"United States efforts to protect American nationals and Peacekeepers: A critical evaluation of the impact on the International Community and the International Criminal Court"

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DEDICATION

To my family,

for all their support and especially for giving me that lifetime opportunity to spend one year in one of the most beautiful countries in the world.

ABBREVATIONS

American Journal of Comparative Law	AjoCL
Brooklyn Journal of International Law	BrooklynJoIL
Columbia Human Rights Law Review	CHuRiLaR
Cornell International Law Journal	CornellILJ
Emory International Law Review	EmoryIntLawRev
European Journal of Intrnational Law	EJIL
Journal of International Criminal Justice	J'IntCrimJustice
Max Planck Yearbook of United Nations Law	MaxPlanckYofUNLaw
Netherlands Yearbook of International Law	NetherlJoIL
Netherlands International Law Review	Neth.J.IL
NordiskTidsskrift for International Law Jus entium	NordTidsIL
Vanderbilt Journal of Transnational Law	VnderbiltJoTL
Yale Journal of International Law	YALEJ.INT'L
Yearbook of International Humanitarian Law	YearbookIHL
Zeitschrift für ausländisches öffentliches Recht und Völkerrecht	ZfaÖR

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CHAPTER 1

PEACEKEEPERS AND THEIR FUNCTIONS IN CONNECTION TO THE UNITED NATIONS[1]

This chapter provides a general overview of UN Peacekeepers[2] and their function in relation to the UN. Furthermore, this chapter examines the establishment[3] and the historical background of the International Criminal Court[4] and evaluates the advantages[5] and disadvantages of universal jurisdiction[6]. At the end of this chapter the question is discussed whether the ICC has general jurisdiction over Peacekeepers in instances where these forces may have committed crimes.[7]

1.1. Introduction

It could be argued that the international cooperation to bring international criminals to justice under the Rome Statute of the International Criminal Court[8] is not undermined in any way by the on-going efforts by the United States government[9] to protect international Peacekeepers from possible politicized prosecution[10] before the ICC. However, on the contrary, the maintenance of international peace and security as well as the protection of human rights could be said to outweigh any adverse effects arising from possible violations of the ICC Statute.

Although the international community advocates of barring US citizens from being extradited to the court the US Government still wishes to protect US Peacekeepers from possible politicized prosecution and juridical machinery by the International Criminal Court.

This fundamental conflict[11] between the United Nations[12] and the US position over the ICC issue has already caused an aggravated transatlantic conflict. The question, whether the ICC's universal human rights jurisdiction constitutes an infringement to American

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[1] See: Chapter 1, par 1.2.1 – 2.
[2] See: Chapter 1, par 1.2.
[3] See: Chapter 1, par 1.3.
[4] See: Chapter 1, par 1.4.1.
[5] See: Chapter 1, par 1.4.3.2.
[6] See: Chapter 1, par 1.4.3.3 – 4.
[7] See: Chapter 1, par 3.4.
[8] Further on the shortform is used: **ICC**.
[9] Further on the shortform is used: **US**.
[10] See for a detailed analyse of the problem under Chapter 2, par 2.2.2.4 - 2.2.2.5.
[11] See: Chapter 2.
[12] Further on the shortform is used: **UN**.

national sovereignty, is answered on both sides of the Atlantic differently. This mini thesis attempts to make this transatlantic conflict more transparent through a comparative analysis of US and UN responses to the ICC. To this end, it provides historical overview of the development of the ICC from an unwritten European idea to its final implementation, and clarifies American and European national interests behind the scenes. Within this analysis, American objections will be outlined and placed in context with the European counter-arguments. The most controversial issues between the transatlantic partners including the prosecutorial powers, the question of immunity for the US nationals as well as the risk of politically motivated prosecutions will constitute the main topics of this mini thesis.

1.2. UN Peacekeepers – An Overview

It is necessary to understand the nature and decision-making process of the UN in order to appreciate the issues involved in today's UN peacekeeping operations. The UN is a political institution and an inter-governmental organization composed of 185 sovereign States[13], and its competence is governed by the UN Charter. Only Member States are competent to make proposals, and the Organization can only act in pursuance of decisions, which are collectively taken by those States.[14]

The Security Council is principally responsible for carrying out the Organization's fundamental objective of maintaining international peace and security.[15] However, neither the Security Council nor any other organs have the power to impose their decisions on the Member States. The Security Council is principally responsible for carrying out the Organization's fundamental objective of maintaining international peace and security. However, neither the Security Council nor any other organs have the power to impose their decisions on the Member States. The only exception occurs when the Council decides to act under Chapter VII of the UN Charter, in which case the decisions are binding and enforceable in the territories of Member States.[16]

[13] www.un.org/rights/dpi1774e.htm [24/07/2005].
[14] Jain, A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court, EJIL 2005, P. 243, 244.
[15] Jain, A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court, EJIL 2005, P. 243.
[16] Murray, Who will police the peace-builders? The failure to establish accountability for the participation of United Nations civilian police in the trafficking of women in post-conflict Bosnia and Herzegovina, CHuRiLaR 2003, P. 123.

Chapter VII of the Charter provides for a collective security system under which the Security Council is empowered to take a range of measures when international peace and security is endangered.

The UN Charter does not explicitly mention, nor authorize, the notion of peacekeeping. In actuality, the UN itself invented the concept. Peacekeeping operations loosely developed out of the UN Charter, specifically Chapter VI, entitled "Pacific Settlement of Disputes". Chapter VI directs that the Security Council may investigate situations that might lead to potential conflict. The Security Council, after considering any dispute settlement-procedures previously adopted by the parties to the conflict, may make recommendations to resolve the conflict.[17]

Although peacekeeping operations are not specifically mentioned in the UN Charter, the International Court of Justice established that the Charter was sufficiently broad to allow the Security Council to monitor a conflict without having to resort to a Chapter VII peace-enforcement action.[18]

The power to establish peacekeeping operations is derived from the powers of the Security Council to deal with actual and potential situations threatening the international peace under Chapter VI[19] and VII[20] of the UN Charter, respectively, in conjunction with its powers to establish subsidiary organs[21] or to entrust the Secretary-General with certain functions[22].[23]

Peacekeeping forces are generally the military personnel contributed by the UN member States to a peacekeeping operation.[24]

A peacekeeping operation has come to be defined as an operation involving military personnel, but without enforcement powers, undertaken by the UN to help maintain or restore international peace and security in areas of international and non-international conflicts.[25]

Essentially, peacekeeping entails the use of military forces to secure and maintain peace, rather than employing them to engage in war. Although peacekeeping operations use professional military personnel, they generally do not envisage combat as the means to mis-

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[17] Reisman, Peacemaking, YALE J. INT'L L. 1993, P. 416.
[18] Sanderson, Dabbling in War: The Dilemma of the Use of Force in United Nations Intervention, in PEACEMAKING AND PEACEKEEPER FOR THE NEW CENTURY, P. 148.
[19] See the UN Charter, Art. 33, 36.
[20] See the UN Charter, Art. 39, 40.
[21] See the UN Charter, Art. 29.
[22] See the UN Charter, Art. 98.
[23] Bothe/Dörschel, UN Peacekeeping A Documentary Introduction, XV; see also *Certain Expenses of the United Nations* Case (Advisory Opinion) ICJ Reports (1962), P. 151.
[24] Bothe/Dörschel, UN Peacekeeping A Documentary Introduction, XV; compare also *Certain Expenses of the United Nations* Case (Advisory Opinion) ICJ Reports (1962), P. 151.
[25] http://www.mindef.gov.sg/Peacekeepers/Peacekeepers.htm [accessed 02/09/2005].

sion accomplishment.[26] Classical peacekeeping is founded on consent of the parties to the conflict. There they are usually posted between rival factions but they are no combat forces. Since the parties have consented to the presence of the Peacekeepers, the need to resort to force is greatly diminished. As a result, classical Peacekeepers are generally only equipped with weapons for use in self-defence.[27]

The role of a UN peacekeeper is in many ways symbolic, an instrument that shows international resolve for restoring and enforcing peace.[28]

Peacekeepers wear blue helmets, display the UN's blue flag, and above all, seek to remain impartial and neutral. Generally, the object of peacekeeping is not to resolve the conflict, but rather to encourage a passive environment that allows the parties to negotiate constructively.

Peacekeeping operations are financed from the UN's regular budget with the permanent members of the Security Council collectively bearing over half of the expenses.[29]

To sum up: Peacekeeping missions have been the technique most frequently used by and associated with the UN to end conflicts and establish peace in these conflict areas.[30]

1.2.1. Peacekeeping missions

The first time Peacekeepers came into force was in May 1948 when the UN Security Council decided to establish a field operation on to supervise a fragile truce between the Arabs and Israelis.[31] Following that, 36 unarmed military observers arrived in the Middle East, becoming the first United Nations Peacekeepers. Today, the UN peacekeeping operations have expanded to 53 different operations throughout the world. As pointed out above,[32] they are signified by the blue helmets or berets, which emblazons the UN Insignia.

To be effective, a peacekeeping mission must be constructed according to the nature of the conflict, the parties involved, and the stability or fragility of the negotiated stay of the hostilities.[33] Consequently, peacekeeping missions are as diverse as are the conflicts that gen-

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[26] Reisman, Peacemaking, YALE J. INT'L L. 1993, P. 416.
[27] Urquhart, The Future of Peace-Keeping, Neth.J.IL 1989, P. 50f.
[28] Urquhart, The Future of Peace-Keeping, Neth.J.IL 1989, P. 50f.
[29] Murray, Who will police the peace-builders? The failure to establish accountability for the participation of United Nations civilian police in the trafficking of women in post-conflict Bosnia and Herzegovina, CHuRiLaR 2003, P. 123.
[30] Reisman, Peacemaking, YALE J. INT'L L. 1993, P. 416.
[31] http://www.mindef.gov.sg/Peacekeepers/Peacekeepers.htm [accessed 02/09/2005].
[32] See: Chapter 1, par 1.2.
[33] Urquhart, The Future of Peace-Keeping, Neth.J.IL 1989, P. 50f.

erate them. For example, the United Nations Truce Supervision Organization (UNTSO) was deployed to monitor a cease-fire, while the United Nations Force in Cyprus (UNFICYP) and the United Nations Interim Force in Lebanon (UNIFIL) placed themselves between the parties to the conflicts preventing one side from crossing into the territory of the other. The Suez Canal/Sinai Peninsula Middle East United Nations Emergency Force II (UNEF II) also occupied a "buffer zone," assisting the parties to the conflict to disengage and withdraw their forces. The Golan Heights United Nations Disengagement Observer Force (UNDOF) mandate included inspecting and verifying that the sides were complying with their accepted force sizes and weapons limits. Further exemplifying the diversity of peacekeeping operations, Peacekeepers in both the Operations des Nations Unites au Congo (ONUC) and the UNFICYP directly assisted the parties to resolve their numerous ongoing controversies[34] by acting as on-the-spot mediators, directly participating in negotiations between the parties.

As mentioned above,[35] protection has become an important function of the more recent peacekeeping operations. Operations in Somalia, the former Yugoslavia, and in Rwanda have been called upon to safeguard protected areas or to protect humanitarian supplies and refugee relief. At the same time, they are called upon to stabilize the situation and work with the concerned parties towards a negotiated settlement. In some cases, the Security Council has authorized UN forces to take "all necessary measures" to ensure the implementation of their mandates.[36]

1.2.2. Peacekeeping duties

Apart from their duties to restore, international peace UN Peacekeepers certainly must observe humanitarian rules in conducting with their activities.

This however involves two main problems. First, the UN is not and cannot be a party to the existing humanitarian conventions, which are only open to States themselves. The other problem is the fact that existing legal instruments are intended for regulating armed conflicts between States or within a State. The rights and obligations are imposed only on States, which are UN member States. As already pointed out,[37] the UN is neither a State,

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[34] Lehmann, Some Legal Aspects of the United Nations of Peace-Keeping Operations, NordTidsIL 1985, P. 11f.

[35] See: Chapter 1, par 1.2.

[36] Amann, American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV The United States of America and the International Criminal Court, AJoCL 2002, P. 386.

[37] See: Chapter 1, par 1.2.

nor does it has the competence to go ahead with obligations concerning human rights abuses. For example, the UN could not appoint a protecting power and does not possess the necessary competence to enact penal laws for the punishment of persons who have committed serious human rights abuses. Therefore, it is not possible for the UN to apply for those legal instruments.

The international community imposes an obligation to observe humanitarian instruments on parties to the Conventions, and they are responsible for taking the necessary measures to ensure these implementations. The law governs inter-State armed conflicts and conflicts within a State when government forces are involved, but it generally does not apply to domestic conflicts. While the 1949 Geneva Conventions and the 1977 Geneva Protocols are nearly universally accepted, most current armed conflicts take place in countries where governments are too weak to maintain law and order within the country. Consequently, international humanitarian law is rarely applied in current armed conflicts taking place within nations. Although Nations agree that criminals should normally be brought to justice by national institutions[38] the circumstance that most governments are too weak to investigate and prosecute human rights abuses, lead the UN Security Council to the establishment of war crime tribunals (e.g. in former Yugoslavia and Rwanda) and the establishment of the International Criminal Court.

1.3. Establishment of International Criminal Tribunals

Even with the growth of an impressive body of international law, the world community has been almost helpless in the face of the failure of national criminal law systems to punish the perpetrators of atrocities. Many newly established democratic States have either not been able to deal with past human rights violations, or have lacked the political will to do so.[39] This was particularly the case when dealing human rights abuses committed by former political leaders.

In the last decade of the twentieth century, the international community witnessed some major human rights tragedies such as in Sierra Leone, Cambodia or East Timor – to name only some. In the past fifty years alone, more than 86 million civilians have died in over 250 conflicts.[40]

[38] http://www.un.org/law/icc/general/overview.htm [accessed 23/07/2005].
[39] Bassiouni, International Criminal Law, P. 58ff.
[40] http://www.un.org/law/icc/general/overview.htm [accessed 23/07/2005].

Tragedies resulting for armed conflict, which have been very important for the development of the nation of universal jurisdiction, have taken place in the heart of Europe - in the former Yugoslavia. The atrocities that occurred in the central African State of Rwanda likewise made a significant contribution. It is for these reasons that the international community has been working towards the creation of a permanent international criminal court for over fifty years.

The Nuremberg and Tokyo military tribunals, established in the wake of the Second World War to prosecute German and Japanese crimes, broke new ground.[41]

But however, it took several more decades until the idea of international prosecution found broad acceptance, first in the creation by the UN Security Council of the International Criminal Tribunal for the Former Yugoslavia (ICTY), thereafter the International Criminal Tribunal for Rwanda (ICTR) and, finally, with the establishment of the permanent International Criminal Court.[42]

1.4. The International Criminal Court

The ICC was established on 17 July 1998 with the adoption of the 'Rome Statute', a binding multilateral convention creating the first Transnational Legal Body intended to hold individuals accountable for committing genocide, war crimes and crimes against humanity. The ICC is the first ever permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished. Anyone who commits any of the crimes under the Statute after this date will be liable for prosecution by the Court.[43] The ICC will prosecute only individuals and not States. Article 17 of the ICC Statute provides that the ICC should exercise jurisdiction only if a State Party is either "unwilling" or "unable" to carry out investigations or prosecutions. This is known as the *principle of complementarity*.[44] This gives States the primary responsibility and duty to prosecute the most serious international crimes, while allowing the ICC to step in only as a last resort if the States fail to implement their duty - that is, only if the national system is "*unwilling*" or "*unable*" to do so.[45] *Bona fide* efforts to dis-

[41] Compare: Aksar, Implenting International Humanitarian Law, P. 7.
[42] Romano, Internationalized Criminal Courts, P. IX.
[43] http://www.icc-cpi.int/about.html [accessed 05/08/2005].
[44] http://www.ebc-india.com/lawyer/articles/813.htm [accessed 23/07/2005] and for a detailed analysis see: Chapter 2, par 2.2.2.4.2.
[45] See Rome Statute, Art. 68.

cover the truth and to hold accountable those responsible for any acts of genocide, crimes against humanity, or war crimes will bar the ICC from proceeding.

Article 2 of the Rome Statute stipulates that the ICC will be governed not by the United Nations itself, but will rather be brought into relationship with the United Nations through an agreement approved by the Assembly of States Parties to this Statute.[46] Thereafter, the ICC's administration and functioning will be left primarily to the Presidency of the Court.[47] The Presidency of the Court is one of the four organs of the ICC.[48] The other three organs, and the responsibilities and duties of all of the organs of the ICC, are described in Part Four of the Statute, entitled "Composition and Administration of the Court". One of the other three organs is the office of the Prosecutor,[49] to which State Parties will refer cases when it is suspected that an international crime of the type described in the Statute has been committed.[50] Under Article 14, any State may request that the Prosecutor investigate a situation in which one or more crimes within the jurisdiction of the ICC appear to have been committed in order to determine who, if anyone should be charged with the commission of such crimes.

The Rome Statute originally designated the seat of the ICC - where it was established physically and is operating from - as The Hague in the Netherlands.[51] The Statute explicitly States, however, that the ICC may try crimes anywhere in the world when another place seems preferable to The Hague. For example, the Court may be established in a specific country where much conflict has occurred and therefore many trials are expected to take place.

[46] See Rome Statute, Art. 38.
[47] See Rome Statute, Art. 2.
[48] See Rome Statute, Art. 34.
[49] See Rome Statute, Art. 34.
[50] See Rome Statute, Art. 14.
[51] See Rome Statute, Art. 3.

1.4.1. Historical Background of the Establishment of the International Criminal Court

The ICC is the last great international organization to be created in the twentieth century although the issue was addressed for the first time almost a hundred years ago.

The Statute of the ICC was established on 17 July 1998, when 120 States participating in the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" in Rome adopted the Statute.[52]

This was the outcome of a process commenced 50 years ago, when the United Nations General Assembly recognised the need for an international Court to prosecute genocidal acts.[53] In Resolution 260 of 9 December 1948, the General Assembly, "recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required",[54] adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Article 1 of that Convention characterizes genocide as "a crime under international law," and Article 6 provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction." In the same resolution, the General Assembly also invited the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.

Following the Commission's conclusion that the establishment of an international Court to try persons charged with genocide or other crimes of similar gravity was both desirable and possible, the General Assembly established a committee to prepare proposals relating to the establishment of such a court.[55] The committee prepared a draft statute in 1951 and a revised draft statute in 1953.[56] The General Assembly, however, decided to postpone consideration of the draft statute pending the adoption of a definition of aggression.

Since that time, the question of the establishment of an international court has been considered periodically.

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[52] http://www.icc-cpi.int/about.html [accessed 23/07/2005].
[53] By the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, GA Res 260 (III) of 9 Dec 1948.
[54] Cassese, International Criminal Law, P. 342.
[55] http://www.un.org/law/icc/general/overview.htm [accessed 23/07/2005].

However, the idea was put on hold until 1989. In December 1989, in response to a request by Trinidad and Tobago, the General Assembly asked the International Law Commission to resume work on an international criminal court with jurisdiction to include drug trafficking.[57]

Then, in 1993, the conflict in the former Yugoslavia erupted, and war crimes, crimes against humanity and genocide - in the guise of "ethnic cleansing" - once again commanded international attention. In an effort to end this widespread human suffering, the UN Security Council established the *ad hoc* International Criminal Tribunal for the Former Yugoslavia, to hold individuals accountable for those atrocities and, by so doing, deter similar crimes in the future.[58]

Shortly thereafter, the General Assembly requested the International Law Commission (ILC) to resume work on the Court.[59] The ILC completed a Draft Statute in 1994.[60] This Draft Statute was revised by a General Assembly *Ad Hoc* Committee on the Establishment of an International Criminal Court and later by the Preparatory Committee (Prep Com) on the Establishment of an International Criminal Court. Both the work of the ILC and the Committees formed the basis for the negotiations at the Rome Conference. The final text of the Rome Statute of the ICC[61] was adopted with a vote of 120 for, 7 against[62] and 21 abstentions. One of the States that voted against the Rome Statute was the US.

However, in order to come into force and start working, the ICC treaty needed to be ratified by at least 60 signatory States of the Statute. Despite the strong objection of the current US Administration, this number was reached in April 2002. Shortly before this date, the Bush Administration had announced on 6 May 2002 that it did not intend to ratify the Statute. Moreover, it considered itself as released from any obligation arising from the American signature of the Rome Statute, given by former President Bill Clinton on 31 December 2000. This withdrawal, unique in the history of International Relations and treaty making, provoked harsh criticism from the member States of the European Union,

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[56] Cassese, International Criminal Law, P. 341.

[57] Broomhall, International Justice and the International Criminal Court, P. 70; Bassiouni, The Statute of the the International Criminal Court, P. 16; http://www.un.org/law/icc/general/overview.htm [accessed 25/07/2005]; Cassese, International Criminal Law, P. 341.

[58] Amann, American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV The United States of America and the International Criminal Court, AJoCL 2002, P. 383.

[59] UN Doc A/Res/44/39 of 4 Dec 1989.

[60] The text of the Draft Statute and the International Law Commission's commentary are found in the Report of the International Law Commission on the Work of its Forty-Sixth Session, 49th Sess., UN GAOR Supp. No.10, UN Doc. A/49/10 (1994), paras. 23-49.

[61] UN Doc A/Conf.183/9 of 17 July 1998, reprinted in (1998) 37 ILM 999.

[62] Besides the United States, China, Libya, Iraq, Israel, Qatar and Yemen voted in opposition to the Rome Treaty.

because it was they who within the so-called "group of like-minded" States, who were the most active supporters of a strong ICC Statute, independent of the UN Security Council.
The ICC Statute and its Rules of Procedure and Evidence, were negotiated by 120 States over a period of several years and drafted by legal experts from numerous different jurisdictions – both civil and common law systems. Since February 2005, 97 States have ratified the Statute. Among these States were States from each continent such as Germany, France, the UK, Japan, Australia, South Africa, and Canada.

1.4.2. The Rome Statute

The ICC Statute is one of the most ambitious treaties in the history of international law. The negotiating process was exceptional act that brought together diplomats, bureaucrats, lawyers, academicians, and activists from widely diverse historical traditions, political perspectives, and legal systems. The participants had to deliberate and agree upon a bewildering array of fundamental issues ranging from the powers of the Security Council in relation to the ICC, preconditions to the exercise of ICC jurisdiction, mechanisms for triggering investigations and prosecutions, and the interrelationship between the ICC and national Courts – not to mention the list and definitions of international crimes.[63]
The ICC Statute contains numerous provisions to ensure that its procedures are carried out in accordance with recognized international standards of justice and guarantees of due process and fair trial. It contains a detailed list of the rights that any accused person shall enjoy, including the presumption of innocence, the right to counsel, to present evidence, the right to remain silent[64] and the right to have charges proved beyond a reasonable doubt.[65] These rights are protected not only in trial and appeal procedures but also during investigations.
Further, the judges must meet criteria of professional competence, integrity and experience in relevant areas of law and must be elected by a two-third majority of State Parties to the Statute.[66] The Statute also has provisions allowing for disqualification of Judges in "*conflict of interest*" situations and procedures for removal from office in exceptional cases of serious misconduct.[67]

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[63] Bilder, The ICC and the Emerging International Criminal Justice System, AJIL 2003, P. 713.
[64] See Rome Statute, Art. 67.
[65] See Rome Statute, Art. 66.
[66] See Rome Statute, Art. 36.
[67] See Rome Statute, Art. 47 and 47.

Moreover, the Statute contains many checks and balances to screen out frivolous proceedings. For example, allegations must be assessed by the Prosecutor to determine whether there is a reasonable basis to proceed.[68] The Prosecutor cannot initiate an investigation without review and approval from a Pre-Trial Chamber of three judges.[69] The suspect and interested States have the right to challenge investigation and to challenge the jurisdiction of the ICC over the matter. A person convicted by the trial court or the Prosecutor has the opportunity to appeal based on grounds of procedural error, error of fact, or error of law to the Appeals Chamber.[70]

The death penalty is excluded under the Statute and the maximum penalty provided is imprisonment of 30 years. The Statute, under Article 75, mandates that the Court establish principles relating to reparations, which include compensation, restitution and rehabilitation.

To sum up: Considering the scope and breadth of the negotiating process of the Statute, it is remarkable that an ICC Statute was adopted at all.

1.5. Jurisdiction of the International Criminal Court

Looking back to the Rome Conference, jurisdiction appears to have been the most pressing, politically the most difficult and therefore the most contentious question of the negotiations as a whole.[71]

The ICC has jurisdiction to try individuals (but not States) for the most serious crimes of international concern: genocide, crimes against humanity, war crimes and possibly aggression if the latter can be satisfactorily defined at a later date.[72] For the first time, general principles of international criminal law were codified.[73]

The ICC shall be complementary to national criminal jurisdictions[74] and the jurisdiction and functioning of the Court shall be governed by the provisions of the Rome Statute.

The jurisdiction of the ICC is geographically not restricted: That means the ICC will have jurisdiction over crimes committed in the territories of ratifying States and over crimes

[68] See Rome Statute, Art. 53.
[69] See Rome Statute, Art. 15.
[70] See Rome Statute, Art. 81.
[71] Kaul/Kreß, Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises, 2 Yearbook of International Humanitarian Law 1999, P. 145.
[72] See Rome Statute, Art. 5-8 and Art. 17; http://www.asil.org/insights/insigh89.htm [accessed 08/09/2005].
[73] See Rome Statute, Art. 22-33.
[74] See Rome Statute, Art. 17.

committed anywhere by nationals of ratifying States.[75] The ICC's jurisdiction *ratione temporis* is limited to crimes committed after the entry into force of the ICC Statute.[76]

It is only when a State Party is unwilling or unable genuinely to carry out the particular investigation or prosecutions that the ICC may find a case admissible before it.[77] "Unwillingness" is to be measured by "unjustified delay" or lack of sufficient "impartiality" or "independence" in the proceedings.[78]

There are three ways that cases can be brought to the ICC. A State that has joined the treaty or the Security Council of the UN can refer a situation to the Court for investigation. In addition, the ICC Prosecutor can start an investigation based on information that she or he received from victims, non-governmental organizations, or any other reliable source. The ICC will rely on State cooperation in its investigation and prosecution of cases. All State Parties, and the States that have accepted the Court's jurisdiction, must cooperate with the Court's investigations and prosecutions.[79] The ICC will not have its own police force and will work side by side with national authorities.

1.5.1 Importance of Universal Jurisdiction

Normally, Courts only exercise jurisdiction over people who are actually within the territory of a State and who are or have committed a crime within such territory.[80]

Gradually, international law began to recognize that certain grave crimes, beginning with piracy three centuries ago, had to be prosecuted because they were matters of international concern.[81] Since these crimes threatened the entire international framework of law, any State where persons suspected of such crimes were found could bring them to justice.[82]

International law now permits States to exercise jurisdiction even if a crime took place in the territory of another State, it does not pose a threat to the prosecuting State's particular

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[75] See Rome Statute, Art. 68.
[76] See Rome Statute, Art. 11(1).
[77] Knoops, An Introduction to the Law of International Criminal Tribunals, P. 8.
[78] Amann, American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV The United States of America and the International Criminal Court, AJoCL 2002, P. 389.
[79] See Rome Statute, Art. 86.
[80] "territorial jurisdiction".
[81] http://web.amnesty.org/library/Index/engior530011999?OpenDocument?OpenDocument [accessed 23/07/2005].
[82] http://web.amnesty.org/library/Index/engior530011999?OpenDocument?OpenDocument [accessed 23/07/2005].

interests and it does not involve suspects or victims who are not nationals of this prosecuting State.[83]

For example, in 1945, the Courts of the victorious Allies began exercising universal jurisdiction under Allied Control Council Law No. 10, which permitted the Allies to prosecute German nationals for abuses against humanity and war crimes committed during the Second World War in their respective zones of occupation.[84]

This conduct is called universal jurisdiction[85] - the ability of a State to prosecute individuals accused of committing certain grave offences, even if the crime did not occur on the territory of the State, involve nationals of the State, or pose a threat to that State's national security.[86] The State exercises jurisdiction over a crime, not because of any links between it and the crime, but rather because the crime is considered a crime against the human race as a whole, which any State is authorised to punish.[87]

The doctrine of universal jurisdiction asserts that some crimes are so heinous that their perpetrators should not escape justice by invoking doctrines of sovereign immunity or the sacrosanct nature of national frontiers. The main approach to achieve this goal seeks to apply the procedures of domestic criminal justice to violations of universal standards, some of which are embodied in UN conventions, by authorizing national prosecutors to bring offenders into their jurisdictions through extradition from third countries.[88]

Universal jurisdiction can apply to grave crimes under international law like genocide, crimes against humanity, war crimes, torture, extra judicial execution and disappearances, as well as to ordinary domestic law crimes such as murder, abduction, assault and rape,[89] whether or not they violate the law of the country in which they are perpetrated.[90]

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[83] http://web.amnesty.org/library/Index/engior530011999?OpenDocument?OpenDocument [accessed 23/07/2005].

[84] Bassiouni, International Criminal Law, P. 46; http://web.amnesty.org/library/Index/engior530011999?OpenDocument?OpenDocument [accessed 04/07/2005].

[85] Bassiouni, International Criminal Law, P. 11; See also Harris, Cases and Materials on International Law, 5. ed, page 280 – 294.

[86] Compare Bassiouni, International Criminal Law, P. 67ff.

[87] Amerasinghe, Jurisdiction of International Tribunals, P. 51ff.

[88] Kissinger, Does America Need a Foreign Policy?, P. 25.

[89] http://web.amnesty.org/web/web.nsf/pages/Ujhome [accessed 04/07/2005].

[90] http://www.crimesofwar.org/thebook/crimes-against-humanity.html [accessed 04/07/2005].

1.5.2 Advantages of Universal Jurisdiction

Nations agree that criminals should normally be brought to justice by national institutions.[91] A trial in the country where the offences were committed is more transparent to victims and shows them that justice is regained. Perpetrators of international law crimes are deprived of the excuse that a court, which does not have the jurisdiction, is taking action against them, that an international court is infringing internal affairs and therefore violating State sovereignty.

Another advantage is that under most national legislations there is no immunity for grave past crimes like murder.[92] The ICC has no retroactive effect, which would lead to the consequence that a large number of international crimes would remain unpunished if national Courts would not make use of the Universal Principle.

Generally, the active State does not breach the *nullum crimen sine lege* principle[93] since it will base its accusations on crimes in the national penal code.[94]

Furthermore, universal jurisdiction helps to end conflicts. In situations such as those involving ethnic conflict, violence begets further violence; one slaughter is the parent of the next. The guarantee that at least some perpetrators of war crimes or genocide may be brought to justice acts as a deterrent and enhances the possibility of bringing a conflict to an end.

As already mentioned,[95] two *ad hoc* international criminal tribunals, one for the former Yugoslavia and another for Rwanda, were created in the 1990s with the hope of hastening the end of the violence and preventing its recurrence.[96]

1.5.3. Disadvantages of Universal Jurisdiction

After the Second World War, the Courts of the Allies began exercising universal jurisdiction over crimes against humanity and war crimes committed during the war outside their own territories and against victims who were not citizens or residents.[97]

However, even today only a limited number of States[98] provide for universal jurisdiction under their national law for such crimes.[99] Apart from the lack of application, universal

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[91] http://www.un.org/law/icc/general/overview.htm [accessed 24/07/2005].
[92] Compare for example section 78 § 2 of the German Penal Code.
[93] Compare *Tadic Case in: http://www.ejil.org/journal/Vol7/No2/art8-03.html.*
[94] Compare for example section 1 of the German Penal Code.
[95] See: Chapter 1, par 1.2.
[96] http://www.un.org/law/icc/general/overview.htm [accessed 24/07/2005].
[97] http://web.amnesty.org/web/web.nsf/pages/14_principles [accessed 04/07/2005].

jurisdiction has several weaknesses in relation to the now internationally recognized and acknowledged International Criminal Court. One of these concerns relates to the effectiveness of universal jurisdiction.

1.5.3.1. Lack of effectiveness of Universal Jurisdiction

In theory, States should ensure that their national Courts could exercise universal and other forms of extraterritorial jurisdiction over grave human rights violations, abuses, and violations of International Humanitarian Law.
However, not all States do so.[100] Other countries up to now have not succeeded to codify internationally recognized grave crimes[101] whether these crimes were committed by State or by non-State actors, such as members of armed political groups.
In these cases, the ICC provides an internationally recognized legal standard and ensures that States, which have failed to codify grave breaches of International Law, do not function as safe havens for perpetrators of International Criminal Law.

1.5.3.2. Superior orders, duress and necessity should not be a permissible defence

National legislatures however permit superior orders, duress and necessity as a defence under certain circumstances.
Article 33(2) of the Rome Statute of the ICC provides that "orders to prohibit genocide or crimes against humanity are manifestly unlawful," and therefore, superior orders are prohibited as a defence with respect to these crimes.[102]
Since subordinates are only required to obey lawful orders, most military subordinates receive training in International Humanitarian Law[103] and the conduct within the Court's jurisdiction includes all manifestly unlawful actions, consequently the number of situa-

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[98] http://web.amnesty.org/library/Index/engior530011999?OpenDocument?OpenDocument.[accessed 04/07/2005].
[99] The German Criminal Code for instance does contain a provision (Section 6 §1).
[100] For example: Australia.
[101] Grave crimes under international law are defined or reflected in most major international instruments, for an exemplary list see: http://web.amnesty.org/web/web.nsf/pages/14_principles; the jurisprudence of the Yugoslavia and Rwanda Tribunals can also be taken into account.
[102] Article 33 (1) Rome Statute provides that a superior order does not relieve a person of criminal responsibility unless three exceptional circumstances are present: "(a) The person was under a legal obligation to obey orders of the Government or superior in question; (b) The person did not know the order was unlawful; and (c) The order was not manifestly unlawful."
[103] http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList121/FF13D0E5BF2B824AC1256B66005F0154 [accessed 10/07/2005].

tions where superior orders could be a defence in the Court to war crimes is likely to be rare.

Therefore, the legal threshold under the ICC is higher than in most national criminal codes. Even the German Criminal Code that has codified genocide as a crime permits necessity as a possible excuse.[104] A perpetrator would encounter a lower legal threshold if he would be charged under Germany's domestic Criminal Code brought to stand trial before the ICC.

1.5.3.3. Independence from political interference

In domestic law, the decision to start or stop an investigation or prosecution of grave crimes under international law can be subject to political interference.[105]

Under International Criminal Law, this decision should be made only by the prosecutor, subject to appropriate judicial scrutiny, which does not impair the prosecutor's independence and is based solely on legal considerations, without any outside interference.[106]

The *Pinochet Case* – as shown later[107] - serves as a good example of a country that was unwilling to prosecute its former Head of State because of his strong sympathy within Chili's population and the support of the leading political party.

1.5.3.3. Visible justice

The centrally located Court in The Hague ensures extensive media broadcasting and wide public attention. The presence and the public reports by international monitors of the trials of persons accused of grave crimes under international law will clearly demonstrate that the fair prosecution of these crimes is of interest to the international community as a whole.[108] The presence and reports of these monitors will also help to ensure that the prosecution of these crimes will not go unnoticed by victims, witnesses and others in the country where the crimes were committed.[109]

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[104] Compare Article 32 German Strafgesetzbuch.
[105] see *Pionchet Case* at Chapter 1, par 1.5.3.6.1.
[106] http://web.amnesty.org/web/web.nsf/pages/UJQA [accessed 04/07/2005].
[107] See: Chapter 1, par 1.5.3.6.1.
[108] http://web.amnesty.org/library/Index/engior530011999?OpenDocument?Open Document [accessed 04/07/2005].
[109] http://web.amnesty.org/library/Index/engior530011999?OpenDocument?Open document. [accessed 04/07/2005].

National Courts functioning under universal jurisdiction might not have a similar transparency and can hence lack the attention of the international community.
This transparency is, however, a basic requirement for the acceptance of the Court's sentence, both by the international community and the affected victims.
The frequently mentioned argument that the trial should be held where the crimes were committed overlooks the lack of practicability; often the social, political and legal conditions prohibit a fair and independent trial.[110]

1.5.3.5. Protection of victims and witnesses

The ICC can take into account the interests of vulnerable victims, witnesses and their families.[111] Affected States might not be able to provide effective security measures to protect victims, witnesses and their families from reprisals before, during and after the trial until the security threat ends.[112]
Special measures are needed to deal with the particular demands of investigating, prosecuting and judging crimes involving violence against women, including rape and other forms of sexual violence.[113] Women who have suffered such violence may be reluctant to come forward to testify in a national, cultural or religious environment,[114] that does not encourage the prosecution of these crimes.[115]
Furthermore, the ICC will establish principles relating to reparation, restitution, rehabilitation and compensation.[116] Some domestic legal systems, however, are not familiar with the concept of compensation of damages not of a physical nature. In these countries, victims and their families are unlikely to be awarded adequate redress.

1.5.3.6. Some States under Universal Jurisdiction still grant immunity for persons of official capacity

[110] See Rome Statute, Art. 17(2) (c).
[111] See Rome Statue, Art. 39.
[112] http://www.icc-cpi.int/witness.php [accessed 04/08/2005].
[113] http://www.amnesty.it/campaign/icc/library/aidocs/I4000698.pdf [accessed 04/07/2005].
[114] http://www.amnestyusa.org/icc/factsheet_7.pdf [accessed 04/07/2005].
[115] Procedural requirements in some countries make the examination of certain sexual offences practically impossible: in class as an example Pakistan was mentioned, where a male rapist can only be convicted if the victim presents at least three male witnesses.
[116] See Rome Statute, Art. 75(1).

The ICC Statute, on the other hand, applies equally to all persons irrespective of any official or former official capacity, be it the head of a State, a Member of the Government, a Member of the Parliament or another elected or governmental capacity.[117]
These principles[118] have been applied by national as well as international Courts, most recently in the decision by the United Kingdom's House of Lords that the former head of State of Chile, Augusto Pinochet,[119] could be held criminally responsible by a national court for the crime under international law of torture.[120]

The significance of the *Pinochet Case* concerning universal jurisdiction will be considered next.

1.5.3.6.1. *Pinochet Case* – An Overview

In September 1973, General Augusto Pinochet successfully led the Chilean military in a violent takeover of the democratically elected government under president Salvador Allende. He promptly introduced the hallmarks of a police State to eliminate his political opposition. During the years of Pinochet's presidency, the military undertook economic reforms that were widely admired, and it maintained a significant amount of public support.[121]
Pinochet cruelly repressed thousands of left-wing sympathizers. His victims included citizens of Chile, Spain and the United Kingdom.[122] However, during the seventeen years of his rule, a secret group of military officers, the "National Intelligence Directorate" ("DINA") spread terrorism across international borders through *Operación Condor*, a covert "plan of joint cooperation among intelligence agencies of different South American countries,"[123] such as Argentina.
In 1990, Pinochet agreed to give up his position as head of State provided that he remained head of the armed forces until he resigned 1998, where after he was made senator

[117] See Rome Statute, Art. 27.
[118] The Charters of the Nuremberg and Tokyo Tribunals, the Statutes of the Yugoslavia and Rwanda Tribunals and the Rome Statute of the International Criminal Court have already confirmed that Courts may exercise jurisdiction over persons suspected or accused of grave crimes under international law regardless of the official position or capacity at the time of the crime or later.
[119] See: Chapter 1, par 1.5.3.6.1.
[120] Compare Kittichaisaree, International Criminal Law, P. 260.
[121] At the end of his regime, 43% of Chileans voted for Pinochet to continue ruling; see: Horwitz, The Tokyo Trial, P. 494.
[122] Byers, The Law and Politics of the Pinochet Case, P.417ff.
[123] Johnson, *27 BrooklynJoIL 2001-2002*, P. 519, 520.

for life. As a senator he retained immunity similar to that which he had received being head of State and military general. This rendered him invincible against lawsuits accusing him of severe human rights breaches and violation of the Chilean Constitution. Several attempts to dismiss him from his position to charge him afterwards remained unsuccessful.[124]

On 16 October 1998, an international warrant for the arrest of Senator Augusto Pinochet Ugarte was received from the Central Court of Criminal Proceedings in Madrid. This resulted in a provisional warrant for his arrest being distributed by a metropolitan stipendiary magistrate.[125] In this warrant, Pinochet was accused of murdering Spanish citizens in Chile and Argentina in the aftermath of the 1973 military "coup" until 1983,[126] crimes for which, under Spanish law, he could be tried in Spain. Nevertheless, this warrant was issued in haste and, as the British High Court subsequently discovered, was flawed in that the crimes listed did not satisfy the definition of "extradition crimes" as set out in the British Extradition Act.[127]

None of the requirements of the British Extradition Act were satisfied. The offences were (a) not committed in Spain, (b) Pinochet was not a Spanish citizen and (c) the British Courts had no jurisdiction to try cases of murder committed outside the UK, unless British citizens have committed them.[128]

Striving for the prosecution of Pinochet accusing him of torture, hostage taking and conspiracy to commit murder between 1 January 1988[129] and 10 December 1992, another provisional warrant was received on 22 October 1998. The reason for this warrant was the fact that "between 1 January 1988 and December 1992 Pinochet intentionally inflicted severe pain or suffering on another in the performance or purported performance of his official duties within the jurisdiction of the Government of Spain."[130]

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[124] Microsoft Encarta Encyclopaedia Standard 2003, Keyword "Pinochet".
[125] Evans, in accordance with the Extradition Act 1989, section 8(1)(b).
[126] Since June 1998 the Spanish Judge, Baltasar Garzón had been investigating complaints about crimes including genocide and terrorism committed between 1976 and 1983 in Argentina, when the country was ruled by a military dictatorship. In this context Garzón came across complaints made by Chilean citizens with respect to Operación Condor. Within this action Chilean authorities under General Pinochet had sought to murder Chilean nationals living in Argentina. See Turano Taylor, Jurisdiction in the *Pinochet Case*: The View from Spain, P. 613, 614.
[127] Extradition Act 1989, section 2.
[128] Sec. 9 of the Offences Against the Person Act 1861 (24 and 25 Vict. C. 100).
[129] The year when the Convention against Torture got into force in the United Kingdom.
[130] Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte [1998] 3 W.L.R. 1456, [1998] 4 All E.R. 897, in the following referred to as "Pinochet No.1"
Details of other alleged offences were set out, namely:
(i)... see text above.

Unlike the first warrant, this one contained offences, which could be tried in the United Kingdom, explicitly torture (under the Criminal Justice Act of 1982) and hostage taking, (under the Hostage Taking Act of 1988).[131]

On the following day, 23 October 1998, Pinochet was arrested under the second warrant. This resulted in a further application for judicial review, the main reason being that a warrant should not have been issued against him, because, as a former head of State, he had immunity under the State Immunity Act of 1978 (Part 1). The British House of Lords decided on 25 November 1998 (with three votes against two) that Pinochet does not enjoy immunity concerning torture.[132]

The core argument of the majority of the Lord Judges was that Pinochet would enjoy immunity for all exercise while being head of State, even after resigning, but that torture does not form part of to the duties as a head of State.[133]

The detention in London of Augusto Pinochet, from October 1998 to March 2000, and the British House of Lord's decisions have been widely seen as a major milestone in the emergence of a new international scenario, setting the stage for a wider realization of international justice for human rights violations and war crimes.[134]

Initially Pinochet was accused by Spanish authorities of torture, genocide and hostage taking. The British House of Lords was assigned to decide whether Pinochet would be extradited to Spain. After a protracted series of appeals, the main question related to whether Pinochet was immune from these proceedings as being a former head of State.

The abhorrent crimes defined in this Law are not crimes under Israel, Spanish or English law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*).[135]

Therefore, international law is, in the absence of an International Criminal Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdic-

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(ii) Between 1 January 1982 and 31 January 1992: (a) he detained; (b) he conspired with persons unknown to detain other persons ("the hostages") and in order to compel such persons to do or to abstain from doing any act, threatened to kill, injure or continue to detain the hostages.
(iii) Between January 1976 and December 1992, conspired together with persons unknown to commit murder in a Convention country.

[131] These dates at which these pieces of legislation took effect played a major role in the decision of the British House of Lords as to whether Pinochet could be extradited.

[132] As recorded in "Pinochet No.1".

[133] With respect to customary criminal law.

[134] José Zalaquett, The Pinochet Case: International and Domestic Repercussion, University of Santiago (2001), Draft.

[135] Bassiouni, International Criminal Law, P. 527.

tions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.[136]

This case shows in an exemplary manner the ineffectiveness of the Universal Principle if the relevant States grant the delinquent "*imunidad y impunidad*"[137] as a "*senador vitalicio*".[138]

Another case, which was very important for the development of a concept of universal jurisdiction, was the *Eichmann Case*.

1.5.3.6.2 *Eichmann Case* – An Overview

Adolf Eichmann, a Nazi functionary of German nationality, concerned in the Nazi murders in Germany and Austria of large numbers of Jewish persons of German, Polish, and other nationalities prior to the 1945 defeat of Germany, escaped to Argentina. There he was tracked down by Israel nationals, seized and abducted to Israel.

Back in Israel, the District Court of Jerusalem tried Adolf Eichmann on fifteen separate counts, including crimes against the Jewish people, crimes against humanity, war crimes, and membership in a hostile organisation as defined in the Israeli Nazi Colloborators Law of 1950.[139]

Argentina complained to the UN Security Council about this clear violation of Argentine sovereignty. The Security Council, while making it clear that it did not condone Eichmann's crimes, declared that "acts such as that under consideration - the kidnapping of Eichmann - which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security". The Security Council requested the Government of Israel "to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law."[140] Argentina did not demand the return of Eichmann, and in August 1960, the Argentine and Israeli governments resolved in a joint communiqué "to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina."[141]

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[136] Bassiouni, International Criminal Law, P. 527.
[137] Translation: immunity and impunity.
[138] See Kittichaisaree, International Criminal Law, P. 56 – 60; Translation: senator for life.
[139] Woetzel, The Nuremberg Trials in International Law, P. 248.
[140] Woetzel, The Nuremberg Trials in International Law, P. 248.
[141] http://www.his.com/~clight/eichmann.htm [accessed 07/08/2005].

Eichmann was subsequently tried in Israel under Israel's Nazi Collaborators Law - a law enacted after Israel became a State in 1948. The Court found that national law would prevail over international law in an Israel court, but examined the international law questions at length. The accused was found guilty and the Supreme Court of Israel subsequently upheld the conviction - on 31 May 1962, Eichmann went to the gallows, the only person ever formally executed by the State of Israel.[142]

1.5.4. Conclusion

It is difficult to draw some general conclusions about the relationship between internationalized and national Courts as the relationship differs from case to case.

One general conclusion that can safely be drawn, however, is that the internationalized Courts have largely been separated and isolated from the national Courts. The jurisdiction of internationalized Courts is either *de jure* or *de facto* mostly of an exclusive nature. To the extent, that jurisdiction is concurrent; the internationalized Court has primacy and can request the deferral of a case.

Enactment of universal jurisdiction laws for crimes and establishing investigations and prosecutions in national Courts are essential to the worldwide effort to end impunity. In doing so, States will ensure that their territory cannot be used as a safe haven for people accused of these crimes.

In the long term, the most important aspect of the interaction between internationalized and national Courts may be the influence that the decisions of the internationalized Courts have on the practice of national Courts.[143]

However, the International Criminal Tribunals and to a certain extent the ICC, were and are still far from being the perfect solution. That means that first, fully international criminal bodies tend to grow considerably in size, employing hundreds if not thousands of personnel, with significant costs, even when a large number of wealthy States can share them. They are inclined to become organs with their own internal logic, momentum, and agenda, which can be influenced little by their creators, least of all by individual States.

Secondly, even in the case of the ICC, tribunals cannot address every possible situation, because of restrictions on their jurisdiction, temporal, geographical, or otherwise.[144]

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[142] http://www.ushmm.org/research/library/bibliography/eichmann/right.htm [accessed 07/08/2005].
[143] Romano, Internationalised Criminal Courts, P. 378.
[144] Romano, Internationalised Criminal Courts, P. X.

In spite of these reservations, the last couple of years have witnessed the creation of two *ad hoc* tribunals that have overcome this reluctance to prosecute gender-based war crimes: The International Criminal Tribunal for the Former Yugoslavia and The International Criminal Tribunal for Rwanda have successfully prosecuted gender-specific sexual violence. Crimes, which have been thoroughly, documented, by victims and witnesses as well as investigators, journalists and aid-workers have enabled the recording of sufficient evidence for successful prosecution of those responsible. As the two first international war crimes tribunals established by non-participants to the conflict, the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda have already had an enormous influence on the development of International Criminal Law in general.

It is clearly stipulated in the Rome Statute that national Courts have the primary responsibility to prosecute crimes.[145] The ICC can only act when national Courts are not able or willing to take legal action.

Furthermore, it is important to consider the fact that domestic Courts alone are not always sufficient. National Courts might not be able to conduct a proper investigation and provide a fair trial because of political and social problems. Criminals staying in these States could simply move to another country in order to evade prosecution. Therefore, to improve the criminal system and to become more useful nations need to cooperate to capture and trial delinquents.[146] Other countries face a quandary if they are capable of taking legal action against perpetrations of international law, but other nations demand extradition. To avoid this difficult political situation, the handing over of criminals to the ICC would provide a better and more useful legal option.

1.5. Jurisdiction of the International Criminal Court over Peacekeepers

As mentioned above,[147] the ICC has jurisdiction to try individuals (but not States) for the most serious crimes of international concern: genocide, crimes against humanity, war crimes and aggression. The Rome Statute does not generally provide for any immunities and the ICC can try any individual responsible for such crimes, regardless of his or her civilian or military status or official position.[148]

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[145] See Rome Statute, Art. 68.
[146] See http://www.usaforicc.org/facts_whyneed.html [accessed 24/07/2005].
[147] See: Chapter 1, par 1.4.
[148] See Rome Statute, Art. 27.

Article 12 of the Rome Statute deals with the jurisdictional regime and mainly distinguishes the following elements:

(a) The precondition for the "normal" complementary jurisdiction of the Court to apply is that either the territorial State or the State of nationality of the suspect is a party to the Statute.[149]

(b) In the case of non-State Parties on whose territory or by whose national's crimes under the Rome Statute have been committed, the jurisdiction of the Court may also be based on their acceptance expressed by a special declaration.[150]

(c) Notwithstanding the hypotheses, which has been mentioned already above, the Court has jurisdiction when the Security Council, acting under Chapter VII of the UN Charter, refers a country situation to it in which crimes under the Rome Statute are presumed to have been committed on a large scale.[151] In such a case, it does not matter whether the State concerned is a party to the Statute or not.

(d) The transitional rule in Article 124 of the Rome Statute gives State Parties, by way of exception to the ordinary rule, the possibility of excluding the prosecution of war crimes committed on their territory or by their nationals for seven years following their accession to the Statute. Such a 'partial withdrawal' from the Statute can only be repeated under very narrowly defined circumstances since the transitional provision is linked to the strict conditions for amendments to the Statute.[152]

In summary: The jurisdiction of the ICC is not restricted to territorial or national criteria's. This judicial framework is modified by the possibility of opting-out of the jurisdiction regulated in Article 124 of the Rome Statute and by the jurisdiction triggered by the Security Council.

However, it is important to note that the actual exercise of jurisdiction under Article 12(2) of the Rome Statute is severely restricted by subsequent provisions of the Rome Statute,[153] which are intended to assure that primacy of jurisdiction is retained either by the territorial sovereign or by the State of nationality of the accused unless that State is unwilling or unable genuinely to carry out the investigation or prosecution.

As a result, there is no particular provision dealing with the issue of jurisdiction over peacekeeping forces. Therefore, Peacekeepers are subject to the jurisdiction of the ICC

[149] See Rome Statute, Art. 12(2).
[150] See Rome Statute, Art. 12(3).
[151] See Rome Statute, Art. 13(b).
[152] See Rome Statute, Art. 12 and 13.
[153] See Rome Statute, Art. 17.

under the same conditions as any other person. The approach reflected in the Statute is clearly that the ICC has jurisdiction over Peacekeepers if they commit crimes under the Statute on the territory of a contracting party or are nationals of a contracting party.[154]

In the next chapter, the US campaign against the establishment of the International Criminal Court will be considered in more detail.

[154] http://www.ejil.org/journal/Vol14/No1/art1-03.html#TopOfPage [accessed 12/06/2005].

CHAPTER 2

THE US CAMPAIGN AGAINST THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT

2.1. Introduction

The aim of this chapter is to give a detailed outline and analysis of the objectives of the United States concerning the establishment of the International Criminal Court. In addition, the most frequently quoted arguments in support of the US objection will be discussed and the different perspectives in this affair will be analysed.

2.2. The US initiatives against the establishment of the International Criminal Court – An Overview

In order to comprehend the logic behind the opposition of the US towards the ICC, it is helpful to consider the objective that the US actually sought to achieve.

In 1994, when the International Law Commission presented its report on an International Criminal Court to the General Assembly, the US was well-disposed to the proposal.

From 1995 through 2000, the US government in actual fact even supported the establishment of an ICC, yet one that could be controlled through the Security Council or could provide exemption from prosecution to US officials and nationals.[155] But from the moment that the final traits of the Rome Statute became apparent, the US has sought accommodation of what it has called "fundamental concerns" with the Articles of the Rome Statute.[156] The US aimed to shape a Court that it would be able to control, above all where proceedings against its nationals were concerned.[157] However, the US was not successful in achieving its aim at Rome and at the final session of the Plenary Committee, on 17 July 1998, the US called for a vote, thereby ensuring the Statute would not be adopted by consensus.[158] But it did not request a roll call vote, which might well have discouraged States from voting in favour, or even abstaining, and which could well have compromised the

[155] Schabas, United States Hostility to the International Criminal Court: It´s all about the Security Council, EJIL 2004, P. 712.
[156] Broomhall, International Justice and the International Criminal Court, P. 163.
[157] Murphy, Efforts to obtain immunity from ICC for U.S. Peacekeepers, AJIL 2002, P. 134.
[158] Broomhall, International Justice and the International Criminal Court, P. 170.

final result. However, certainly, there was no shortage of opportunities to influence the process in a negative way.[159]

One of the main arguments adduced by the US for the rejection of the Rome Statute was the fear that US soldiers participating in peacekeeping operations might be subject to politicised prosecutions before the Court.[160] Since the beginning of the negotiations, the main goal of US negotiators had been to seek a guarantee that the ICC exempt US military personnel participating in peacekeeping operations from prosecution before the US becomes a party to the treaty.[161] US officials criticised the fact that the Statute purports to establish an arrangement whereby US armed forces operating overseas – namely Peacekeepers – could conceivably be prosecuted by the ICC, even if the US had not agreed to be bound by the treaty. State officials argued that because the US is expected to intervene in humanitarian crisis around the world, US soldiers would be particularly vulnerable to being rendered subject to the jurisdiction of the ICC.[162]

All the temporary criminal tribunals that the US had previously supported were limited to investigating non-American citizens; that could not hold US citizens accountable. Expecting that the ICC would not be allowed to take any action until after a UN Security Council decision had referred a case to the Court, US officials at first also supported the proposed permanent Court. Within the Security Council, Washington could use its veto power to prevent any investigation of itself or political allies. The US sought a Court in which the Prosecutor could never bring charges against anyone from the US, although the US could, through a Security Council decision, bring charges against other nationals. This position so flagrantly violated principles of equal justice that the rest of the world eventually rejected the US position in order to establish a Court with independent authority.

Although the Clinton administration felt itself unable to offer a clear promise of signature in advance, it nevertheless chose to sign the Rome Treaty on 31 December 2000. Its purpose, as expressed by former president Clinton, was to be in a position to influence the evolution of the Court.[163] While participating and negotiating at the ICC Preparatory

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[159] Schabas, United States Hostility to the International Criminal Court: It's all about the Security Council, EJIL 2004, P. 708.

[160] http://www.un.org/icc/speeches/617usa.htm [accessed 08/08/2005].

[161] Stahn, Gute Nachbarschaft um jeden Preis? Einige Anmerkungen zur Anbindung der USA an das Statut des Internationalen Strafgerichtshofs, ZfaÖR 2000, P. 659.

[162] Murphy, US Efforts to Secure Immunity from ICC for U.S. nationals, AJIL 2003, P. 133.

[163] Amann, American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV The United States of America and the International Criminal Court, *AJocL 2002, P.* 381.

Commission's Sessions, the US aimed to insulate itself from the effects of the Rome Treaty.[164]

But in 2001, the Bush administration discontinued participation in ICC meetings and, on 6 May 2002, officially nullified the Clinton administration's signature of the Rome Statute.[165]

To summarize: The US Government refused to ratify the Rome Statute. The questions thus remain whether these circumstances have had any further consequences on the establishment of the ICC and what role the US has played in the international context concerning the establishment of the ICC.

2.2.1. Importance of US support for the establishment of the International Criminal Court

The US as the "sole remaining superpower"[166] and the "leader of the free world,"[167] is often called upon to execute a Security Council Mandate. The US is therefore crucial to multinational peacekeeping efforts.[168] A considerable number of forces to the UN peacekeeping missions are contributed by the US whose troops also play a major role in operations carried out by regional organisations such as Stabilisation Force in Bosnia and Herzegovina (SFOR) in the former Yugoslavia. Furthermore, the US musters essential logistics for peacekeeping operations that other States are not capable of providing. An example is the United Nations Operation in Somalia (UNOSOM II) in 1994, which was particularly dependant on the troops of the US[169] or the still ongoing Iraq conflict where US troops present the majority among the other involved troops. The United Nations Operation in Somalia was seriously weakened when the US withdrew its military personnel and its logistics from the operation. Besides the contribution of military personnel and logistics, the US financial support is vital to multinational peacekeeping operations.[170]

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[164] Scheffer, Staying the Course with the International Criminal Court, 35 CornellILJ P. 66-67.
[165] http://www.asil.org/insights/insigh87.htm [accessed 08/09/2005].
[166] Schabas, United States Hostility to the International Criminal Court: It´s all about the Security Council, EJIL 2004, P. 720.
[167] Murphy, The American Society of International Law, AJIL 2003, P. 715.
[168] Zwanenburg, The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?, EJIL 1999, P. 126; Schabas, United States Hostility to the International Criminal Court: It´s all about the Security Council, EJIL 2004, P. 720.
[169] United Nations *The UN and Somalia 1992-1996* (New York, 1996), P. 62.
[170] Zwanenburg, The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?, EJIL 1999, P. 127.

These facts reveal that US military forces and political support are central to international peacekeeping operations and the present level of peacekeeping operations would be difficult to maintain without American support.

To sum up: The ICC and the regime of international justice would undoubtedly be much stronger with the support of the US.
Therefore, it is important to analyse the main US arguments concerning the fact that the US has not yet ratified the Rome Statute.

2.2.2. American Reasoning

The US has expressed several fundamental concerns in relation to the establishment of the ICC and the Court's Jurisdiction.

2.2.2.1. Violation of the *Pacta Tertiis Rule*

The US has raised the concern that, in general, Article 12 of the Rome Statute offends against International Law.
Article 12 of the Rome Statute stipulates that a State, which becomes a Party to the Rome Statute thereby, has to accept the jurisdiction of the Court with respect to the most serious crimes listed under Article 5 of the Statute.[171]
The US officials claimed that the jurisdictional scheme of the ICC conflicts with the most fundamental principles of treaty law. That means that States cannot be bound by a treaty without their consent, yet the ICC Statute allows the Court to try individuals for serious international crimes without the consent of their national governments.[172]
Only States that are Party to a treaty can be bound by its terms.[173] The so called "*pacta tertiis rule*" prohibits the creation of obligations for non-State Parties. Yet Article 12 of the ICC Treaty reduces the need for ratification of the treaty by national governments by providing the Court with jurisdiction over the nationals of non-Party States.[174]
However, the US argument that the ICC Statute is illegal because it contemplates the possibility that the ICC may judge nationals of non-Party States is based on confusion be-

[171] See Rome Statute, Art. 5 and Art. 12.
[172] Scheffer, The United States and the International Criminal Court, AJIL *1999*, P. 18.
[173] See Vienna Convention on the Law of Treaties, UN Doc A/CONF.39/27 of 23 May 1969, Art 34.
[174] Scheffer, The United States and the International Criminal Court, AJIL *1999*, P. 18.

tween the notions of obligation and interest.[175] The jurisdiction of the Court concerns individuals and not the individual's home State. Clearly, the Rome Statute does not create any obligations on non-State Parties.[176] Under the terms of the Rome Treaty, the contracting parties are obliged to provide funding to the ICC, to extradite indicted persons to the ICC, to provide evidence and other forms of co-operation to the Court.

Those are the only obligations the Rome Treaty establishes on States, and these obligations apply only to State Parties.

It is true that a non-Party State may protect its nationals from prosecution by the Court by conducting its own investigations.[177] Thus, the ICC Treaty may have an effect on the practice of non-Party States. If a national of a non-contracting State is accused of committing a crime on the territory of a State Party, the ICC may exercise jurisdiction if it determines that the State is neither able nor willing to prosecute. In order for a non-State Party to protect its nationals from prosecution by the Court, it must, according to the Statute's complementarity provisions, prosecute its nationals itself.[178] However, the non-State Party is under no obligation to do so and it is under no obligation to co-operate with the Court. The State's failure in prosecuting its nationals will merely be judged as a factor entering into the Court's evaluation of whether a given case is admissible or not under the standard of complementary contained in Article 17 of the Statute.[179] Certainly, a prosecution of nationals of non-State Parties coincides with interests of that State. But a mere interference with interests clearly does not provide a ground for saying that the Statute violates international law.[180]

The Rome Statute does not create legal obligations for non-State Parties and, therefore, does not infringe upon the *pacta tertiis rule*. There is accordingly little basis for the US position that treaty law prohibits jurisdiction over the nationals of non-Party States.

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[175] Mégret, Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the looming Revolution of International Law, EJIL *2001*, P. 249.
[176] Hafner, A Response to the American View as Presented by Ruth Wedgwood, EJIL *1999*, P. 117.
[177] Stahn, Gute Nachbarschaft um jeden Preis? Einige Anmerkungen zur Anbindung der USA an das Statut des Internationalen Strafgerichtshofs, *ZfaÖR 2000*, P. 659
[178] Hafner, A Response to the American View as Presented by Ruth Wedgwood, EJIL *1999*, P. 117.
[179] Mégret, Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the ooming Revolution of International Law, EJIL *2001*, P. 249.
[180] Mégret, Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the ooming Revolution of International Law, EJIL *2001*, P. 249.

2.2.2.2. Independence of the International Criminal Court

Another US concern is the fear that the mere existence of an independent Court might limit the US to use military power. To have a Court ready to investigate US officials for war crimes or crimes against humanity might inhibit officials from sending forces into combat and using aerial bombardment that might kill many civilians. Yet the law governing international military conduct is not changed by the establishment of the proposed Court and the content of the Statute does not justify US fears. As long as US military actions are consistent with international humanitarian law, the US has nothing to fear from the Court. For the purpose of ensuring the observance of humanitarian rules, the UN, the host country, and the countries contributing troops must enter into a tripartite commitment. Each side is required to observe the basic principles and spirit of existing humanitarian conventions. These instruments include the 1949 Geneva Conventions, the 1977 Geneva Protocols, and the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict.[181] Questions about the applicability of international humanitarian law to UN peacekeeping operations are important. While there have been reported breaches of human rights by UN forces, the number of instances is very limited. The Member States are concerned of intensifying their efforts to ensure the observance of humanitarian law by their troops acting on behalf of the UN.

2.2.2.3. Non-State Parties compared to State Parties referring to Article 124 of the Rome Statute

Another argument invoked by the US is based on Article 124 of the Rome Statute. Thus, because Article 124 of the Rome Statute allows a State Party not to accept the jurisdiction of the Court over war crimes, it has been alleged that this allows a State Party to escape prosecution of its nationals, something that a non-Party State cannot do. The objection is insignificant, because only two States have invoked the provisions - France and Colombia. In any event, it is misplaced, because nationals of France and Colombia can be prosecuted for war crimes committed on the territory of another State Party, in the same way as American nationals can be prosecuted. There is no injustice or inequality here. As for the *ad hoc* jurisdictional regime in Article 12(3) of the Rome Statute, which allows a State to give jurisdiction to the Court without itself actually joining the treaty, its scope has been

subsequently narrowed by the Rules, largely the result of post-Rome participation of the US in the follow-up work.

2.2.2.4. Politically motivated charges

Central among the US officials concern is - as already mentioned above[182] - its intention to ensure that an international prosecutor might not bring politically motivated charges against US officials. The concern about politically motivated prosecutions of US or other nationals is in a way understandable, but the Rome Statute contains a number of principles and provisions that effectively safeguard Peacekeepers against politicised prosecution before the Court.[183]

2.2.2.4.1. *Proprio Motu* Prosecutor

Under the Rome Statute there is a *proprio motu* Prosecutor, namely a Prosecutor with the power of initiative. The Prosecutor may initiate investigations based on information of crimes within the jurisdiction of the Court.[184] The US feared that a Prosecutor with such wide powers would initiate politically motivated proceedings against Peacekeepers. Any State Party would be able to ask for investigation into a matter, or the Prosecutor may open an investigation on her or his own initiave.[185]

This fear, however, seems to be unjustified as the investigation by the Prosecutor must first be authorised by the pre-trial Chamber of the Court consisting of three judges,[186] which shall decide if there is a reasonable basis to proceed with an investigation and whether the case falls within the Court's jurisdiction.

The judges of the pre-trial Chamber of the Court will thus ensure that investigation by the Prosecutor is warranted.

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[181] Roy S. Lee, CornellILJ 1995, UNITED NATIONS PEACEKEEPING: DEVELOPMENT AND PROSPECTS.

[182] See: Chapter 2, par 2.2.

[183] http://www.asil.org/insights/insigh87.htm [accessed 08/09/2005].

[184] See Rome Statute, Art. 15.

[185] Amann, American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV The United States of America and the International Criminal Court, AJoCL 2002, P. 388, 389.

[186] Leigh, The United States and the Rome Statute, *AJIL 2001, P.* 126.

2.2.2.4.2. Principle of complementarity

In addition to these jurisdictional limitations mentioned above,[187] Article 1 of the Rome Statute provides that the ICC is complementary to national criminal jurisdictions. Under the principle of complementarity, the Court will not be allowed to act when national judicial systems are available and willing to prosecute suspects. If a State carries out its obligation to investigate a suspected crime, even if it decides there is no reason to prosecute a suspect, the ICC cannot intercede. In other words, the Court is purportedly designed to serve as a Court of last resort for extraordinary cases, as an international safety net to prevent criminals of lawless States from escaping without punishment for their crimes.

The understanding of the majority of participating States was that States have a fundamental interest in remaining responsible and accountable for investigating and prosecuting violations of their laws.[188] Indeed, it seems as if the complementarity principle had to be inserted to the Rome Statute in order to ensure acceptance for the Statute. The principle of complementarity in the Rome Statute stands apposite to the primacy principle of the International Criminal Tribunals for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Under the primacy principle, the ICTY[189] and ICTR[190] can *compel* a national Court to drop a case and cede jurisdiction to the tribunals, whether or not there is outright *mala fides* or unwillingness on the part of the concerned State to prosecute. This is the case notwithstanding that national Courts enjoy concurrent jurisdiction with the international tribunals.

The complementarity principle is spelt out in Article 17(1), according to which a case is inadmissible before the Court if:

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

(b) The case has been investigated by a State who 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.

Further criteria for determining unwillingness to prosecute are laid down in Article 17(2) of the Rome Statute. These criterias include:

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[187] See: Chapter 2, par 2.2.2.4.1.

[188] Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13 (1999), reprinted in (1999) 38 ILM 1656.

[189] See Rome Statute, Art. 9.

[190] See Rome Statute, Art. 8.

(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 of the Rome Statute;
(b) There has been an unjustified delay in the proceedings, which in the circumstances is inconsistent with intent to bring a person to justice; and
(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.
One of these conditions set out in Article 17(2) must be fulfilled to declare a case against a Peacekeeper admissible before the ICC. This is very unlikely as far as a national criminal justice system like the one of the US is concerned. Generally the US system of criminal justice functions very elaborately and the proceedings are conducted independently and impartially as required by Article 17(2).[191]
The only exception allowing independent Court action is when a State intentionally tries to avoid its international obligation by shielding a criminal from responsibility. Because the ICC is not designed to supplant effective national judicial systems such as US military and civilian Courts, it is extremely unlikely that US nationals would ever come before the ICC.
Therefore, this strict concept of complementarity will make it very difficult to declare a case admissible before the Court if a decently working national criminal justice system, such as the one in the US, has initiated an investigation or a prosecution of an offence falling within the jurisdiction of the ICC.[192]

These principles do ensure that the US would not be subjected to unwarranted political motivated charges.

2.2.3. Ratification of the Rome Statute by the United States

Before and during the Rome Conference, the US aimed to shape a Court that it would be able to control, above all where proceedings against its nationals were concerned.[193] This aim was expressed through proposals that would require Security Council Approval of proceedings related to a situation being dealt with by the Council under Chapter VII of the

[191] Zwanenburg, The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?, EJIL 1999, P. 126.
[192] http://www.hrw.org/campaigns/icc/docs/1422legal.pdf [accessed: 22/09/2005].
[193] Weschler, Exceptional Cases in Rome: The United States and the struggle for an ICC, P. 85.

Charter and that would require the State of nationality of the accused to recognize the Court's jurisdiction before the Court could act. The basis of these proposals was the arguments mentioned above.[194]

The US was not successful in achieving its aim at Rome, and consequently voted against the adoption of the Rome Statute.

Rather than the Security Council having power to decide the Chapter VII situations against which the Court will proceed, the ICC has *Carte Blanche* to act within such situations – subject to the limits of the Statute – unless the Security Council makes the affirmative decision under Article 16 of the Rome Statute to request a one–year, renewable deferral. Under Article 12 of the Statute, the acceptance of the territorial State is enough to allow the ICC to exercise jurisdiction, even if without the approval of the State of nationality of an accused.

Nonetheless, the text of the Rome Statute that was adopted on 17 July 1998 contained numerous provisions in this regard. Noteworthy is the fact that the discretion of the Prosecutor to initiate investigations *proprio motu* is controlled by a panel of judges in the so called Pre-Trial Chamber.[195]

Secondly, even once an investigation begins, the complementarity provisions would allow the US, even as non-State Party, to stop ICC proceedings at the earliest stage simply by asserting that it was investigating the matter itself.[196]

Thirdly and most important, the Rome Statute includes a provision in Article 98(2) that in effect allows the US to enter into agreements that would block surrender of its nationals to the ICC.

Nonetheless, the fact remains that the independent judges of the ICC will make the key decision as to whether a State was willing and able to proceed genuinely, and governments apart from the US government would choose the officials of the ICC.

To sum up: Under the current system and with the Rome Statute in force, American Peacekeepers can in fact legally be surrendered to the ICC if they commit crimes under the Rome Treaty on the territory of a State Party.

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[194] See: Chapter 2, par 2.2.2.
[195] See Rome Statute, Art. 15.
[196] See Rome Statute, Art. 18 – 20.

2.3. Conclusion

The Rome Statute, however, is based on principles and provisions that effectively protect Peacekeepers against prosecution before the Court and thus the practical implications of the Rome Statute with regard to the issue of jurisdiction over Peacekeepers are not as far reaching as the concerns of the US let assume. With all the safeguards built into the Treaty to prevent inappropriate prosecutions, the fears of the US with regard to politicised prosecutions of their Peacekeepers are not justified at all.[197] Therefore, US insistence on still more protection is unreasonable.

It may be concluded that the traditional arrangements for the exercise of criminal jurisdiction in the form of the Status-of-Forces and Participation Agreements will only be affected in very rare cases.[198] This is particularly true as the scope of the crimes falling within the jurisdiction of the ICC is very limited so that most of the offences committed by Peacekeepers will fall within the jurisdiction of the national Courts.

However, the provisions of the Rome Statute provide that prosecution of Peacekeepers will be ensured whenever Peacekeepers commit crimes under the jurisdiction of the ICC and the contributing State or the State, in whose territory the crimes are committed, are not willing or able to prosecute. This is of particular significance with regard to the problems of primary responsibility of national authorities in investigation and prosecution of Peacekeepers.

Thus, the establishment of the ICC guarantees an equal and effective prosecution of Peacekeepers who have committed international crimes.

Considering the campaign by the US against the negotiating process of the Rome Statute, it is remarkable that an ICC Statute was adopted at all. However, even after the ICC became into force the US did not relinquish their efforts to exempt their Peacekeepers from the Jurisdiction of the ICC. These subsequent efforts will be considered in the next chapter.

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[197] Stahn, Gute Nachbarschaft um jeden Preis? Einige Anmerkungen zur Anbindung der USA an das Statut des Internationalen Strafgerichtshofs, ZfaÖR 2000, P. 661.

[198] Zwanenburg, The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?, EJIL 1999, P. 141.

CHAPTER 3

THE US DOCTRINE AGAINST THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT AFTER THE COURT'S ESTABLISHMENT

3.1. Introduction

This chapter seeks to illustrate the tension between the US and the International Criminal Court concerning the US efforts to exclude Peacekeepers of non-Party States from the jurisdiction of the ICC. To this end, Security Council Resolutions 1422,[199] 1487 and 1497 specially will be analysed.

3.2. An Overview – Security Council Resolutions 1422, 1487 and 1497

Although the Rome Statute guarantees diverse principles to prevent unjustified prosecutions of Peacekeepers before the ICC,[200] the US embarked on different initiatives to exempt its Peacekeepers from the jurisdiction of the ICC.

On 23 June 2004, the US withdrew its request to the Security Council for the renewal of Resolution 1487.[201] This Resolution itself renewed Resolution 1422, adopted on 12 July 2002.[202] Under the latter Resolution, the Security Council had granted immunity from prosecution by the ICC to UN troops contributed by non-Party States under the Statute for twelve months. However, on 1 August 2003, the Security Council adopted Resolution 1497.[203] Unlike Security Security Resolutions 1422 and 1487, this new Resolution conferred on States that are not Party to the Rome Statute the *exclusive jurisdiction* over crimes committed by their troops serving under a multinational force or UN stabilization force in Liberia, except where such jurisdiction has been explicitly waived.[204] There is a substantive and a practical distinction to be made between a mere "deferral" resolution such as 1487, which the US refused to renew, and a "terminating" resolution, such as 1497, when considering the competence of the Security Council to act against the ICC.

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[199] For a detailed outline of *Security Council Resolution 1422* see Annex of this mini-thesis.
[200] See: Chapter 2, par 2.1 – 2.2.
[201] http:// www.amnesty.org/pages/icc-US_threats-eng [accessed 22/07/2005].
[202] http://www.un.org/law/icc/general/overview.htm [accessed 23/07/2005].
[203] www.iccnow.org/documents/ declarationsresolutions/UNOtherRes.html [accessed 27/08/2005].
[204] http://www.iccnow.org/membermediastatement/2003/08.01.03-LCHR-LiberiaRes.pdf [accessed 20/09/2005]; http:// www.iccnow.org/documents/otherissues/1422/HRW1422April2003.pdf [accessed 28/09/2005].

But before analysing Resolution 1497, a short outline of the adoption of the Security Council Resolution 1422 and its further influence on Resolution 1497 will follow.

3.3. Security Council Resolutions 1422 and 1487

On 6 May 2002, the Bush Administration announced that the US does not intend to become a Party to the Rome Statute of the ICC.[205]

In June 2002, the US government threatened to shut down all UN Peacekeeping operations where US Peacekeepers were involved – especially the UN mission in East Timor - unless the Security Council adopted a Resolution providing immunity for US soldiers and nationals from ICC non-Party States involved in UN or authorized missions for a renewable twelve-month period. However, the operation was renewed without such a provision.

Nevertheless, the Security Council adopted Resolution 1422 at its 4572nd meeting on 12 July 2002, following an intense debate on the UN peacekeeping mission in Bosnia-Herzegovina (UNMIBH). In an extraordinary step two weeks earlier, United States UN Ambassador John Negroponte vetoed the mission's renewal.[206] The veto was prompted by the concern that US personnel serving in the peacekeeping operation could be subject to unwarranted, politically motivated prosecutions by the ICC. In addition, Bush administration officials threatened to veto the renewal of all peacekeeping operations, if Council members did not agree to the text of Resolution 1422.[207] Resolution 1422 prevents the ICC from proceeding with investigations or prosecutions of government officials or military personnel of non-Party States contributing to UN peacekeeping operations for a renewable twelve-month period starting 1 July 2002. The Resolution only applies to nationals of States that are not Parties to the Rome Statute.

Although the vast majority of States had spoken out beforehand against the American proposition and against the possibility for the Security Council to reopen negotiations on the Rome Statute, the States voted, on 12 July 2002, in favour of a Resolution, which was supposed to be a compromise. Among those States who opposed the US position were Mexico, Canada and the closest allies of the US in Europe, such as France and the UK. Thus, the 15-0 vote did not reveal the deep concerns that some delegates expressed about the final compromise.[208] The only effective way to block a decision of the Security Coun-

[205] http://www.asil.org/insights/insigh87.htm [accessed: 10/09/2005].
[206] www.amic.org/docs/peacekeeping/pdf [accessed: 10/08/2005].
[207] http://www.ejil.org/journal/Vol14/No1/art1-03.html#TopOfPage [accessed: 10/08/2005].
[208] www.wfa.org/isses/wicc/unsc1422/july12.htm [accessed: 14/08/2005].

cil itself is by exercising a veto by one of the five permanent Member States – the United States, the United Kingdom, China, France and the Russian Federation.

Both Resolutions 1422 and 1487 dealt with the deferral of the ICC jurisdiction under Article 16 of the Rome Statute. Neither of these Resolutions permanently excluded the ICC from prosecuting UN troops contributed by States not Party to the Statute. These Resolutions only suspended the ICC from commencing or continuing the investigation or prosecution of crimes involving troops contributed by non-Parties to the Rome Statute.

However, eager to preserve peacekeeping operations, the UN Security Council members adopted the text of Resolution 1422 despite its serious flaws. Resolution 1422 has, in turn, been renewed through the adoption of Resolution 1487 on 12 June 2003.

3.3.1. Consistency with the Rome Statute

The relationship between the operative part of Security Council Resolutions 1422 and 1487, and certain provisions of the ICC treaty are very controversial. These Resolutions have provoked strong criticism from the international community and tension between the Security Council and the ICC manifests itself in several parts of the Rome Statute.

In the following sections, it will be considered whether the Security Council acted beyond its power in international law by terminating, rather than deferring, the ICC jurisdiction as required by Article 16 of the Rome Statute.[209] It will also examined whether, by vesting in non-Parties to the Rome Statute the exclusive jurisdiction with respect to crimes committed by troops contributed by such parties to a UN operation, the Security Council acted lawfully under international law.

3.3.1.1. Consistency with Article 16 of the Rome Statute

Security Council Resolutions 1422 and 1487 are in the form of requests to the ICC to defer investigation or prosecution of cases for a 12-month automatically renewable period unless the Security Council decides otherwise.[210] On the face of it, these Resolutions are in compliance with the terms of Article 16 of the Rome Statute.

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[209] See Rome Statute, Art. 16.

[210] Jain, A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court, EJIL 2005, P. 247; Schabas, United States Hostility to the International Criminal Court: It's all about the Security Council, EJIL 2004, P. 714.

The ICC may be prevented from exercising its jurisdiction when so directed by the Security Council, according to Article 16 of the ICC Statute. Article 16 of the Rome Statute stipulates that the Security Council may adopt a Resolution under Chapter VII of the Charter of the United Nations requesting the Court to suspend prosecution, and that in such a case the Court may not proceed. Nobody at the Rome conference expected Article 16 of the Rome Statute to be invoked by the Security Council even before the Court was actually operational, but that is precisely what happened in July 2002 with the adoption of Security Council Resolution 1422, barely days after the Statute entered into force.[211] However, it is questionable whether Resolution 1422 is consistent with Article 16 of the Rome Statute.

The phrase contained in Article 16 of the Rome Statute that "no investigation or prosecution may be commenced or proceeded with" presupposes the existence of a particular "investigation" or "prosecution" that relates to a specific incident or the potential culpability of an individual regarding specific conduct. The Pre-Trial Chamber must authorize the commencement of a specific "investigation".[212] All prosecutor inquiries up to this point are not "investigations", but only "preliminary examinations".[213] Only after Pre-Trial Chamber, authorization of an "investigation" is the Security Council entitled to request a deferral under Article 16 of the Rome Statute.

The structure of the Rome Statute further underscores the requirement that any Security Council deferral request must respond to a specific case. The position of Article 16 in the Statute reveals that the Council may only issue a request under this provision once a concrete "investigation" or "prosecution" is taking place. Article 16 follows Articles 13 – 15 of the Rome Statute, determining that investigations may be initiated by the Prosecutor upon the referral of a situation either by a State Party of the Statute or the Security Council, or by a *proprio motu*[214] action of the Prosecutor.

This demonstrates that, as a matter of logic, an Article 16 deferral request is not meant to be a tool for Security Council preventive, indiscriminate action, but a response to specific ICC proceedings.[215] Any such deferral must be temporary, subject to the 12-month limit stipulated in Article 16, so that the perpetrators of any atrocities would ultimately be brought to account for their crimes - via either national judicial systems or the ICC. Article 16 does not provide for any limitation as to the number of times a request under Article 16

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[211] Schabas, Introduction to the International Criminal Court, P. 83.
[212] See Rome Statute, Art. 15.
[213] See Rome Statute, Art. 15(6).
[214] See: Chapter 2, par 2.2.2.4.1.
[215] http://www.hrw.org/campaigns/icc/docs/1422legal.pdf [accessed 07/10/2005].

may be made in respect of the same case. Therefore, this deferral may be for an unlimited period.[216] Even then, the manner in which Security Council Resolution 1422 is worded would go against the object and purpose of Article 16. Article 16 clearly states that the deferral of investigation or prosecution is to be in accordance with a resolution passed by the Council acting under Chapter VII, which implies that there must be a threat to international peace and security that necessitates the deferral of proceedings by the ICC.[217] Any automatic renewal clause in a resolution would go against the obligation imposed on the Council to examine whether a situation constitutes a threat to international peace and security, and then pass a resolution under Chapter VII requesting the ICC to defer proceedings in a particular case.

The above interpretations of Article 16 are consistent with one of the Rome Statute's key features: to limit the role of the Security Council *vis-à-vis* the ICC, and specifically to prevent the Court's investigations and prosecutions from being subject to prior Security Council approval. The drafting history of the Rome Statute clearly points to the conclusion that Article 16 was not meant to be used as a blanket provisions exempting a class of persons from the jurisdiction of the ICC, but rather as a mechanism to ask for deferral on a case-by-case basis.[218] But by ignoring the "case-by-case" requirements of Article 16, the current text of Resolution 1422 does exactly the opposite, subjugating the ICC to the politics of the Security Council.[219]

Summing up: Article 16 of the Rome Statute establishes a mechanism for deferring investigations or prosecutions on a "case-by-case" basis, subject to time limitations. Security Council Resolutions 1422 and 1487 do not meet the requirements of Article 16 and must therefore be regarded as being in conflict with this provision.

[216] Schabas, Introduction to the International Criminal Court, P. 65.
[217] See UN Chater, Art. 39.
[218] Stahn, The Ambiguities of Security Council Resolution 1422, EJIL 2003, P. 98.

3.3.1.2. Consistency with Article 27 of the Rome Statute

The exemption of Peacekeepers from proceedings before the ICC could also be difficult to reconcile with Article 27 of the Rome Statute, which rules out immunities based on official capacity.[220]

Security Council Resolutions 1422 and 1487 have the effect of rendering Peacekeepers from non-Party States immune from proceedings before the ICC.

Article 27 of the Rome Statue expressly prohibits making distinctions based on official capacity. As already mentioned above,[221] Peacekeepers do not enjoy immunity from crimes within the jurisdiction of the Court under the rules of the Rome Statute.

Referring to this, the provision reads:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Immunities or special procedural rules, which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 27 is a crucial provision that encompasses the fundamental object and purpose of the Treaty to ensure that no person is above the law.[222] Without strict adherence to this principle, the door to impunity will remain open. By contrast, Security Council Resolution 1422 allows an entire class of individuals to escape judgment of the ICC, opening the door to impunity if national Courts of non-Party States fail to carry out good faith investigations and prosecutions. The basic rule is that if Peacekeepers are deployed on the territory of a State Party of the Rome Statute and commit crimes under the Rome Statute, the ICC may generally try them.[223] It could be argued that Article 27 does not apply to peacekeeping forces, as they are not explicitly mentioned in Article 27(2) as persons with official capacity. However, the enumeration in the second sentence of Article 27(1) can only be regarded as non-exhaustive in view of the use of the phrase "in particular". The basic rule

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[219] http://www.iccnow.org/documents/otherissues/impunityart98/FIDHImpunityEng.pdf [accessed 23/07/2005].
[220] www.hrw.org/campaigns/icc/usproposals.htm [accessed 07/10/2005].
[221] See: Chapter 1, par 1.5.
[222] http://www.hrw.org/campaigns/icc/docs/1422legal.pdf [accessed 18/09/2005].
[223] http://www.ejil.org/journal/Vol14/No1/art1-03.html#TopOfPage [accessed 10/08/2005].

spelt out in the first sentence of Article 27(1) is that *all* persons with "official capacity" shall be treated equally in the sense that the very nature of their capacity does not exempt them from the jurisdiction of the ICC.[224] The term "official capacity" aims to include all the capacities, which might tempt the person to claim immunity from criminal responsibility and to hide behind any position, which might be strong enough to support his or her endeavours to achieve impunity. Personnel of international organisations are within the non-exhaustive Article 27(1) of the Rome Statute. Hence, persons having any official capacity on the international or on the domestic level should be treated equally in the sense that the nature of their capacity is irrelevant with respect to their responsibility under international criminal law.

By exempting all Peacekeepers from non-Party States to the Rome Statute from the jurisdiction of the ICC, Security Council Resolution 1422 has the effect of rendering an entire class of individuals immune from prosecution by the ICC. Therefore, it might be argued that the immunity is based on the nationality rather than the peacekeeping position of the offender, as Resolution 1422 exempts only Peacekeepers from States that are not Party to the Rome Statute from the jurisdiction of the ICC. Resolution 1422, however, does not exclude every citizen of non-Party States to the Statute from the jurisdiction of the Court, but merely Peacekeepers.

Hence, the Resolution is not only based on the nationality of the offender but also on his or her job as a Peacekeeper and, therefore, makes in effect distinctions on the basis of "official capacity."

Resolution 1422, by bestowing blanket immunity from the Court's jurisdiction to an entire class of persons in advance of unknown future events, is in manifest violation of the Rome Statute. Ultimately, of course, the Court has the final word in determining the legal and practical effect of the resolution; however, all Party States have the obligation now to avoid renewing a resolution that violates the Rome Statute.

To sum up: Whereas customary international law does not protect a State official who commits international crimes in his official capacity (denying immunity *ratione materiae*), such officials are exempted from prosecution for acts done in their personal capacity as state officers,[225] although admittedly cases on this point are still scant and most of them exist in the context of civil litigation. The seeming inherent absurdity of the distinction between *immunity ratione materiae* and *immunity ratione personae* in relation to interna-

[224] http://www.hrw.org/campaigns/icc/docs/1422legal.pdf [accessed 18/09/2005].

tional crimes is underscored by the International Law Commission's failure to see any justification in preventing an "individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequence of this responsibility."[226]

Thus, the Security Council Resolutions 1422 and 1487 are not only inconsistent with Article 16 but also with Article 27 of the Rome Statute.

3.3.2. The Effect of Security Council Resolutions 1422 and 1487

As shown above,[227] the adoption of Security Council Resolutions 1422 and 1487 raised serious concerns about the scope of the Security Council's power.

The multiple inconsistencies lead to the questions about whether and to what extent the determinations of the Security Council prevail over the provisions of the Rome Statute. The answer to this question mainly depends on two factors:

First whether if the Security Council has the authority to adopt a resolution that runs counter to the provisions of Article 17 and 27 of the Rome Statute, and secondly whether these Resolutions have any binding effects on UN Member States and the ICC. Both of these factors will be considered next.

3.3.2.1. Security Council Resolutions 1422 and 1487 under Chapter VII of the UN Charter

The Security Council has been entrusted with the primary responsibility of maintaining international peace and security.[228] Once the Security Council has determined that a threat to peace exists, the Council has a wide discretion concerning action under Chapter VII of the UN Charter.[229] Its authority to adopt Security Council Resolution 1422 must therefore be assessed on the basis of its Chapter VII powers under the UN Charter.

The Security Council enjoys broad freedom of judgement concerning action under Chapter VII, which can have a far-reaching impact upon rights that States normally possess

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[225] Bianchi, Immunity Versus Human Rights: The Pinochet Case, EJIL 1999, P. 237.
[226] Bianchi, Immunity Versus Human Rights: The Pinochet Case, EJIL 1999, P. 239.
[227] See: Chapter 3, par 3.2.2. – 3.2.3.
[228] See UN Chater, Art. 39.
[229] Gill, Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, NetherlJoIL of International Law 1995, P. 61.

under the Charter, under other international conventions and under customary international law.

Due to the fact that the Security Council is an organ of the UN, the provisions of the Rome Statute do not bind the Council but that does not mean that the Security Council is above the law.[230] The Security Council is still bound by restrictions laid down in the UN Charter itself.[231]

3.3.2.1.1. Limitation of the Power of the Security Council by Articles 24, 25 and 103 of the UN Charter

Although the Security Council enjoys broad freedom in making determinations under Chapter VII, the Security Council is expressly bound by the restrictions laid down in Articles 24, 25 and 103 of the UN Charter. The Security Council is charged under Article 24 with the primary responsibility for the maintenance of peace and security and has a mandate from all Member States to act on their behalf in this regard.[232]

Referring to Article 25, a strong case can be made that a decision of the Council taken in violation of the Charter is not binding upon UN Member States, because Members of the UN have only agreed to accept and carry out decisions of the Security Council in accordance with the UN Charter.[233] This position finds support, in particular, in the Advisory Opinion of the International Court of Justice in the *Admission Case*,[234] where the Court held that the political character of an organ could not release it from the observance of treaty provisions established by the Charter, when they constitute limitations on its powers or criteria for its judgement.[235]

Article 103 of the UN Charter states that in the event of a conflict between the obligations of the Members of the UN under the Charter and their obligations under any international agreement, their obligations under the Charter shall prevail. However, in fact, Article 103 of the Charter does not directly state that a Chapter VII decision of the Security Council prevails over any other inconsistent treaty provision. However, the obligation of UN Member States under Article 25 of the UN Charter to accept and carry out decisions of the

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[230] See: Chapter 2, par 2.2.
[231] Gill, Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, NetherlJoIL 1995, P. 39.
[232] See UN Charter, Art. 24.
[233] See UN Charter, Art. 25.
[234] See ICJ, *Conditions of Admission to the United Nations, Advisory Opinion*, ICJ Reports 1948, P. 64.
[235] Doehring, Unlawful Resolutions of the Security Council and their Legal Consequences, MaxPlanckYofUNLaw Yearbook of United Nations Law 1997, P. 98.

Security Council is an obligation under the Charter within the meaning of Article 103. UN Member States are therefore bound by Article 103 to give obligations arising from binding Chapter VII Resolutions of the Council priority over any other commitments.[236]
In discharging its functions, the Security Council is not, therefore, free from legal limitations. The Security Council is bound by the restriction laid down in the UN Charter itself. Under Articles 1(1) and 24 of the UN Charter the Security Council has the duty to act in accordance with the purposes and principles of the Organisation.

3.3.2.1.2. Limitation by the *Jus Cogens Principle*

Security Council Resolutions 1422 and 1487 may also violate the *jus congens principle* by shielding Peacekeepers of non-Party States to the Rome Statute from the ICC's exercise of jurisdiction. The concern is that Resolution 1422 may undermine the asserted *jus congens principle* of customary law that perpetrators of serious violations of humanitarian law must either be prosecuted or extradited to a state that will prosecute.[237]
As already mentioned above,[238] the ICC's jurisdiction is limited to the most serious crimes that affect the international community as a whole, such as genocide, war crimes or crimes against humanity. These crimes are categorised by several commentators as *jus cogen norms*, which hold the highest hierarchical position among all other norms and principles and enjoy a higher rank than treaty law and customary law.[239] The main concern is that the adoption of Security Council Resolution 1422 and the intent to block permanently the jurisdiction of the ICC over Peacekeepers from non-Party States might actually permit perpetrators to escape justice and thus de facto legitimise impunity.[240]
However, such an argument could only be made if Peacekeepers from non-State Parties to the ICC had been exempted from individual criminal responsibility and not only from the jurisdiction from the Court because such a decision would have entailed a flagrant violation of the principle of equality.[241] But this is obviously not the case, because Paragraph 1 of Security Council Resolution 1422 refers only to proceedings before the ICC, leaving the whole system of national prosecution of Peacekeepers for core crimes under the Stat-

[236] See UN Charter, Art. 103.
[237] El Zeidy, The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422, Vanderbilt Journal of Transnational Law 2002, P. 1529.
[238] See: Chapter 1, par 1.5.
[239] Brownlie, Principles of Public International Law, P. 515.
[240] Bassiouni, International Criminal Law, P. 39f.
[241] Gowland-Debbas, The Relationship between the Security Council and the Projected International Criminal Court, Journal of Armed Conflict Law 1996, P. 114.

ute unaffected.[242] Moreover, Paragraph 5 of the Security Council Resolution 1422 provides that noting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes. There is no rule of customary international law, which would require that Peacekeepers should be brought before an international jurisdiction.

Therefore, Security Council Resolution 1422 cannot be regarded as violating the *principle of jus cogens*.

3.3.2.1.3. Limitation by the *Pacta Sunt Servanda Principle*

Security Council Resolutions 1422 and 1487 can also be inconsistent with the *principle of pacta sunt servanda*. This principle obliges Parties to a treaty to perform their obligations under it in good faith.[243] The *principle of pacta sunt servanda* is a fundamental norm of international law in the nature of *jus congens*.[244] Any resolution, which forces Parties to a treaty to consistently act in derogation of a specific treaty provision, would be in violation of this principle. The UN Charter itself affirms the commitment of the UN to nurture respect for treaty obligations.[245] The Preamble is an integral part of the Charter, and is as valid and operative as the other parts.[246] The Preamble reflects the intent of the founders of the UN and informs the interpretation of the Charter. The *travaux preparatoires* of the UN Charter indicate that this respect for treaty obligations is as essential for maintaining international order and stability as it is a morally compelling norm.[247]

3.3.2.1.4. Conclusion

The provisions of the Rome Statute, as such, cannot act as a limitation on the powers of the Security Council acting under Chapter VII. If Resolutions 1422 and 1487 passed by the Council have the effect of actually modifying the operation of the Rome Statute, the Council would be acting in a manner inconsistent with international law.

Therefore, it follows, that Security Council Resolutions 1422 and 1487 are inconsistent with the Rome Statute and *ultra vires* the powers of the Security Council.

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[242] Compare Paragraph 5 of the Preamble of Resolution 1422.
[243] Art. 26 of the VIENNA CONVENTION ON THE LAW OF TREATIES SIGNED AT VIENNA 23 May 1969.
[244] See: Chapter 3, par 3.3.2.1.2.
[245] See Preamble of the UN Charter.
[246] Chakste, Justice and Law in the Charter of the United Nations, AJIL 1998, P. 594.
[247] A Separate Law for Peacekeepers: The Clash between the Security Counci and the International Criminal Court, EJIL 2005, P. 251.

Hence, the Security Council does not have the power to adopt a resolution that restricts the legal functioning of the ICC beyond the limits provided for in Article 16 of the Rome Statute. As a result - Security Council Resolutions 1422 and 1487 must be considered as inconsistent with the Rome Statute.

3.3.2.2. Effect on Member States of the UN

Although as shown above,[248] Security Council Resolutions 1422 and 1487 are inconsistent with the Rome Statute, the question remains whether the Resolutions are binding upon UN Member States.

States that are Parties to the UN Charter as well as the Rome Statute are placed in a position where they must fulfil their obligations under the latter, unless their obligations under the UN Charter are in conflict with those under the Rome Statute.[249] The only event in which a Security Council Resolution may create an obligation under the UN Charter is when it is binding on Member States under Article 25 of the UN Charter. Council Resolutions therefore do not *per se* constitute binding obligations under the UN Charter, but must fall within the ambit of Article 25.[250] In order to constitute binding obligations under Article 25, Council Resolutions must be in accordance with the Charter. It could be argued that in the event that decisions are *ultra vires* the powers of the Council, they do not give rise to any binding obligations under the Charter.

Furthermore, the language of Security Council Resolutions 1422 and 1487 leave open the scope for Member States to comply with their obligations under the Rome Statute. These Resolutions expressly provide that States should not take any action that is contrary to a request to the ICC seeking the deferral of proceedings, or with their international obligations.[251] The reference to international obligations apart from those relating to the request would suggest that Member States could not act in derogation of their obligations under the Rome Statute.

But on the other hand, an international organisation, such as the Security Council, cannot function without the loyalty of its Members. In other words, if a right to challenge the legality of Security Council decisions were to reside with individual Member States, the binding character of these decisions would be undermined and Article 25 of the UN Char-

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[248] See: Chapter 3, par 3.3.1. – 3.3.3.
[249] See Rome Statute, Art. 103.
[250] Bowett, The Impact of Security Council Decisions on Dispute Settlement Procedures, EJIL 1994, P. 93.
[251] Paragraph 3 of the Resolutions reads:"...decides that Member States shall take no action inconsistent with Paragraph 1 and with their international obligations".

ter would become a "dead letter".[252] Moreover, granting a State the right unilaterally to reject a Security Council Resolution would seriously hamper the effectiveness of the Organisation. This could lead to a collapse of the complete peacekeeping system of the UN if States were free to judge for themselves on the legality of Resolutions and to deny the binding effect due to an autonomous judgement.[253] In case that a Member State claims the illegality of a Resolution the State has to indicate the legal defects of the contested Resolution and establish a *prima facie* case.[254] If a *prima facie* case is established, the Organisation could then consider the claim, if necessary, by referring the case to the International Court of Justice for an advisory opinion.[255]

Therefore, it seems more reasonable that UN Member States are bound to comply with allegedly illegal decisions of the Security Council, and their options are generally limited to protesting for the International Court of Justice.

3.3.2.3. Effect on the ICC

The proposition that Security Council Resolutions 1422 and 1487, which are not consistent with the Rome Statute,[256] may bind the ICC is controversial.

An international organisation, such as the ICC, has a separate legal personality independent of its Member States.[257] Under Article 25 of the UN Charter, mandatory Security Council Resolutions only create binding obligations for States, and not for international organisations constituted by these States. Therefore, while Resolutions passed by the Security Council may be binding upon Member States of the UN regardless of whether they have an impact on another organisation, this cannot extend to binding the organisation itself. Even Article 103 of the UN Charter cannot be invoked in support of the claim that the ICC is directly bound by binding secondary law of the Security Council because Article 103 merely binds States, but not the Court.[258]

Furthermore, the ICC Prosecutor is independent, and his decisions on whom to prosecute are not controlled by the State Parties of the Rome Statute. Hence, Resolution 1422, which

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[252] Angelet, Protest Against Security Council Decisions, in: International law: Theory and Practice, P. 278.
[253] Schweigmann, The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice, P. 209.
[254] Doehring, Unlawful Resolutions of the Security Council and their Legal Consequences, MaxPlanckYofUNLaw Yearbook of United Nations Law 1997, P. 206.
[255] Schweigmann, The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice, P. 210.
[256] See: Chapter 3, par 3.3. – 3.4.
[257] See Rome Statute, Art. 4.
[258] Hoffmeister/Knoke, Das Vorermittlungsverfahren vom dem Internationalen Strafgerichtshof – Prüfstein für die Effektivität der neuen Gerichtsbarkeit im Völkerstrafrecht, ZaöRV 1999, P. 805.

is incompatible with the principle of independence of Courts and different provisions of the Rome Statute, cannot bind the Prosecutor in his decisions. It was the drafter's intention of the Rome Statute to create an independent permanent Court[259] with an independent Prosecutor without being controlled by State Parties.[260]
Therefore, regardless of the validity of Security Council Resolutions 1422 and 1487, they would not have any binding effect on the ICC.

To sum up: The establishment of the ICC should ensure an effective and equal prosecution of offences committed by Peacekeepers. However, by the adoption of Security Council Resolutions 1422 and 1487, this goal was undermined.
Security Resolution 1422 must be regarded as unlawful, as it violates diverse Articles of the Rome Statute, such as Articles 16 and 27. Nevertheless, UN Member States are bound by the terms of the Resolutions and, therefore, must refrain from co-operating with the ICC if the Court requests the surrender of – for example – a US Peacekeeper who has committed an international crime on the territory of a State Party to the Rome Statute.
Regardless that Security Council Resolutions 1422 and 1487 effect UN Member States these Resolutions do not have any further effects on the ICC itself.

3.3.2. Security Council Resolution 1497

On 23 June 2004, the US withdrew its request to the Security Council for the renewal of Resolution 1487.[261] This Resolution itself renewed Resolution 1422, adopted on 12 July 2002.[262] Under the latter Resolution, the Security Council had granted immunity from prosecution by the ICC to UN troops contributed by non-Party States under the Statute for twelve months. On 1 August 2003, the Security Council adopted Resolution 1497.[263]
Security Council Resolution 1497, passed in response to the conflict in Liberia,[264] authorizes the deployment of a Multinational Force to support, to secure the environment for the

[259] See Preamble of the Rome Statute.
[260] See Rome Statute, Art. 42 and Art. 15.
[261] See: Chapter 3, par 3.2.
[262] See: Chapter 3, par 3.3.
[263] www.iccnow.org/documents/ declarationsresolutions/UNOtherRes.html [accessed 09/08/2005].
[264] Liberia experienced a civil war from 1989 until a temporary solution was found, so to speak, in 1997. After almost a decade of internecine conflict, the main rebel faction, the National Patriotic Front of Liberia, won a democratic election organized under the auspices of the United Nations Mission in Liberia (UNOMIL) and the subregional grouping, the Economic Community of West African States (ECOWAS). Toward the end of 2000, the conflict was resuscitated and worsened until the Liberian president, Charles Taylor, accepted exile in Nigeria in 2003.

delivery of humanitarian assistance, and to prepare for the introduction of a longer-term UN stabilization force to relieve the Multinational Force.[265]

The situation in Resolution 1497 is somewhat different in comparative to Resolution 1422 and 1487, as the threat to international peace and security clearly existed and this new Resolution conferred on States that are not Party to the Rome Statute the exclusive jurisdiction over crimes committed by their troops.[266]

Security Council Resolution 1497 *prima facie* precludes the ICC from adjudicating matters concerning troops contributed by States not Party to the Rome Statute. Consequently, this mandate constitutes, by far, a much more devastating impact on the functioning of the ICC than the two previous Resolutions.

As pointed out above,[267] unlike the other two Resolutions 1422 and 1487, the legal authority of Security Resolution 1497 does not derive primarily from Article 16 of the Rome Statute.[268] This has serious implications for the ICC jurisdiction, especially because, under the ICC Statute, this Article is the only normative regulation of how the Security Council should deal with a matter before the ICC. This implication is even direr because, unlike Resolutions 1422 and 1487 - which contained renewal clauses, Resolution 1497 contains no time bar. This implies that Resolution 1497 remains current and unaffected by the expiration of Resolutions 1422 and 1487 and continues to be valid until the Security Council adopts another resolution terminating its operation. At the time of writing, no such Resolution has been adopted.

In order to determine the competence of the Security Council, not only to terminate the jurisdiction of the ICC but also to fundamentally impact the normative structure of its Statute, the following paragraphs examines the legal basis for Security Council Resolution 1497.

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[265] Jain, A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court, EJIL 2005, P. 241.

[266] Jain, A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court, EJIL 2005, P. 241.

[267] See Chapter 3, par 3.2. – 3.3.

[268] 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. Rome Statute of the International Criminal Court, July 17, 1998, art. 16, U.N. Doc. A/CONF.183/9.

3.3.2.1. Security Council Resolution 1497 versus Article 17 of the Rome Statute

By conferring exclusive jurisdiction on non-Parties, Resolution 1497 upset the rule of complementarity[269] contained in Article 17 of the Rome Statute. This rule is the defining matrix of the relationship between the ICC and the Courts of Member States. Article 17 of the Rome Statute states that the Court shall determine that a case is inadmissible where "the case is being investigated by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."

The purpose of Article 17 of the Rome Statute is to ensure that any unwillingness or inability of State Parties to the Rome Statute to investigate or prosecute crimes committed by their citizens does not impede international justice even though such states enjoy priority of trial.[270]

Whereas under the complementarity principle,[271] the ICC cannot truncate adjudication of a matter by a national Court absent either of the two qualifying conditions stated in Article 17, the International Tribunals[272] are not so restricted,[273] provided there is a conflict between the International Tribunals and national Courts exercising concurrent jurisdiction. Consequently, by conferring exclusive jurisdiction over troops contributed by non-Parties on such States, the Security Council divested the ICC of all powers to either retry or reinvestigate a case when it has gone through an unsatisfactory domestic adjudication or to conduct a trial or investigation *ab initio* in the default of a Member State exercising its right of primary trial.

Evidently, the Security Council bypassed Article 17 or, phrased more kindly, numbed the complementarity rule in order to allay the fear of those opposed to the trial of their nationals by a Court whose jurisdiction they do not accept. That is not to say that the Security

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[269] See: Chapter 2, par 2.2.2.4.2.

[270] Article 17(2) of the Rome Statute lists circumstances that may evidence the unwillingness of a national court, and hence, the admissibility of a case to the ICC. According to that Article, [i]n order to determine the willingness 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) [t]he 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) [t]here 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) [t]he 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.

[271] See: Chapter 2, par 2.2.2.4.2.

[272] International Criminal Tribunals for Former Yugoslavia and Rwanda.

[273] In the Security Council debate on Resolution 1422, the French representative, Mr. Levitte, alluded to the distinction between these two principles in order to challenge what he perceived to be the United States' inexplicable worry about Article 16. According to Mr. Levitte, it was more logical for the United States to have protested against the primacy principle since it does not accord its troops the magnitude of the protection complementarity offers.

Council prejudged the debate about the jurisdiction of the ICC over nationals of non-Party States. Rather, as the debate in the Security Council on Resolutions 1422 and 1487 revealed,[274] the Security Council adopted this compromising approach in order to ensure a broad participation of all UN Member States in its operations, regardless of their membership to the ICC Statute.

Nevertheless, it is submitted that by so acting, the Security Council did not harm the complementarity rule in any way since its action mainly relates to non-Parties and did not in reality disturb the basis of the Rome Statute.

3.3.2.2. Security Council Resolution 1497 versus Article 16 of the Rome Statute

While Security Council Resolutions 1422 and 1487 are in the form of requests to the ICC under Article 16 of the Rome Statute,[275] Security Council Resolution 1497 is not in the nature of a request adopted under Article 16.[276] The effect of Resolution 1497 is not only to ask the Court to defer proceedings under the Rome Statute, but to exclude the ICC's jurisdiction altogether by providing for exclusive jurisdiction of States that are non-Parties to the Romes Statute over the acts of their personnel.

Therefore, Security Council Resolution 1497 has obviously not been adopted under Article 16 of the Rome Statute.

To sum up: The Security Council acted in excess of its authority under the Rome Statute, to the extent that the Resolution did not comply with the regulation of Article 16 of the Rome Statute. However, whether this *ultra vires* act by the Security Council invariably makes its decision to terminate ICC jurisdiction illegal is not a question that can be answered solely under Article 16 of the Rome Statute. The other implicated provisions that will be considered next.

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[274] See: Chapter 3, par 3.3. – 3.4.

[275] See: Chapter 3, par 3.3.1.1.

[276] Paragraph 7 of Resolution 1497 reads: "..decides that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State".

3.3.2.3. Security Council Resolution 1497 versus Articles 98 and 27 of the Rome Statute

While Article 16 may be the only provisions in the Rome Statute that permits the Security Council to defer proceedings under the Rome Statute, it does not represent the sole mechanism by which the ICC's jurisdiction may be excluded.

The Rome Statute itself provides for the suspension in some cases of those obligations of the State that have the accused in custody, which are in conflict with international agreements.[277] Under Article 98(2), if by virtue of such an agreement, the consent of a sending State is required to surrender its national to the ICC, the ICC must first obtain the cooperation of that State for surrender.

A Security Council Resolution under Chapter VII may also be regarded as an international agreement between UN Member States. This is by virtue of the fact that the Security Council, while discharging its function of maintaining international peace and security, acts as an agent of the Member States of the UN.[278] Therefore, Operative Paragraph 7 of Security Council Resolution 1497 may be taken to represent an international agreement for the purposes of Article 98(2) between UN Member States, undertaken through the instrumentality of the Security Council.

Operative Paragraph 7 would not, however, be a valid agreement under Article 98(2). State Parties to a treaty are obligated not to act in a manner that undermines the spirit of the treaty, or is inconsistent with its object and purpose.[279] This restriction also applies in the fashioning of subsequent agreements with States that are not Parties to the treaty.[280] The purpose of the Rome Statute is the prevention of impunity,[281] and the effective prosecution of crimes that are considered heinous in international law.[282]

An agreement that does not provide any effective guarantees of investigation and prosecution undermines the purpose of the Rome Statute and will not, therefore, be a valid agreement for the purposes of Article 98(2).

Unlike Resolutions 1422 and 1487, which suggest that States that are non-Parties to the Rome Statute are under an obligation to ensure effective prosecution of crimes that are the

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[277] Jain, A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court, EJIL 2005, P. 248.
[278] See Rome Statute, Art. 24.
[279] Compare *Case concerning Military and Paramilitary Activities in and Against Nicaragua in 1996,* ICJ Report 14, P. 138.
[280] See Art. 30(5) of VIENNA CONVENTION ON THE LAW OF TREATIES SIGNED AT VIENNA 23 May 1969.
[281] Wedgewood, International Criminal Law and the Role of Domestic Courts, AJIL 2001, P. 123.
[282] See Preamble of the Rome Statute.

subject matter of the ICC's jurisdiction,[283] Resolution 1497 does not talk of the responsibilities of States in international law with respect to the prosecution of these crimes. Therefore, a contributing State that is a non-Party to the Rome Statute could choose not to prosecute crimes committed by its nationals, or grant amnesty in respect of these crimes. In such a situation, Operative Paragraph 7 would exclude not only the jurisdiction of the ICC, but also the jurisdiction of the territorial State, which, under customary international law, enjoys a title of jurisdiction independent of that of the State of nationality.[284]

It therefore constitutes a paradox that, in order to exclude the jurisdiction of the ICC (which was meant to expand the existing bases of criminal jurisdiction in international law and increase international accountability for serious crimes) Security Council Resolution 1497 results in a situation where all mechanisms of accountability are demised.

While Article 12 of the Rome Statute allows the ICC to exercise jurisdiction over nationals of non-Party States, nothing in the Rome Statute so entitles the Court to dispense with immunities that officials of such states enjoy in customary international law. Therefore, Article 98(1) forbids the ICC from proceeding with a request for surrender or assistance that would require the requested state to act inconsistently with its obligations under international law with respect to 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. By referring to obligations under international law with respect to state or diplomatic immunity, the Statute recognizes that Article 27 of the Rome Statute cannot be applied to Parties and non-Parties equally and that the Article does not necessarily coincide with international law. Thus a third State that has not ratified the Rome Statute and is likely to be the most affected,[285] is encouraged to waive its rights under international law as a precondition for the application of Article 27 to its nationals.[286]

Whether Article 98(1) of the Rome Statute also applies to State Parties to the Rome Statute is a controversial issue but one, which is not within the remit of this article.[287] However, certainly, there are significant complexities in coordinating Articles 27(2),[288] which extends the Court's jurisdiction to those State officials who enjoy personal immunities, with 98(1), which seems to narrow the scope of Article 27(2). In light of the fact that the

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[283] Preamble Paragraph 5 of the Resolutions reads: "...noting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes."
[284] Mann, The Doctrine of Jurisdiction in International Law, Recueil des Cours 1964, P.88.
[285] Gaeta, Official Capacity and Immunities, in Rome Statute Commentary, P. 993.
[286] See Rome Statute, Art. 23.
[287] Gaeta, Official Capacity and Immunities, in Rome Statute Commentary, P. 993.
[288] See: Chapter 3, par 3.3.1.2.

application of Article 27 depends on States, especially non-Parties to the Rome Statute cooperating with the Court by entering a waiver, it is difficult to read too much into Resolution 1497 from this standpoint. The Resolution seems to be doing no more than assisting those States that do not wish to be railroaded into the universe of the Rome Statute without their consent. The United States had already declared its intention not to cooperate with the ICC by not ratifying the Rome Statute in 1998.[289] Article 98(1) encourages States to cooperate with the ICC on matters jurisdiction over which Article 27 empowers the Court to go beyond the accepted limits of customary international law. States have discretion as to whether to cooperate with the ICC for the purpose of Article 98(1).

To sum up: In offering a once-off escape route to all States unwilling to cooperate with the Court, Resolution 1497 merely hastened the process that would have in any case been procured through multitudes of bilateral treaties, such as the United States has concluded with several state parties of the Rome Statute.

[289] See: Chapter 2, par 2.2.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

The ICC is the last great international organization to be created in the twentieth century with jurisdiction over the most serious crimes, such as genocide, war crimes and crimes against humanity, committed in the territories of ratifying States and over crimes committed anywhere by nationals of ratifying States.

By adopting the Security Council Resolutions 1422 and 1497, the Security Council tried to exempt Peacekeepers from jurisdiction of the ICC. The main concern is that the adoption of Security Council Resolution 1422 and the intent to block permanently the jurisdiction of the ICC over Peacekeepers from non-Party States might actually permit perpetrators to escape justice and thus *de facto* legitimise impunity.

Nevertheless, as examined above,[290] there is no particular provision dealing with the issue of jurisdiction over peacekeeping forces. Therefore, Peacekeepers are subject to the jurisdiction of the ICC under the same conditions as any other person. The approach reflected in the Statute is clearly that the ICC has jurisdiction over Peacekeepers if they commit crimes under the Statute on the territory of a contracting Party or are nationals of a contracting Party.

At the heart of Security Council Resolutions 1422, 1487 and 1497 excluding the jurisdiction of the ICC for Peacekeepers and American citizens is the issue of a clash between two institutions – both of which enjoy considerable support in the international community: The Security Council and the ICC. The ultimate objective of both is the maintenance of international peace. While the ICC, by the terms of its constitutive instrument, is an independent international organization, it cannot restrict the operation of the UN Charter. As pointed out above,[291] the authority of the Security Council, which has been entrusted with the primary responsibility of maintaining international peace and security under the UN Charter, is restricted through the provisions of the Rome Statute.

The Security Council must act within the framework of the Treaty under which it has been constituted. By passing Resolutions, such as 1422, 1487 and 1497, that exclude ICC juris-

[290] See: Chapter 1, par 1.6. and Chapter 3, par 3.3.2. – 3.3.3.

diction over Peacekeepers involved in UN peacekeeping operations, it carves out an exception from ICC jurisdiction for a specific category of people. This law-making power exercised by the Security Council violates both Article 16 and Article 27 of the Rome Statute.[292] Resolution 1497 represents the most far-reaching and egregious example of the United States attempts to exempt itself from mechanisms of international justice, undermining both settled international law as well as the ICC. Operative Paragraph 7 is an unnecessary and ultimately harmful addition to a Resolution of great consequence.[293]
Regardless of the validity of Security Council Resolutions 1422, 1487 and 1497, the ICC would neither be bound by these Resolutions nor would they be required to act in a manner that is consistent with their obligations under the Rome Statute.[294]
The continued US insistence that no person should be tried without the consent of his or her national government seems a self-defeating condition, which if established, would enable any excellent criminal to stay out of court. It is difficult to imagine the governments of a Saddam Hussein or a Slobodan Milosevic consenting to the prosecution of their own crimes.

The main object and purpose of the Statute is to ensure that those who commit heinous crimes do not escape justice. All nations are already obligated to prosecute or to extradite for prosecution anyone who commits genocide or crimes against humanity. By conferring exclusive jurisdiction over such crimes on the non-Parties to the Rome Statute, the Security Council probably acted in good faith, ensuring in the process that it would be the State of the culprit that try the crimes in the first instance. There is no provision in the Rome Statute that requires only the ICC to try or investigate such crimes, lest the provision of complementarity becomes meaningless. Nor does Resolution 1497 prevent the ICC from ever trying such crimes, since a state having exclusive jurisdiction to prosecute under Resolution 1497 is not prevented from waiving its right.

Accepting the Security Council not only as the ultimate political power for guaranteeing the world's peace and security but, more so, as the pivotal institution for reconciling our multitudinous and often varied interests is tangential to achieving those goals. But that does not mean that the Security Council must behave irresponsibly.

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[291] See: Chapter 3, par 3.3. – 3.4.
[292] See: Chapter 3, par 3.3.2. – 3.3.3.
[293] See: Chapter 3, par 3.3.2.3.
[294] See: Chapter 3, par 3.3.2.2.

With the United States' withdrawal of its renewal request with respect to Resolution 1487 in June 2004, one can only hope that the permanent ICC will prevail. If the Security Council must exercise its powers *vis-à-vis* the ICC, it must at least demonstrate that such action is warranted by the need to protect the collective interest and advance common goals and not merely to serve the national interests of its Member States.

4.2. Recommendations

Security Council Resolutions 1422, 1487 and 1497 may mark a deplorable setback for the development of international law if it is used as an instrument to permanently bar the exercise of jurisdiction of the ICC over Peacekeepers of non-State Parties. Such a step would not only severely limit the independent prosecutorial powers of the Court, which was one of the major achievements of the Rome Conference, but also call into question the principle of equality before the law.

Neither the adoption of Resolution 1422 nor Resolution 1497 is admissible under the Rome Statute and the relevant rules of international law. Therefore, the international community must oppose US initiatives, as mentioned above,[295] to guarantee the effective and equal prosecution of Peacekeepers and to ensure compliance with the ICC. There can be no immunity for genocide, crimes against humanity, war crimes and other serious violations of human rights and humanitarian law. All States, whether a Party to the Rome Statute or not, should be obliged under international law to bring their nationals to justice for crimes under international law.

Therefore, the UN must actively support a mechanism to ensure that appropriate action is taken in respect of any peacekeeping troops alleged to have engaged in criminal activities or abuse of human rights. This must include an easily accessible complaints mechanism and prompt independent investigation of serious human rights violations.

It is crucial that the Security Council is not be used as a mechanism to advance an agenda so at odds with the goals of the UN. In order to this all States that value, the ideals of accountability and justice must make every effort to avoid this from happening in the future.

[295] See: Chapter 2 and 3.

ANNEX

Content of Security Council Resolution 1422

The text of Security Council Resolution 1422 reads as follows:

"The Security Council,

Taking note of the entry into force on 1 July 2002, of the Statute of the International Criminal Court (ICC), done at Rome 17 July 1998 (the Rome Statute),

Emphasising the importance of international peace and security of United Nations operations,

Noting that not all states are parties to the Rome Statute,

Noting that States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity,

Noting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes,

Determining that operations established or authorised by the United Nations Security Council are deployed to maintain or restore international peace and security,

Determining further that it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorised by the United Nations Security Council,

Acting under Chapter VII of the Charter of the United Nations,

1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to United Nations established or authorised operation,

shall for a 12-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;

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

3. Decides that Member States shall take no action inconsistent with paragraph 1 and with their international obligations;

4. Decides to remain seized of the matter."

Content of Security Council Resolution 1497

The text of Securuty Council Resolution 1497 reads as follows:

"1. *Authorizes* Member States to establish a Multinational Force in Liberia to support the implementation of the 17 June 2003 ceasefire agreement, including establishing conditions for initial stages of disarmament, demobilization and reintegration activities, to help establish and maintain security in the period after the departure of the current President and the installation of a successor authority, taking into account the agreements to be reached by the Liberian parties, and to secure the environment for the delivery of humanitarian assistance, and to prepare for the introduction of a longer-term United Nations stabilization force to relieve the Multinational Force;

2. *Declares* its readiness to establish such a follow-on United Nations stabilization force to support the transitional government and to assist in the implementation of a comprehensive peace agreement for Liberia and *requests* the Secretary-General to submit to the Council recommendations for the size, structure,

and mandate of this force, preferably by 15 August 2003, and subsequent deployment of the United Nations force no later than 1 October 2003;

3. *Authorizes* UNAMSIL to extend the necessary logistical support, for a limited period of up to 30 days, to the forward ECOWAS elements of the Multinational Force, without prejudicing UNAMSIL's operational capability with respect to its mandate in Sierra Leone;

4. *Requests* the Secretary-General, pending a decision by the Security Council on the establishment of a United Nations peacekeeping operation in Liberia,

to take the necessary steps, including the necessary logistical support to the ECOWAS elements of the Multinational Force, and pre-positioning critical logistical and personnel requirements to facilitate the rapid deployment of the envisaged operation;

5. *Authorizes* the Member States participating in the Multinational Force in

Liberia to take all necessary measures to fulfil its mandate;

6. *Calls upon* Member States to contribute personnel, equipment, and other resources to the Multinational Force; and *stresses* that the expenses of the Multinational Force will be borne by the participating Member States and other voluntary contributions;

7. *Decides* that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out

of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State;

8. *Decides* that the measures imposed by paragraphs 5 (a) and 5 (b) of resolution 1343 (2001) shall not apply to supplies of arms and related materiel and technical training and assistance intended solely for support of and use by the Multinational Force;

9. *Demands* that all States in the region refrain from any action that might contribute to instability in Liberia or on the borders between Liberia, Guinea, Sierra Leone and Côte d'Ivoire;

10. *Calls* on the Liberian parties to cooperate with the Joint Verification Team and Joint Monitoring Commission as established under the 17 June 2003 ceasefire agreement;

11. *Further calls* on all Liberian parties and Member States to cooperate fully with the Multinational Force in Liberia in the execution of its mandate and to respect the security and freedom of movement of the Multinational Force, as well as to ensure the safe and unimpeded access of international humanitarian personnel to populations in need in Liberia;

12. *Stresses* the urgent need for all Liberian parties who are signatories to the 17 June ceasefire agreement, in particular the LURD and MODEL leadership, immediately and scrupulously to uphold the 17 June ceasefire agreement, to cease using violent means and to agree as soon as possible to an all-inclusive political framework for a transitional government until such a time when free and fair elections can be held and notes that critical to this endeavour is the fulfilment of the commitment to depart from Liberia made by President Charles Taylor;

13. *Urges* the LURD and MODEL to refrain from any attempt to seize power by force, bearing in mind the position of the African Union on unconstitutional changes of government as stated in the 1999 Algiers Decision and the 2000 Lomé Declaration;

14. *Decides* to review the implementation of this resolution within 30 days of adoption to consider the report and recommendations of the Secretary-General called for in paragraph 2 and consider further steps that might be necessary;

15. *Requests* that the Secretary-General through his Special Representative to report to the Council periodically on the situation in Liberia in relation to the implementation of this resolution, including information on implementation by the Multinational Force of its mandate;

16. *Decides* to remain actively seized of the matter."

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