foreign Relations, 2002: 12), possibly as part of the political campaign in an election or by-election, for example. If the public could be moved to give inputs in a debate on the ICC, it might change the stance of the United

States government to a certain extent. Otherwise the American public will have little or no impact on the ICC.

NGOs could play an important role in this regard. Many organisations that are promoting human rights, women's rights and humanitarian aid are in favour of the ICC and are actively promoting it (Chayes & Slaughter, 2000: 241). Furthermore, there are many dedicated groups that promote the ICC, such as the Coalition for the International Criminal Court (Brown, 2000: 63). In fact, there would not be an ICC if it was not for the efforts of NGOs such as this one (Chayes & Slaughter, 2000: 241).

The strength of non-governmental organisations lies in their ability to change public perceptions in terms of events or policies of public importance. Such events or things of interest could range from the environment (which is done by organisations such as Green Peace) to the humane treatment of prisoners across the world (which is done by organisations such as Amnesty International). The issue of human rights is checked, amongst others, by Human Rights Watch (Rozenberg, 2002: 1). There are also groups opposed to Globalisation and 'Free' Trade, and groups that monitor the treatment of women. In fact, the ICC Statute even stipulates in Article 15 that the Prosecutor may gather information from NGOs when evaluating the seriousness of information relating to cases being investigated by the ICC (Chayes & Slaughter, 2000: 241).

The violence that was such a feature at meetings of the World Trade Organisation or of the G8 tends to focus the attention on the issues being pursued by the NGOs. NGOs could therefore have an incredible political impact on events, which would and could have serious implications for those in charge of formulating (public) policy.

The campaign to ban land mines was the first real accomplishment of the multilateralism and active agenda-setting participation of NGOs in the international system (Edgar, 2002: 134). The so-called "Ottawa process" did much to lay the groundwork for the participation of the NGOs in formulating the ICC Statute in Rome (Edgar, 2002: 134). NGOs proved in Ottawa that they could play an important role in the development of

multilateral initiatives, even when faced with opposition from states such as the United States.

In terms of the ICC, the NGOs that are directly involved played an important role in the formulation of the ICC Statute (Chayes & Slaughter, 2000: 241). One could say that the NGOs were instrumental in formulating international law development. To a certain extent, the NGOs in Rome were the representatives of the international civil society (Brown, 2000: 62).

Many of the NGOs that were present at the Conference offered their assistance to the delegates of the various countries (Brown, 2000: 62). The NGOs that offered this assistance formed an alliance, the Coalition for an ICC (CICC) (Nel, 2002: 158). The assistance took the form of helping to research the various points of contention, which in turn helped some of the countries that did not have sufficient capacity to be better prepared, thereby placing them in a position to participate actively in the proceedings (Brown, 2000: 63). The CICC, for example, provided legal experts who participated as members of these government delegations (Nel, 2002: 158).

In this way, the NGOs helped to shape the agenda in the direction which they felt would be most beneficial for formulating an ICC that would further the cause of human rights by punishing those responsible for the 'most serious crimes of international concern'. During the Conference, the NGOs even went so far as to support an alliance with what became known as the Like-minded Group, which consisted of states eager to pursue these same ideals for the ICC (Weschler, 2000: 103). This group became an important voice during the Conference and was instrumental in shaping the ICC Statute (Weschler, 2000: 103). Many of the European states were part of this group, including the United Kingdom and Germany, as well as many of the world's developing states (Weschler, 2000: 93).

The reactions of most of the NGOs to the stance of the United States towards the ICC were negative, not only at the Rome Conference (Weschler, 2000: 103), but also afterwards, following the developments relating to seeking immunity for American

peacekeepers. Human rights groups are against giving immunity to American soldiers (Marquis, 2002: 1). Amnesty International feels that the United States is moving against justice, rather than pursuing it (Marquis, 2002: 2). Human Rights Watch feels that the United States has an unhealthy fixation with the remote possibility of an American being charged before the ICC (Becker, 2002: 2).

It would in any case be interesting to see whether the NGOs would be able to sway public opinion in favour of the ICC, or whether their political impact would be to strengthen the resolve of the United States. The CICC worked very hard after the Rome Conference to ensure that the 60 ratifications needed to realise the ICC were achieved (Nel, 2002: 158).

In terms of public opinion, should the NGOs succeed, it might influence the American public to voice their concerns about the ICC. Regardless of whether this concern is towards the ICC or away from it, it will at least lead to a better understanding of the ICC, as well as of the concerns and arguments against it.

The relationship of the United States with its allies will definitely be influenced by its stance on the ICC. This is because most of the states that are the traditional allies of the United States are member states of the ICC, since they have already ratified the ICC Statute. These include the United Kingdom, Canada, Germany, France and Italy (Coalition for the ICC, 2002: 1). These are but a few of the more than 70 states that have ratified the ICC Statute thus far, but does not include the 139 states that signed the ICC Statute (Coalition for the ICC, 2002: 1).

Of the other permanent members of the Security Council, only the People's Republic of China is not a signatory to the ICC Statute. China might also act like the United States to protect themselves from the ICC. There is even the possibility that France or the United Kingdom, as member states of the ICC, could veto resolutions in terms of Article 16 of the ICC Statute aimed at deferring an investigation or prosecution. However, the question that needs to be asked again is whether they will risk doing so.

Many of the European States that worked very hard for the establishment of the ICC feel that the attitude of the United States towards the ICC is unfortunate (Prestowitz, 2002: 25). It is as if the United States does not feel the need to consult its friends and allies, or even to feel the need for such friends or allies at all (Prestowitz, 2002: 25). This is another case related to the balance between the hard and the soft power of the United States, where it seems that the use of hard power is undermining the soft power.

There is a growing perception amongst the states in Europe that the United States is increasingly defining its interests very narrowly, which does not give other states the room to embrace such interests for themselves (Prestowitz, 2002: 25). Since the Second World War, the United States traditionally has backed the processes of creation of international institutions and multilateral initiatives such as the United Nations and the World Trade Organisation (Prestowitz, 2002: 25). Now it is seen as backing away from these processes. Would the United States be able to afford to continue doing so in the foreseeable future?

The importance of the international rule of law is another principle that the United States used to hold as important, especially in terms of its national security (Chayes & Slaughter, 2000: 237). This was one of the factors that made the United States attractive to other states. In fact, the goals of the ICC in this regard are a fair reflection of the values promoted by the United States in the international community during the past few decades (Scheffer, 2000: 115 – 116).

There is a certain irony in this situation between the United States and the ICC (Sewall et al, 2000: 20). By making the point that it fears the political impact that the ICC might have in possibly undermining its international efforts in promoting its interests, the United States is, in fact, doing political damage to these very international efforts to promote its interests, especially in relation to the request that Americans should be exempt from the jurisdiction of the ICC (Sewall et al, 2000: 20).

It is almost as if the United States sees itself as dealing with inferiors that do not deserve equal status (Thakur, 2002: 2). In criticising other states for supporting the ICC, the United States is, in fact, criticising states that share the same values as it does, which might lead to even more resentment against the country (Malinowski, 2002: A26).

CONCLUSION

The aim of this thesis was to look at the controversy in the international system in terms of the American rejection of the ICC, and then to determine whether this rejection was based on sound principles. The issue was whether the United States makes a good case for rejecting the ICC, or whether its concerns and arguments are not valid in terms of what the ICC Statute and international customary law actually stipulates.

The main concern of the United States, namely that an American would be charged before the ICC in a politically motivated process, was tested by looking at some of the arguments connected to it. Of the five initial arguments, three were picked for closer scrutiny, as set out in chapter 1. These arguments concerned the question of jurisdiction (chapter 2), the role of the United Nations Security Council (chapter 3) and arguments in terms of the Constitution of the United States (chapter 4). A broad overview of possible political implications were given in this chapter.

The evaluations of the arguments in terms of jurisdiction, the Security Council and the Constitution found that it would be possible for an American to be charged before the ICC. The ICC Statute does, however, have many procedural safeguards to protect any accused person from frivolous prosecutions. There are also safeguards such as complementarity that make it possible for these accused persons to be tried by their own domestic legal systems, should the need arise. This was illustrated in all of these chapters. It can be concluded, therefore, that even though the United States might have made some points that appear to justify their stance, on closer inspection none of their arguments really pass the test. Under these circumstances, it would be very difficult to convince others of the merits of the arguments against the ICC.

In terms of the political implications of its stance towards the ICC, the United States is risking the very normative basis of the multilateral global order that it helped to create after the Second World War. Thus, although the arguments and counter arguments made in this thesis seem to be of a purely legal nature, this final chapter has illustrated that they have wide implications for the global political order as a whole.

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APPENDIX A:**SELECTED ARTICLES FROM THE STATUTE OF THE ICC**PreambleThe States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain 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,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

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

Resolved to guarantee lasting respect for and the enforcement of international justice,

Article 1
The Court

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

Article 5
Crimes within the jurisdiction of the Court

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 accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;

- (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the

deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

- (e) 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:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) 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;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the

conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13

Exercise of jurisdiction

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:

(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.

Article 14
Referral of a situation by a State Party

1. 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.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15
Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16
Deferral of investigation or prosecution

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.

Article 17
Issues of admissibility

1. 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.
2. 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 an intent to bring the person concerned to justice.
3. 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.

Article 20
Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct 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.

Article 28
Responsibility of commanders and other superiors

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.

Article 36

Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.
2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.
3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:
 - (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

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

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the

purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographical representation; and
- (iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 39 Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

- (ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;
- (iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;
- (c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.
3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.
- (b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.
4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 42

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be 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 Court. A member of the Office shall not seek or act on instructions from any external source.
2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.
3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4. The Prosecutor shall be elected by secret ballot by an absolute majority of the

members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 55

Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

- (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
 - (i) To ensure the person's appearance at trial,
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

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- (c) A concise statement of the facts which are alleged to constitute those crimes;
- (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
- (e) The reason why the Prosecutor believes that the arrest of the person is necessary.
3. The warrant of arrest shall contain:
- (a) The name of the person and any other relevant identifying information;
- (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and
- (c) A concise statement of the facts which are alleged to constitute those crimes.
4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.
5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.
6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.
7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:
- (a) The name of the person and any other relevant identifying information;
- (b) The specified date on which the person is to appear;
- (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
- (d) A concise statement of the facts which are alleged to constitute the crime.
- The summons shall be served on the person.

Article 60Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.
2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.
3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.
4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.
5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 66Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
 - (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
 - (c) To be tried without undue delay;

- (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
- (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;
- (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (h) To make an unsworn oral or written statement in his or her defence; and
- (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 72

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.
2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.
4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.
5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:
 - (a) Modification or clarification of the request;
 - (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
 - (c) Obtaining the information or evidence from a different source or in a different form; or
 - (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.
6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.
7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:
 - (a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:
 - (i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings *in camera* and *ex parte*;
 - (ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the

Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 98

Cooperation with respect to waiver of immunity and consent to surrender

1. 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.

2. 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.

Article 103

Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period,

the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104

Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 121

Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide

whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 126 Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

[Source: United Nations Website at <http://www.un.org/law/icc>]

APPENDIX B:**SELECTED ARTICLES FROM THE CHARTER OF THE UNITED NATIONS**CHAPTER VTHE SECURITY COUNCILFunctions and PowersArticle 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

VotingArticle 27

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

CHAPTER VIPACIFIC SETTLEMENT OF DISPUTESArticle 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of a, seek a solution by

negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

CHAPTER VII

ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

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 4 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its and in accordance with a special agreement or agreements, armed forces, assistance,

and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member its work.

3. The Military Staff Committee be responsible under the Security Council for the strategic direction of any armed forces paced at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the security Council and after consultation with appropriate regional agencies, may establish sub-committees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the 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-defence 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.

CHAPTER XVIMISCELLANEOUS PROVISIONSArticle 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

[Source: United Nations Website at <http://www.un.org/aboutun/charter/index.html>]