The International Criminal Court – A Court Without A State?

A Transformation From State-Centered Governance to Non-State-Centered Governance?

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ABSTRACT

Although the International Criminal Court (ICC) has not yet commenced its first trial, it has been the subject of much controversy. There is in particular much debate as to the Court’s effect on state sovereignty.

This thesis attempts to move understanding of these issues beyond the unsatisfactory state of the existing debate. Instead of comparing the powers of the ICC with the remaining powers of states or asking what state of affairs ‘really’ corresponds to sovereignty, it considers those contested spaces where the ICC and states may conflict and the potential for “complementarity.” The effect of the Court on the exclusive authority of states in the area of international criminal justice thus becomes the focus. In the process, this thesis examines whether the ICC really represents a transformation from state governance to a non-state-centered pattern of governance.
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<tr>
<td>ASPA</td>
<td>American Servicemember’s Protection Act</td>
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<td>ASP</td>
<td>Assembly of States Parties</td>
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<td>CICC</td>
<td>Coalition for an International Criminal Court</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>DSRSG</td>
<td>Deputy Special Representative of the Secretary-General</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>IJPs</td>
<td>International Judges and Prosecutors</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IMT</td>
<td>International Military Tribunal (in Nuremberg)</td>
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<td>IMTFE</td>
<td>International Military Tribunal for the Far East (in Tokyo)</td>
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<td>KFOR</td>
<td>Kosovo Implementation Force</td>
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<td>KWECC</td>
<td>Kosovo War and Ethnic Crimes Court</td>
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<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>NGO(s)</td>
<td>Non-governmental organization(s)</td>
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<td>OTP</td>
<td>Office of the Prosecutor, International Criminal Court</td>
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<td>PICT</td>
<td>Project on International Courts and Tribunals</td>
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<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
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<td>Acronym</td>
<td>Full Form</td>
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<td>----------------------------------------------------</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>SOA(s)</td>
<td>Sphere(s) of Authority</td>
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<td>SOFA(s)</td>
<td>Status of Forces Agreements</td>
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<td>SRSG</td>
<td>Special Representative of the Secretary-General</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNMBiH</td>
<td>United Nations Mission in Bosnia and Herzegovina</td>
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<td>UNMIK</td>
<td>United Nations Interim Administration Mission in Kosovo</td>
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<td>UNMISSET</td>
<td>United Nations Mission of Support in Timor-Leste</td>
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<td>UNOTIL</td>
<td>United Nations Office in Timor-Leste</td>
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<td>UNTAET</td>
<td>United Nations Transitional Administration in East Timor</td>
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<td>US</td>
<td>United States</td>
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<tr>
<td>WCC</td>
<td>War Crimes Chamber (Bosnia and Herzegovina)</td>
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<td>Abbreviation</td>
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<tr>
<td>Agreement</td>
<td>Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone</td>
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<td>Charter</td>
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<td>General Assembly</td>
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<td>Law</td>
<td>Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea</td>
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<td>Prepcom</td>
<td>Preparatory Committee</td>
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<td>Privileges/Immunity Agreement</td>
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<td>Provisional Institutions of Self-Government</td>
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<td>Rome Statute</td>
<td>Rome Statute of the International Criminal Court</td>
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<td>Relationship Agreement</td>
<td>Negotiated Relationship Agreement between the International Criminal Court and the United Nations</td>
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<td>Secretary-General</td>
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<td>Special Court Statute</td>
<td>Statute for the Special Court of Sierra Leone</td>
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<td>Special Department</td>
<td>Specialized War Crimes Department Bosnia and Herzegovina</td>
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<td>Special Panels</td>
<td>The Special Panels for Serious Crimes</td>
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<td>Statute</td>
<td>Rome Statute of the International Criminal Court</td>
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<td>United States</td>
<td>United States of America</td>
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ACKNOWLEDGEMENTS

This thesis is dedicated to the memory of Keith Rennie and Alan Bate, Q.C.

The process of writing this thesis has been a long and arduous one especially given the chance to work simultaneously in the developing field of international criminal justice. The patience shown by my family and friends, the members of my thesis committee and the University of Northern British Columbia in general ensured that this product came to be. In that regard, I would like especially to thank my family for their unwavering support and encouragement. I would like to thank R. Ian Mackay Rennie for our many conversations about the International Criminal Court and its effect over the years and as we both researched the area.

EMR
Chapter One: Introduction

It has been said that, "[a]ny international criminal jurisdiction capable of vindicating the interests of the international community necessarily will involve some compromise of state sovereignty" and that, "...[w]hen an international institution exercises authority over events within a state's territory, the result is often a perception of diminished state sovereignty. When the international institution concerned is a criminal court, the issue is especially sensitive."2

The recent creation of the International Criminal Court (hereafter, the ICC) has highlighted the tension between international criminal justice and the notion of sovereignty. Much of the abundant literature on the ICC discusses the relationship between this new permanent institution and states and, in the course of doing so, refers to the notion of sovereignty. While the term “sovereignty” is used with ease by many, it is also often used with imprecision and, although there is certainly no agreement as to its meaning, the notion is almost always associated with the state. Embedded in that literature are assumptions that are not always explicitly acknowledged, about the world in which we live and, in particular, about the role of states and the role of international organizations.

Since the emergence of the state, there have been various attempts to prosecute the perpetrators of war crimes and other atrocities in civilian or military courts. The prosecutions were handled by applying domestic law in the form of codes, statutes and/or regulations within the territory of the particular state.3 States had the final say in deciding to or not to investigate and prosecute and had, therefore, a monopoly in the area of international

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1 The author wishes to emphasize this thesis represents the opinions of the author and not the United Nations or to the United Nations Mission in Kosovo (UNMIK).
criminal justice. Accordingly, the theoretical and practical ability to exercise (or not) that exclusive authority was also seen as an integral aspect of state sovereignty.⁴

State efforts at investigation and prosecution, however, were sporadic at best. Some states did better than others. Although there were precedents of temporary ‘international’ or ‘internationalized’ tribunals, such tribunals were crisis-specific, limited in time and limited in territorial scope. It was only when the ICC was created in 2002 that states lost that absolute monopoly on the prosecution of those who commit war crimes, crimes against humanity and genocide.

The founding document that led to the creation of the ICC, the Rome Statute of the International Criminal Court (hereafter, the Statute or the Rome Statute), was adopted less than four years after the diplomatic conference for its establishment.⁵ Before the Statute was adopted, the states involved in the negotiations had to vote on it as a package. While the vote was not formally recorded, most reports indicate that 120 states voted in support of the multilateral treaty, 7 states voted against and 21 states abstained.⁶

Over one hundred countries have ratified the Statute. While three of the five permanent members of the United Nations Security Council (hereafter, Security Council) ratified the Statute, two others have refused to do so: the United States of America (hereafter, United States) and the Peoples’ Republic of China.⁷ The United States initially signed the Statute and then later ‘unsigned’ it arguing that the ICC was too independent and that it violated the sovereignty of the United States. India, on the other hand, abstained in the vote because it did not think that the ICC was independent enough.⁸ Therefore, while a remarkable number of states have signed and ratified the Statute or are in the course of doing so, states representing a majority of the world’s population have not. Accordingly, some
have refused to ratify it and other states (including the United States) have been overtly hostile to it. In general the dispute seems to be the result of the perceived inevitable clash between the domestic and the international realms and a deep disagreement as to the effects of the creation of the ICC.

The clear opposition to the Court has not, however, prevented it from commencing its task. Within its first year of operation, the ICC’s Office of the Prosecutor (hereafter, the OTP) received almost five hundred communications from individuals and non-governmental organizations (hereafter, NGOs) in relation to potential investigations. In 2004, the OTP received three referrals of situations from states parties that respectively involve alleged atrocities in the Democratic Republic of Congo (hereafter, DRC), Uganda and the Central African Republic and commenced investigations in two of those cases. Most recently, in March 2005, pursuant to Chapter VII of the United Nations Charter (hereafter, the Charter), the Security Council referred the situation in Darfur, Sudan to the OTP and the OTP has commenced its third investigation. As well, the OTP is analyzing other “situations of concern” in other parts of the world. Accordingly, the ICC, if effective, is destined to become a major new actor in the international community and, for that reason, has been chosen as the focus of this thesis.

Literature Review – The “State” of the Discourse on the ICC

Despite the fact that the ICC has not even had its first trial, there is an enormous amount of literature on the ICC including a number of excellent texts outlining the pros and cons of an international criminal court. The bulk of the literature more often than not simply summarizes the Statute and either supports or opposes the ICC in its current form.
The literature is also full of repeated references to sovereignty that are rarely analyzed in depth. Further, the literature is far from consistent as to the potential effect of the ICC on sovereignty and differences of opinion even exist amongst those who are either for or against a permanent international criminal court. Before reviewing two of the more sophisticated works, namely those of Bruce Broomhall and Eric Leonard, a quick literature review will clearly show the reader the incoherence in the discourse.

First, simple reference to four proponents of the ICC quickly illustrates the variations in their opinions. Yves Beigbeder\textsuperscript{14} saw the vote in Rome as “introducing radically important innovations into relations between [s]tates, eroding their sovereign prerogatives and establishing a new relationship between national courts and institutional justice”.\textsuperscript{15} Monroe Leigh, on the other hand, viewed the ICC’s jurisdiction as “rather modest, residual, [and] … treaty-based.” To Leigh, the exercise of its jurisdiction is severely restricted by the Statute and the Statute took nothing from the jurisdiction of the state where the crime is committed or where the accused is a national.\textsuperscript{16} Michael Mysak opined that “[s]tate sovereignty is not challenged by this system, beyond the fact that it provides a strong reason for states to conduct their own internal investigations”\textsuperscript{17} and he instead felt that the American objections to the Statute likely masked another position: “control of an International Criminal Court without the risk of being subject to its jurisdiction – a position propelled by the somewhat outdated doctrine of state sovereignty.”\textsuperscript{18}

Second, in relation to those scholars who are clearly opposed to the ICC, different opinions of the effect of the ICC on sovereignty also abound. For example, William Lietzau opined that, “[f]rom a macro perspective, U.S. jurisdictional proposals [for the ICC] reflect an attempt to balance necessary judicial authority on one side, and preservation of state
sovereignty and current structures that promote international peace and security on the other." Lietzau further stated that “responsibility for the exercise of jurisdiction has rested on the states” and that responsibility and accountability cannot be delegated away from the state. Gary Dempsey and Guy Roberts describe the ICC as a “jurisdictional leviathan.” Roberts claimed that the ICC “will ... rob nations of their sovereignty, impose new standards of law based on the whim of activist judges, and eliminate other more viable options for achieving peace and social justice. Nations ... are, in effect, agreeing to cede their sovereignty over their own court systems and notions of justice to a supra-national tribunal” – something that Roberts considers to be an unacceptable cost. Roberts considered the creation of the ICC as “the beginning of the end of state sovereignty” and “a clear and present danger to national sovereignty.”

Further, Kristafer Ailsleiger used similarly evocative language and described the ICC as “a Pandora’s Box that poses too many threats to U.S. sovereignty and the Constitution to be acceptable.” While Ailsleiger acknowledged other views of sovereignty, he used the traditional absolutist notion. In other words he considered sovereignty to be exclusive, supreme and independent authority within one’s own territory and independent from outside authority. According to Ailsleiger the ICC “will sound the death knell for national sovereignty.” To him, the ICC is “a supranational court with near-universal jurisdiction.”

David Nill argued that that personal jurisdiction raises sovereignty concerns and that the ICC involves a ceding of sovereignty: “the state where the crimes are committed must cede its sovereignty in order for the court to operate there.” Nill’s analysis of the notion of sovereignty is found in the following quotation:

It is presumptuous to believe that all members of the world community accept the same definition of sovereignty as the United States. Sovereignty for an
American ... devolves from the people, not the state. Other nations perceive sovereignty as a national right belonging to the government. For nations that accept the latter definition of sovereignty, ceding it to an international entity is less troublesome. However, for individuals and nations that accept the definition of sovereignty as a power and right emanating from the people, cession to international entities is very troublesome.29

Henry A. Kissinger has also commented on the ICC whilst addressing the issue of universal jurisdiction. Kissinger stated that “an unprecedented concept has emerged to submit international politics to judicial procedures” which leads to “substituting the tyranny of judges for that of governments.” Oddly, he later did not describe it as unprecedented but as the trend whereby domestic criminal justice is applied to violations of universal standards through the use of United Nations conventions and the creation of the ICC.30

Third, additional opinions can be found as to the effect of the ICC on notions of sovereignty amongst those who do not immediately fall into the category of being a proponent or an opponent of the ICC. For example, Patricia McKeon (in an article written before the Rome Conference) noted that one of the main obstacles to an international criminal court is the principle of sovereignty.31 Further, she stated that, “[w]hile no longer considered an absolute right, the principle of sovereignty still thrives in international law and appears to be incompatible with the aspirations of a permanent court” and she argued for “a shift in balance between the sovereign rights of the states and the authority of the larger international community.”32 Although McKeon acknowledged, “the meaning of sovereignty depends upon its context,”33 she went on to use traditional thinking when she noted that sovereignty “forbids the exercise of jurisdiction by one state over matters and parties within the territorial limits of another independent state.”34 For McKeon an international criminal court could potentially erode sovereignty.35
Some authors have stated that the ICC does not affect sovereignty as it was established with the consent of states participating in its establishment and agreeing to be bound by it through ratification, while others have asserted that the ICC is "an extension of a state's own domestic jurisdiction."36

Antonio Cassese stated, "the framers of the Rome Statute were not sufficiently bold to jettison the sovereignty-oriented approach to state cooperation with the Court and opt for a 'supra-national' approach. Instead of granting the Court greater authority over states, the [sic] draughtsmen have left too many loopholes permitting states to delay or even thwart the Court's proceedings."37

Gerry Simpson concluded that the Rome Statute proposes to buttress state sovereignty through its content, state consent requirements and the notion of complementarity. While Simpson did not arrive at a definitive conclusion as to the Statute's effect on sovereignty, he argued that a series of tensions intersect in international criminal law including sovereignty and international law and politics. Simpson noted the tension between state sovereignty and international law is "more acute" in international criminal law and asked, "to what extent is an international system based on state consent hospitable to an international criminal order founded on centralised coercion?"38

Michael A. Newton, in reviewing the notion of complementarity, stated that "[a]lthough the delegates to the Rome Conference unanimously agreed that national jurisdictions have primary responsibility for investigating and prosecuting the crimes enumerated in ... the Rome Statute, they strove to establish an international judicial institution that would allow supranational justice and accountability to pierce the shield of unconstrained sovereignty."39 More particularly, he noted that the Statute allowed state
sovereignty to be subordinated and that "[t]he complex blend of civil law, common law, customary international law, and sui generis that combine in the Rome Statute is held together by the notion that the sovereign nations of the world are joined, not as competitors in the pursuit of sovereign self interest, but as interdependent components of a larger global civil society."^40

On the issue of jurisdiction, Newton noted that the threshold before the ICC can assert jurisdiction "is an up-front textual device that restricts the reach of the ICC, which in turn preserves the de facto latitude of sovereign criminal forums" and "also establishes the ICC as a supranational institution working within a system of sovereign states...The Rome Statute envisions an enforcement regime based on overlapping power between territorial sovereigns (states) and non-territorial sovereigns (the international community as a whole), represented by the ICC prosecutor."^41 Newton viewed sovereignty as "unrestrained state discretion"^42 and noted that the Statute has the potential for eroding the principles of state sovereignty.^43

Assessment of the Literature

A number of important themes can be discerned from this general review of the literature. First, one finds a heavy reliance upon the traditional notion of absolute and exclusive sovereignty permeates the literature. That notion of sovereignty is often explicitly asserted whilst commenting upon the American opposition to the ICC with what is at times particularly emotive language. Unfortunately, however, most of this literature uses sovereignty (as per the prescient words of Antonio Cassese) as a catchword or a "substitute for thinking and precision."^44 In addition to failing to address carefully the issue of
sovereignty, this literature is usually not accompanied by a detailed analysis of the complicated legal framework surrounding the ICC. Second, in the literature there is disagreement as to the nature of the ICC itself. To some, the ICC is supranational and to others it is not. As well, there is disagreement as to the nature of the ICC's jurisdiction. Some see it as very limited, whilst others consider its jurisdictional reach to be universal or nearly so. Thirdly, not surprisingly in light of the first two points, there is no consensus as to the Court's effect on the notion and practice of sovereignty. Agreement does not even lie amongst either the ICC proponents or those opposed to the ICC. Some authors argue that sovereignty is neither challenged nor infringed, whilst others argue that it is weakened or eroded. In fact, to some the ICC is "too obsequious to state sovereignty" while to others it is, as noted, its' "wrecking ball".

The divergence of opinions as to the potential effect of the ICC on sovereignty in the literature may be explained by the fact that some of the authors have not used the term sovereignty with care. As well, some of the authors either have wrongly interpreted the legal framework accompanying the ICC or have used too broad an analysis so that they missed some of the critical nuances associated with this unique institution. For one author, one provision in isolation may lead to one conclusion, and to another author that same provision together with other provisions may lead in the opposite direction. All the same, the provisions of the Statute are heavily interrelated with one another. Another explanation for the varied opinions may be the embedded assumptions linked to each author's own theoretical stance and, in some cases, own agenda. A lot of the literature focuses on the American opposition to the Statute by either taking that side or responding to it. Accordingly, realist theoretical assumptions necessarily abound. Lastly, a difference of
opinion is also not unexpected given the limited record upon which the ICC can be currently assessed.

**Approach: Evaluating Sovereignty and Authority**

It may be that the use of the highly contested term sovereignty in the literature has ensured that the effect of the ICC on sovereignty remains irresolvable. The proponents and the opponents equally point to provisions that support their view and, in doing so, invoke the term sovereignty. Too much reliance upon the notion of sovereignty in the debate has allowed the participants to avoid careful consideration of what exactly it meant. As a result, discussions about the transfer of exclusive authority or autonomy associated with the creation of the ICC were often overlooked. Instead of focusing on what may or may not be a measurable rise or decline in state sovereignty due to the court's creation, this thesis will look for areas where it is likely that there will be a claim to sovereignty.

Notwithstanding the general state of the literature as noted above, this thesis will take two of the more sophisticated academic works (the work of Bruce Broomhall and Eric Leonard) and consider the ICC-sovereignty debate as part of the larger discourse of power. Both authors have assessed the ICC in a way that differs from most of the literature and, in particular, refrained from choosing specific provisions to the exclusion of others for a particular conclusion.

Sovereignty has been the subject of debate in many different contexts for decades and this thesis will not resolve that debate. Arriving at a definition of sovereignty is difficult. According to Fowler and Bunck, “the concept of sovereignty has been used not only in different senses by different people, or in different senses at different times by the same
people, but in different senses by the same person in rapid succession. Its meaning quite often depends upon the context and the objectives of those using the word.

In an effort to move beyond the unsatisfactory state of the ICC literature noted above, however, it may be helpful to note the common suggestion that discussions about sovereignty form part of a broader discourse of power. As a result, this thesis will also focus on the work of three authors who grapple with how to measure sovereignty whilst considering power, Karen Litfin, Wouter Werner and Jaap De Wilde.

In a non-ICC related study Karen Litfin assessed the impact of international environmental agreements on the notion of sovereignty. Litfin considered sovereignty to be “an aggregated concept that varies according to historical and social circumstances.” Interestingly, she tried to disaggregate the under-theorized concept by separating it into three components: (1) autonomy, (2) control, and (3) legitimacy, with each of them operating upon “the tangible dimensions of territory and population.” She defined control as “the ability to produce an effect,” autonomy as “independence” and legitimacy as “the recognized right to make rules.” Litfin noted that, while the three concepts are interrelated, the theoretical incoherence in discussions about sovereignty results from mixing these three concepts.

Others have tried to separate out the elements of sovereignty and use a multidimensional approach to sovereignty but I prefer Litfin’s analysis because it clearly differentiates between autonomy and control. In addition, Litfin claimed her analysis decentered or shifted the focal point away from – or maybe diffuses the locus of power from - the state. In that regard, Litfin stated that she deliberately declined to consider the state and territoriality as additional variables because both were essential to the modern notion of state sovereignty. Litfin, however, did not, in my opinion, completely remove them from her
analysis in light of her comments that “the pivotal issue is the impact … on state autonomy, control and legitimacy” and the comments earlier in her article that each of her three criteria “operates upon the tangible dimensions of territory and population.”

The best way to determine how the ICC might affect autonomy and control is through a detailed assessment of the jurisdictional provisions of the ICC and the nature of the ICC itself. While legitimacy (another dimension in Litfin’s approach) is critical to the effectiveness of any court, it cannot be included as a variable in this thesis because the court has not yet completed a case. As well, the American government’s decisions to sign the Statute and later to “unsign” it indicate that counting the number of signatories to the Statute is not necessarily an indicator of legitimacy.

According to Werner and De Wilde, sovereignty is not needed if states really “were isolated and autarkic.” Accordingly, to them, there is a “descriptive fallacy” associated with the notion. There is an “erroneous assumption that there must be something in reality corresponding to the meaning of the term ‘sovereignty’.”

Very simply, Werner and De Wilde see sovereignty not as a state of affairs, but as the exercise of power. As a result, ingeniously, Werner and De Wilde suggest that, “[i]nstead of asking what state of affairs ‘really’ corresponds to the idea of sovereignty, one should ask in what context a claim to sovereignty is likely to occur, to whom a sovereignty claim is addressed, what – if any - normative framework is used to determine the legitimacy of a sovereignty claim and what consequences generally follow from the acceptance of a sovereignty claim.” Further, Werner and De Wilde held that claims to sovereignty “are more likely to occur in contexts that are beyond the traditional concept of sovereignty” — in
other words a situation that does not involve “complete control internally and impermeability vis-à-vis other sovereigns.”

They then used this approach to assess the European Union and its effect on sovereignty. The authors correctly considered the fact that member states handed over their powers at an unprecedented rate in areas “considered essential for the sovereignty of the state” and that European Community law now has a direct and binding effect on the law of the member states. Werner and De Wilde held that instead of trying to measure the amount of powers left with member states, a better approach was to ask “whether the member states still rely on their sovereign status and whether relevant audiences accept their claims to sovereignty.”

The approaches used by Litfin and Werner and De Wilde allow for the research question in this thesis to be asked in a way that differs from the unsatisfactory ICC-sovereignty discourse noted above. Most authors seek to measure the powers of the ICC and compare them with the powers left with states. Even assuming that those changes are so easily measured, such an examination is not helpful because the provisions of the Statute are so interrelated. Counting one section to the exclusion of another can very easily lead to an incomplete and/or inaccurate conclusion and such an analysis is not able to assess whether there has been a net change in the location of authority or, to use the words of Litfin, a “sovereignty bargain.” Therefore, it is not intended that this thesis analyze each section of the ICC framework in order to determine what amounts to an increase or a decrease in the authority of states. Instead, this thesis will consider areas of potential sovereignty claims.
Sovereignty, Authority and Governance

Although Bruce Broomhall was of the view that the Statute balanced “the needs for a credible system of justice and the desire to induce wide [s]tate support for the ICC,” he opined that “the real strengths” of the Statute (as reflected in the definitions, general principles, and some of the mechanisms of the Statute) were “tempered by the fact that the ultimate effectiveness of the Court remains in the hands of [s]tates, individually and collectively.” As a result, to him, “the institution of sovereignty, at least in areas relevant to international criminal law, is in no danger either of being replaced or of its importance being radically diminished in the foreseeable future.”

Broomhall’s work went beyond most of the literature in that it focused on the “tension between international criminal law and the international system” and the gulf between “the sovereignty-limiting rationale of the Nuremberg legacy and the sovereignty-based control over enforcement.” As well, he carefully considered the issue of sovereignty and the distinction between sovereignty and autonomy.

Broomhall opined that sovereignty is “constituted by the recognition of the international community, which makes its recognition conditional on certain standards” and that such conditions have “become increasingly accepted in the fields of international law and international relations.” As a result, sovereignty, which is much more diffused in this era of globalization, is contingent. Second, in relation to autonomy, Broomhall astutely noted, “it is sometimes assumed that sovereignty is synonymous with control or autonomy.” He stated, however, that “authority to rule over a territory is different from behavioural
autonomy inside or outside that territory” and authority may be delegated without eroding sovereignty as such.\textsuperscript{65}

At the end of his work, Broomhall considers all three terms as follows:

...the foreseeable future does not hold the realistic prospect of a significant replacement or realignment of the institution of sovereignty, at least in any sense relevant to the establishment of the preconditions for regular, impartial enforcement of international criminal law. Bearing in mind the distinction between sovereignty and autonomy ... it is much easier to assert a reduction in the latter than it is a decline in the former. A decline in sovereignty, in the sense of a loss of exclusive authority within [s]tate jurisdiction, would imply a corresponding increase in authority at some other level of the system. Of course, no cosmopolitan or supra-state institutional order can be said to be emergent at present even if institutional obligations increasingly condition sovereignty.\textsuperscript{66}

This thesis will focus on the ICC framework and its affects upon states with a consideration of the location of exclusive authority or autonomy. Broomhall’s work is also valuable in that it reminds us that state actions (especially enforcement-related actions) will be critical to the ICC’s success. It should be noted, however, that this thesis will only deal with the issue of state enforcement in a general way because of the quality of Broomhall’s work and because of space limitations associated with this thesis.

In one of the few detailed theoretical analyses of the ICC, Eric Leonard concluded that the formation of the ICC is an example of a transformation from “the old pattern of governance” to a “non-state centered pattern.”\textsuperscript{67} Leonard also opined that, “…although much of the power ... still resides with states parties,” “states have ceded some of their authority to new spheres of authority.”\textsuperscript{68} Specifically, Leonard portrays the ICC as an example of a shift “from the Westphalian state to multiple spheres of authority (SOAs), both at the subnational and supranational level.”\textsuperscript{69}
According to Leonard, governance is “an accepted set of rules that guide actors in their endeavor to solve collective problems” which did not require a hierarchical command structure. To him, governance was not government but something outside of formal government institutions. Leonard defined authority as "the right to command and correlatively, the right to be obeyed." Authority, to Leonard, requires a hierarchical structure.

In an effort to arrive at a complete understanding of the effects of the formation of the Statute, Leonard assessed the ICC from three different (and sometimes overlapping) theoretical perspectives namely, neoliberal institutionalism, regime theory and global governance. While all three theories allow for the possibility of cooperation at the international level, they focus on different actors, causal factors and authority structures. Accordingly, each perspective answered some questions that the other perspectives could not. In addition to referring to the jurisdiction provisions of the Statute, Leonard’s study focused primarily on the events that led up to the creation of the Statute including the negotiations leading up to and at the Rome conference. As well, Leonard considered governance, authority, conflict management (or what he also called international cooperation) and the primary actors in such.

In his work, Leonard argued that, while states still have an important or critical role, they will not control the actions of the Court as “the [s]tate is no longer the final arbitrator in questions of authority.” According to him, the ICC “appears to be an example of transnational authority, or authority that exists beyond the borders of the Westphalian state.” Further, Leonard viewed the creation of the ICC as “a new form of governance” which allowed for the input of multiple actors, even those beyond the state.”
According to Leonard, the “emergence of the ICC encapsulates the tension that currently exists between state sovereignty and global governance,” challenges state sovereignty and such an analysis is relevant to broader questions of governance post-Cold War. As well, Leonard stated that increased governance beyond the nation state is partly attributable to the decline in rigid adherence to the norm of state sovereignty.76

By focusing on the negotiation history of the Rome Statute, Leonard correctly minimized the possibility of drawing erroneous conclusions that the Statute was more of an extreme step than it was. For example, previous draft versions of the Statute had very different powers for the ICC and its organs, some of which were watered down in the final version.

In a more recent article, Leonard revisited the issue of the effect of the creation of the ICC on sovereignty by looking at where claims to supreme rule may lie within the authority structure of the ICC. In the course of doing so, he emphasized sovereignty’s socially constructed nature (due to the interaction between agents, structures and the rules between them) and non-static nature.77 Astutely, Leonard noted that the classic F.H. Hinsley definition of sovereignty does not necessarily include the state78 and reminded the reader that the Westphalian state is a rather recent phenomenon. Like Liftin, Leonard tried to disaggregate sovereignty from the state. Specifically, to Leonard “[s]overeignty embodies the notion of authority and the recognition of other actors of that authority” or “a claim to supreme rule” and the agents possessing such authority can change.79

As conclusions, Leonard first opined that the jurisdiction of the ICC is quite broad. Then he noted that, however, except for a Security Council referral, the trigger mechanisms limit the jurisdiction of the court and its ability to use its power.80 Second, by virtue of the
notion of complementarity, the ICC will only assert jurisdiction “when the state failed to act according to the principles of international justice.” Third, the ICC is an example of a trend towards non-state authority wherein the state, while still a crucial agent, is no longer is the privileged one. The state “no longer holds supreme authority in the area of humanitarian law.”

In the course of his analysis, Leonard also asked the following three questions:

1. Does the ICC undermine the principles of state sovereignty?
2. What are the implications of this institution on sovereignty?
3. Can we consider the authority structure of the ICC a new form of sovereignty?

Leonard answered these questions in short order. First he felt that the ICC does undermine the principles of state sovereignty but not sovereignty in general. Second, he opined that sovereignty has changed and evolved so as to involve non-state authority. Third, Leonard opined that complementarity is a new form of sovereignty in a limited way. Specifically, he stated, “[t]he ICC clearly maintains the primary attributes of sovereignty – supreme authority with no higher authority and a clear set of spatial boundaries. However, this supreme authority only exists within the realm of humanitarian law.”

Leonard’s newer research is in some ways more sophisticated but it none the less looked only at the Statute and only then answered the above three questions with a minimum of analysis.

Focus of Thesis

This thesis will involve a case study of the ICC framework in an effort to understand the effect of the creation of the ICC on the exclusive authority of states. In the course of
doing so, this thesis will re-examine the ultimate conclusion of Leonard that the creation of the ICC is really an example of a transformation from state governance to one of non-state centered governance. As a consequence, this thesis will also consider whether exclusive authority has been ceded to the ICC, its type and its extent. Whether the authority is shared between the ICC and a state, or was given to the ICC exclusively will also be assessed. If it is found that such authority has been given to the ICC, consideration will also be made as to whether that transfer is temporary or permanent.

Chapter Two briefly summarizes the circumstances surrounding the negotiations that led to the Statute, and past efforts to create an international criminal court, to refresh or acquaint the reader but these efforts are not intended to be the focus of this thesis. These areas were covered by Leonard in his work.

Instead, this thesis will consider the effect of the ICC legal framework that was established after Leonard completed his work and will consider the ICC with other international or internationalized criminal tribunals – something Leonard did not really consider in his analysis. As there may also be a difference between a written legal framework and practice, consideration will also be made of the limited practice of the ICC to date.85

Leonard’s work primarily focused only on the ICC in conjunction with the state. Although Leonard briefly mentioned the International Criminal Tribunal for the former Yugoslavia (hereafter, ICTY) and the International Criminal Tribunal for Rwanda (hereafter, ICTR) in the course of his dissertation, he simply considered them as examples of the transformation from the Westphalian state-centered thinking to that of the post-Westphalian order and as one of the circumstances that set the stage for the political will to create the Statute. Leonard, however, made no detailed comparison of the ICC with the ICTY, the
ICTR or any other international or internationalized criminal tribunal. As a result, Leonard’s study could not assess whether the ICC involved a greater or lesser transfer of state authority than that involved in the case of any international or internationalized tribunal.

Because he asserted the ICC represents an example of a transformation in global governance, it is submitted that, in addition to states, the ICC should also be compared with other international or internationalized criminal tribunals. Not to do so leaves one with the impression that international criminal justice will only be handled by states or by the ICC. In fact, the ICC will not be the only available mechanism when states are unwilling or unable to investigate or prosecute persons accused of the most serious of crimes. Other possible mechanisms include other states by way of universal and/or extraterritorial jurisdiction; mixed composition tribunals; and ad hoc tribunals created under Chapter VII of the Charter with the assistance of the Security Council. These international or internationalized criminal tribunals will be compared to the ICC with specific reference to their source, status (including whether they are truly international), expected life span, jurisdiction (including subject-matter jurisdiction, territorial jurisdiction and temporal jurisdiction), and relationship to domestic courts.

Further, although the ICC is involved in three investigations, it has yet to undertake its first trial. Nonetheless a complicated legal framework has been set up around the ICC since Leonard’s first work with the creation of various agreements and rules. The creation of this complicated legal framework in addition to the Statute may alter the conclusions of Leonard’s work. As a result, Leonard’s work should be reconsidered with this additional information that was not available to him in 2001 so as to minimize the risk of an incomplete analysis. Lastly, as principle and practice often do not coincide in life, some consideration of
the limited practical experience with the ICC as stated in official documents is also warranted.

A reader with a cursory knowledge of the ICC will, of course, know that the ICC framework gives some specific authority to the ICC. As noted above, however, for some governments and some authors the powers given to the ICC are too sweeping whilst, for others, the powers are too heavily circumscribed. Notwithstanding the fact that the ICC may concurrently share some jurisdiction with a state, except for a limited number of situations, preference will be given to state investigation and prosecutions. If a state is in this preferential position (termed "complementarity"), a sovereignty claim between the state and the ICC is not likely. If, however, the ICC acquires or takes over jurisdiction in one of those exceptional situations, a sovereignty claim may be quite likely.

The question that may then be asked is how one is to assess the Statute and the accompanying legal framework. In relation to the ICC legal framework, the focus of this thesis will be on the issue of the jurisdiction and admissibility provisions of the ICC that give the court the ability to investigate and prosecute criminal cases with specific reference as to when exclusive authority rests with the ICC. Special mention will also be made of the underlying notion of "complementarity."

In that regard, this thesis will look at cooperative situations between the ICC and states and situations of possible conflict. Such contested spaces are more interesting because it is there that we will see the true effects of the ICC on states and are more likely to see a sovereignty claim. While I agree with Leonard’s overall conclusion that states still retain extensive authority post-Rome, it is in the areas of conflict that they lose at least some or all of that control.
Because of the previously noted concerns about the quality of the literature, this author has specifically chosen to rely upon original sources wherever possible, including the constitutive documents that make up the ICC framework. The framework around the ICC is developing at a quick pace and occasional reference will be made to draft primary sources still awaiting the approval of the Assembly of States Parties (hereafter, ASP). The analysis of the jurisdictional ICC framework will include heavy emphasis upon the Statute and occasional reference to the Rules of Procedure and Evidence (hereafter, RPE),\textsuperscript{86} the Elements of Crimes,\textsuperscript{87} the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (hereafter, Relationship Agreement),\textsuperscript{88} and the Agreement on Privileges and Immunities of the Court (hereafter, Privileges/Immunity Agreement).\textsuperscript{89} I also consider the OTP policy paper and limited actions to date as part of the legal framework.

\textbf{Justifying the Topic}

One may ask why, when the ICC has not yet completed its first case, these questions should be considered important. First, although sovereignty is a highly contested concept, it is a fundamental concept in the fields of international relations and international law. A lot of the literature written about the creation of the ICC often uses sovereignty as a catch word without precision. That same literature fails to analyze the ICC framework in detail before coming to a conclusion as to the effect of the ICC. Any response that can remedy the imprecision and that can address the inconsistent opinions that the ICC both attacks and protects the notion of sovereignty will certainly be a constructive addition to the literature. Second, Eric Leonard considered the court's formation an example of a transfer away from state-centered governance to non-state centered governance. The literature, despite its
limitations, does not always agree with Leonard’s conclusion. If, however, Leonard’s assessment is correct, it will have relevance to the broader issue of the contemporary relationship between states and international organizations and the redistribution of exclusive authority or power. This thesis will re-examine that conclusion with a detailed examination of the current ICC legal framework whilst appreciating the existence of other international or internationalized tribunals. To date, this author finds minimal substantive analysis of the ICC’s jurisdiction considered in context with such legal mechanisms. The failure to consider those tribunals may result in an incomplete picture that then leads to erroneous conclusions about the effect of the ICC. Third the ICC, a new actor on the international scene, has now commenced two investigations at the request of the states involved and has commenced a third investigation without the involved state’s consent. Accordingly, a sovereignty claim is very likely on the horizon.

Before commencing with the heart of this thesis, it is recommended that the reader at least briefly review the next chapter - a chapter that is meant to stand-alone. Chapter Two contains background information for those without a detailed knowledge of the ICC. It first summarizes the complicated ICC framework and the negotiation process that led to its creation. Further, as the bulk of the secondary ICC literature uses the American opposition to the ICC as an analytical starting point, the second chapter will then summarize the actions of the United States at Rome and its reasons for refusing to ratify the Statute. To ensure that the reader is left with an up-to-date knowledge of this area, references will also be made as to the current American position on the ICC in both the domestic and international realms, including the infamous “unsigning” of the Statute, efforts to get Security Council deferrals and efforts to negotiate agreements that purport to eliminate the ability of the ICC to assert
jurisdiction. Lastly, the chapter will conclude with a brief overview of other international or internationalized criminal courts and tribunals before and after 1998 to lay the groundwork for a comprehensive comparison with the ICC in the following chapter.

Chapter Three will analyze the ICC framework in detail with specific consideration of the notions of complementarity and jurisdiction. The aim of the analysis is to find out the effect of the Court's jurisdiction and where exclusive authority now resides. Before coming to any conclusions, this third chapter will also review the ICC from a broader or more global perspective. In particular, it will compare certain aspects of the ICC's jurisdictional regime and status to the other international or internationalized criminal tribunals before and after the Rome Conference.

Chapter four, the concluding chapter of this thesis, will then take the results of that analysis and re-examine Leonard's conclusions and discuss possibilities for future research as this Court goes about doing its work.
Chapter Two: The International Criminal Court and Others

In order to assist the reader, this chapter will provide a brief overview of the International Criminal Court (hereafter, ICC) framework, the American position on the ICC and the recent proliferation of other courts in addition to the ICC.

General Background

It is this author's opinion that a detailed summary of the events leading up to the creation of the ICC is not necessary because numerous summaries are readily available in the literature. A general summary will remind the reader that the ICC was not created out of thin air and that it is not a recent concept. In fact, a combination of circumstances including the end of the Cold War, globalization, the increased pervasiveness and strength of international humanitarian law, and a rising human rights discourse turned previous efforts and failures into success. The risk with such a general summary, however, is that important details will be left out.

The Rome Statute was not the result of the first call for a permanent international criminal court. Trials for war crimes and crimes against the peace occurred as early as the thirteenth century and were generally conducted by the victors upon the losers.

After the Hague Peace Conference of 1899 an international penal tribunal was specifically contemplated in the 1937 Convention for the Prevention and Punishment of Terrorism and an annexed Protocol, the 1948 Genocide Convention, and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. Although the last two Conventions came into force, no such tribunal was created.
War crime trials were seriously considered after the end of World War I, but the United States opposed the concept. The United States argued that such trials were "a direct attack on the concept of state sovereignty" and that subjecting heads of state to criminal prosecution "was unprecedented in national or international law and contrary to the principle of national sovereignty." Kaiser Wilhelm II, the former German Emperor, was to be tried before a special tribunal for a “supreme offence against international morality and the sanctity of treaties." The Netherlands, however, refused to make him available for trial noting that the above offence was unknown in Dutch law either domestically or in its treaties and that it appeared to be political rather than criminal in nature. Ultimately, no international trials occurred after World War I and Germany was permitted to conduct its own prosecutions (known as the Leipzig trials). According to Antonio Cassese, it was a “period which placed an exceptionally high premium upon considerations of national sovereignty.”

After World War II tribunals were set up first in Nuremberg and then in Tokyo (discussed in detail below). The results at Nuremberg led to codification of the Nuremberg principles by the United Nations General Assembly in 1946 and the creation of the International Law Commission (hereafter, the ILC). In 1948 the United Nations invited the ILC to study the “desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide and other crimes over which jurisdiction will be conferred upon that organ by international conventions.” Various specific proposals were then introduced over the years.

The impetus for an international judicial organ post-Nuremberg and post-Tokyo, however, was short-lived despite further atrocities around the world. Most scholars seem to attribute its short life to the lack of cooperation associated with the Cold War. Sharon A.
Williams offers a number of other reasons: "a reluctance to yield up any element of sovereignty to an international tribunal, nationalistic pride in the superiority of domestic criminal law, reticence to participate in establishing another international institution, problems of obtaining consensus on subject matter jurisdiction, applicable substantive and procedural criminal law rules, issues relating to recognition and enforcement of judgments and the cost."\textsuperscript{106}

Calls for a permanent international court, however, did not cease. In 1992, the General Assembly asked the ILC to draft a treaty for an ICC.\textsuperscript{107} There was also renewed interest in the concept of an international criminal court after the creation of the International Criminal Tribunal for the Former Yugoslavia (hereafter, ICTY) and the International Criminal Tribunal for Rwanda (hereafter, ICTR) in 1993 and 1994. "Tribunal fatigue" and high costs led to consideration of a permanent international criminal court as an alternative to \textit{ad hoc} arrangements. Further, it has also been asserted that a number of states wanted to "remove the Security Council's monopoly on international tribunals, which the states saw as being too selective in distributing justice."\textsuperscript{108}

In 1993, the ILC unveiled its draft international criminal court statute and finalized the draft statute in 1994. That same year, the General Assembly established an \textit{ad hoc} committee to review the ILC final draft statute and to consider arrangements for convening an international conference.\textsuperscript{109} The draft statute contemplated an international criminal court where jurisdiction could only be exercised with explicit state consent along the lines of the jurisdictional provisions of the International Court of Justice (hereafter, ICJ). In 1995 the General Assembly established the Preparatory Committee (hereafter, PrepCom) with authority to draft a text to be submitted to the diplomatic conference of plenipotentiaries\textsuperscript{110}
and in 1997 the General Assembly authorized the Rome Conference. Six PrepCom sessions were then held between March 16 and April 3, 1998 and a number of other informal meetings occurred before the Rome Conference.

**Brief Overview of the Rome Statute and the ICC Framework**

The founding multilateral treaty that led to the creation of the ICC (hereafter, the Rome Statute or the Statute) came into force much faster than anyone anticipated and it has been repeatedly described as one of the most complicated international legal documents ever. The Statute contains 128 articles, most with numerous subsections. In the course of establishing the ICC and its structure, the Statute also codifies the specific offences for which the ICC can try individuals and the various steps in a criminal proceeding before it. A combination of attributes from both common law and civil law systems is found in the Statute. Specific sections of the Statute outline the court’s jurisdiction and applicable law and its basic legal procedures. The issues of international cooperation and judicial assistance and enforcement are also covered.

The Court has four organs: the Judiciary, the Presidency (to administer the Court), the Office of the Prosecutor (hereafter, the OTP), and the Registry (the organ responsible for the non-judicial aspects of the administration and servicing of the Court). The Registry also includes a Victims and Witnesses Unit. The Court has eighteen qualified Judges representing the principal legal systems of the world, geographical location and gender. Judicial appointments and the appointments of the Prosecutor and the Deputy Prosecutors vary in duration.


The Court will only have jurisdiction over crimes committed on or after July 1, 2002, the day that the Statute entered into force. The ICC will have jurisdiction over “the most serious crimes of the international community as a whole” as set out in the Statute namely, genocide, crimes against humanity, war crimes and the crime of aggression. Despite extensive efforts since 1998, there is still no agreement as to definition of the crime of aggression or the circumstances under which the ICC will have jurisdiction to prosecute that crime. Accordingly, at present, the ICC only has three offences over which it can assert jurisdiction.

The Court’s jurisdiction may be invoked through one of three different routes. First, a state party may refer a situation to the OTP. Second, the ICC Prosecutor may initiate his or her own investigation. Third, the Security Council may refer a situation under Chapter VII of the United Nations Charter to the OTP. With respect to the first two routes, the crime must have occurred on the territory of a state party or the accused must be a national of a state party or a state must have declared its acceptance that the court exercise jurisdiction. It appears, however, that a Security Council referral does not have the same jurisdictional requirements and, in fact, it may be the only scenario where the ICC effectively exercises universal jurisdiction.

The Statute has set up a very complicated framework that deals with admissibility and jurisdiction. First, the ICC is meant to deal with the “most serious crimes of international concern.” While an alleged crime may fit within one of more of the three enumerated crimes that can be handled by the ICC, the alleged crime that is the subject of prosecution must also be placed into the category of “most serious crimes of international concern.” Second, the ICC is to be “complementary” to national criminal jurisdictions – in other words, except in
limited situations, there is a presumption in favour of state jurisdiction. 127 Third, cases will not be admissible before the Court in a number of specific situations. For example, if the first requirement has been met and the state with jurisdiction to investigate refuses to do so, the ICC may take over the case if the state is “unwilling or unable to genuinely” carry out the investigation or prosecution and the case is not of “sufficient gravity to justify” ICC involvement. 128 The ultimate decision on inability and/or unwillingness is up to the ICC. Notwithstanding the fact that a state (with jurisdiction to do so) decided not to investigate and/or prosecute a case (or alternatively a state prosecuted a person and they were acquitted or lightly sentenced), the ICC may still investigate or prosecute the case if the proceedings were in effect a sham (that is not independent, not impartial and contrary to justice) so as to shield the person concerned from criminal responsibility. 129

Additional checks and balances are built into the complicated procedural system. For example, if the Prosecutor commences or initiates an investigation (a formal step), all states parties and those which would normally exercise jurisdiction are notified by the Prosecutor and given a limited period of time to advise the Prosecutor if the state will investigate or has investigated. 130 There is also a power whereby the state can ask the ICC to defer to a state investigation. 131 Further, the Court must not commence or must suspend proceedings for twelve months if the Security Council asks it to do so via a Chapter VII resolution. 132 That request may be renewed.

The ICC will be an independent permanent court with, unlike most international organizations, explicit recognition that it has an international legal personality. 133 As a result, the ICC’s status as a subject in international law will permit it to enter into negotiations and arrangements not within the authority of a domestic court.
The Court will be funded through assessed contributions made by states parties, funds provided by the United Nations (subject to United Nations General Assembly [hereafter, General Assembly] approval) and through voluntary contributions from other governments, organizations, corporations and individuals.\textsuperscript{134}

The ICC will be independent of the United Nations and it will also have a relationship with the United Nations. The specific terms of that relationship are defined in the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (hereafter, Relationship Agreement).\textsuperscript{135} Specifically, the Relationship Agreement envisages close cooperation and consultation between the United Nations and the ICC in areas of mutual interest including the exchange of information (subject to certain exceptions including national security information) and judicial assistance to the ICC. In other words, a close but distinct relationship between both international institutions is foreseen. It is a relationship of mutual respect and cooperation subject to their respective mandates.\textsuperscript{136} Whether, however, mutual respect will always be possible because of their differing roles remains to be seen.

Since the adoption of the Statute, ten separate Preparatory Commissions tried to iron out the Court's finer details before the Statute entered into force. Once the Statute came into force, the Assembly of States Parties (hereafter, the ASP)\textsuperscript{137} adopted the recommendations of the Preparatory Commissions. At the first ASP meeting in September 2002 other items adopted by consensus included the Rules of Procedure and Evidence (hereafter, the RPE), the Elements of Crime, the Agreement on Privileges and Immunities of the International Criminal Court (hereafter, the Privileges/Immunity Agreement) and the Relationship Agreement.\textsuperscript{138} As well, the ASP also established a special working group on the crime of
aggression to continue the work started by the earlier Preparatory Commissions on this issue. The ultimate goal is to submit proposals for inclusion in the Statute at a review conference.\textsuperscript{139} The First Session resumed in February and April 2003 and members of the ASP elected the ICC's eighteen judges and the Prosecutor.\textsuperscript{140} A second session was held in September 2003 and a third session occurred in September 2004.\textsuperscript{141}

Lastly, the Statute includes two different amendment procedures depending upon whether the proposed amendment is of an exclusively administrative nature or the proposed amendment is substantive in nature.\textsuperscript{142} In the case of substantive amendments, the amendment process will be cumbersome and difficult. As a result, unless there is a strong unified international will, such amendments will likely be few and far between. Amendments will take place in the ASP. All states parties have a vote and decisions are made by a majority, although consensus is preferred.\textsuperscript{143}

**Rome Statute Negotiations**

The proceedings leading up to, at and since Rome have not been recorded *verbatim*. To the extent that there are *travaux préparatoires*, they tend to be based on the published recollections of the participants.\textsuperscript{144} Those recollections are both positive and negative in nature. Perhaps that is not surprising in light of the circumstances under which the Statute was negotiated – that is, a short time-frame, simultaneous meetings at which delegates could not all be present, fatigue by the delegates, differing views as to the role of the state and the role of the international community and the strong exception taken by some delegations to the nature of the process.\textsuperscript{145}
The negotiations in Rome were marked with strong divisions between various groupings or coalitions such as the permanent five members of the Security Council, states suspicious or distrustful of them, the Like-Minded Group (a group of countries who wanted a strong, independent effective court) and regional groupings. The groupings, however, did not always fall along traditional lines - for example, the United Kingdom, one of the permanent members of the Security Council, decided to join the Like-Minded Group and “to oppose the provision in the draft statute that would require prior approval by the Security Council before the court could proceed with investigations and trials.”

The negotiations also involved significant participation from well-organized and well-prepared non-governmental organizations (hereafter, NGOs) at the Rome Conference (including the Coalition for an International Criminal Court [hereafter, CICC]) which grew to include approximately 800 NGOs and which became allied with the Like-Minded Group. The NGOs wielded a significant amount of influence in the negotiations with a number of NGO arguments being adopted by countries.

Sovereignty was a dominant theme throughout the negotiations leading up to the creation of the Statute. Many states (especially the United States) argued that their sovereignty would be eroded.

Further, according to Duffy, a number of states initially "sought a statute that would specifically accommodate their own particular domestic constitutions" but changed their mind when it became apparent that approach would not result in a treaty. As a result, compromises occurred between the states parties before the final text was ultimately voted upon as a “package” and adopted.
American Opposition

Despite active American involvement with the International Military Tribunal (hereafter, IMT), the International Military Tribunal for the Far East (hereafter, IMTFE), the ICTY and the ICTR (all discussed below), and repeated strong American statements in support of an international criminal court prior to the Rome Conference by both the United States Congress and the Clinton Administration, the United States voted against the Statute. American opposition to the Statute has since continued and has, in fact, grown.

Immediately after the Rome Conference, the Senate Foreign Relations Committee held hearings on what had happened in Rome. David Scheffer, the then Ambassador-at-Large for War Crimes Issues, and others made statements to the Committee outlining the areas upon which the United States was successful and explaining the reasons for the American opposition. The word “sovereignty” came up both directly and indirectly in official comments made by American government officials.

John Bolton, an official in the George W. Bush administration, reflects the nature of the opposition when he described the ICC as “not a court of limited jurisdiction” and described its authority as “vague and excessively elastic” with unclear definitions and a wide interpretive authority. With specific image provoking language, Bolton noted that “[i]f the American citadel can be breached, advocates of binding international law will be well on the way toward the ultimate elimination of the ‘nation state’.” In other words, Bolton considered sovereignty to be the equivalent of state supremacy.

Bolton also took issue with the concept of complementarity. To him, deference in the Statute to national judicial systems was nothing more than lip service and “like so much else connected with the ICC, complementarity is simply an assertion, utterly unproven and
untested. In fact, if complementarity has any real substance, it argued against creating the ICC in the first place, or, at most, creating ad hoc international tribunals. Not surprisingly, Bolton considered the ICC to be harmful to American interests. In what has been an often cited phrase, Bolton argued that the United States should use “Three Noes” - no financial support, directly or indirectly; no cooperation; and no further negotiations with other governments to “improve” the ICC.

Marc Grossman, then United States Under Secretary for Political Affairs, stated that the flaws in the Statute included: that the ICC takes power away from the Security Council; that it has a prosecutorial and judicial system with unchecked power that could result in politically motivated prosecutions; and that it undermines the democratic rights of Americans. Moreover, he argued, any treaty to which the United States is not a party cannot bind it.

While the United States government has consistently maintained its opposition to the Statute since 1998, its rationale for such appears to have shifted.

President Clinton signed the treaty on the last date possible, but made clear that he would not recommend ratification. Not surprisingly, the Statute was never ratified by the government of the United States. Accordingly, the United States is not a state party. The United States, however, did participate in some of the Preparatory Commission hearings as an observer and it was later accused of trying to amend the Statute with some of its recommendations. Ambassador Scheffer saw discussions on the Elements of Crime as “an important opportunity to correct” the Statute and the United States consequently successfully lobbied for more clearly defined crimes. Monroe Leigh noted that, post-Rome, “the American negotiating team ... made extraordinary efforts to secure modifications in the
statute that would ‘enable it to sign the treaty’.” In response, David Scheffer acknowledged the American proposals, but disputed Leigh’s characterization.166

The George W. Bush administration has maintained its opposition to the Rome Statute in four major ways. First, in May 2002, President Bush withdrew President Clinton’s signature from the Statute.167 Second, the United States actively started to seek agreements with states parties and non-states parties pursuant to Article 98(2) of the Statute. These agreements prohibit the surrender, transfer or re-transfer of American nationals to the ICC without the consent of the United States.168 While the United States calls these agreements “bilateral immunity agreements,” various states parties, the European Union and NGOs, have heavily criticized them. Some NGOs have, in fact, called these agreements “bilateral impunity agreements.”169 To date, more than 92 states have signed bilateral agreements – at least 50 of which are parties to the Rome Statute.170 Third, the United States also repeatedly tried to get immunity from the ICC via Security Council resolutions. First, in June 2002 the United States threatened to stop supporting United Nations peacekeeping missions unless the Americans taking part received immunity from investigation and prosecution by the ICC.171 A crisis involving the United Nations Mission in Bosnia and Herzegovina (hereafter, UNMBiH) was avoided when the Security Council issued Resolution 1422 (2002) under its Chapter VII powers. That Resolution, in addition to referring to the concept of complementarity, stated:

Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.
Further to the express intention of the Security Council to renew the request “for further 12-month periods for as long as may be necessary” if the same conditions applied, the United States received a new resolution to the same effect in 2003.\textsuperscript{172} A third request, however, was withdrawn in 2004 by the United States. Ambassador James B. Cunningham, Deputy United States Representative to the United Nations, stated that the United States “decided not to proceed with further consideration and action on the draft at this time to avoid a prolonged and divisive debate” whilst noting that not all Security Council members agreed with the proposed draft resolution. He further stated that the United States would “take into account the risk of ICC review when determining contributions to UN authorized or established operations” and that the US would continue to negotiate Article 98 agreements. A week earlier, Kofi Annan had announced his opposition to the third request and alluded to the now infamous allegations of prisoner abuse in Iraq.\textsuperscript{173} On July 2, 2004, the United States government informed the United Nations that some of its personnel will be withdrawn from peacekeeping missions.\textsuperscript{174}

Fourth, in August 2002, President George W. Bush signed the American Servicemember’s Protection Act (ASPA).\textsuperscript{175} The Act prohibits American authorities from cooperating with the ICC, direct and indirect transfers of information to the ICC, support for the ICC, various types of mutual legal assistance with the ICC, and American military assistance to states parties (except North Atlantic Treaty Organization [hereafter, NATO] members, defined major non-NATO allies and Taiwan). The President, however, has the right to waive repeatedly the prohibitions as long as certain preconditions are met. Two of the conditions are that (1) the person’s actions leading to the investigation or prosecution were not done in an official capacity and that (2) the ICC investigation or prosecution is in
the United States’ “national interest.” The Act also authorizes the President to “use all means necessary and appropriate” to free members of the American armed forces and certain other persons detained or imprisoned by the ICC. Further, in light of recent events, § 2015 of the Act was added as follows: “Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.” President Bush has also since signed other legislation that denies economic aid to states that support the ICC.

In conclusion, Zappalà identifies a weakness in the American government’s position in the following quote:

There is an underlying notion, in the US position, that a State has the absolute and exclusive power to investigate and prosecute crimes committed by its nationals. This is a misconception. Holding criminal proceedings is a right belonging not only to the State of active nationality (that is the accused’s own State), but also to the territorial State, that is the State on whose territory the crimes were committed (also known as the locus commissi delicti State), since these crimes are also (or, in some instances, even primarily) violations of the legal order of that State.

One should note that while States have a general obligation to protect their citizens, there are no provisions allowing for indiscriminate immunity from the jurisdiction of foreign States. Normally, every individual abroad is under the jurisdiction of the territorial State.”

Overview of Other International and Internationalized Criminal Tribunals

An examination of the ICC alone may give a misleading impression as to its potential effects on sovereignty as such an investigation ignores the context within which the ICC has been created and in which it will operate. In order to minimize the limitations of such a narrow approach, consideration will also be made to the recent proliferation of international
criminal tribunals and other "internationalized" criminal tribunals created before and after the signing of the Rome Statute. A Brief reference will first be made to the "international" military tribunals in Nuremberg and Tokyo for two reasons. First, both are often touted as the model from which current international courts derived. Second, any discussion and comparison of the ICC with the IMT and the IMTFE is especially timely because an interesting debate has started in the literature as a result of the American decision in 2001 to use military commissions and tribunals as part of its "war on terrorism".

Once the reader has been refreshed on the circumstances surrounding the IMT and the IMTFE, the discussion will then move to more current examples namely, the ICTY, the ICTR, the situations involving the United Nations Interim Administration Mission in Kosovo (hereafter, UNMIK) and the United Nations Transitional Administration in East Timor (hereafter, UNTAET), the Special Court for Sierra Leone (hereafter, SCSL) and the Extraordinary Chambers in the Courts of Cambodia. The recent creation of the War Crimes Chamber in the State Court of Bosnia and Herzegovina will not be separately addressed because of limited space. Instead it will be briefly referred to in the discussion on the ICTY.

While there have been analyses of these other international or internationalized criminal tribunals, this author is not aware of any detailed comparison between all of these courts and the ICC with special consideration of their source, status (including whether they are truly international), duration, jurisdiction (including subject-matter jurisdiction, territorial jurisdiction and temporal jurisdiction), and their relationship to domestic courts.

Cesare Romano, Associate Head of the ongoing Project on International Courts and Tribunals (PICT) (a joint undertaking by the Center on International Cooperation, New York University and the Centre for International Courts and Tribunals at University College,
London) astutely observes that there are a number of terms used in discussing this area: ‘international tribunals’, ‘international courts’ and ‘international judicial institutions’. In that regard, he laments the absence of a “universally accepted definition of what is an “international court, tribunal, or judicial body.” Despite this “terminological jumble” and Romano’s attempt to define the criteria for an ‘international judicial body’, Romano introduces us to yet another term – the “internationalized criminal court.” This thesis will not explore the subtleties of that terminological confusion, but will use the term “internationalized tribunal” when the legal mechanism being studied combines elements of local and international law or uses both local and international staff. As well, this thesis will use the term “international tribunal” when the tribunal sits outside the domestic court system.

**Pre-Rome International Military Tribunals**

As a result of the events of World War II, two ‘international’ military tribunals or IMTs were established – one in Nuremberg and one in Tokyo. Both tribunals were established by state action but not by a multilateral treaty per se.

After the unconditional surrender of Germany, the IMT was established in August 1945 by four countries (the United States, the Soviet Union, France and the United Kingdom) “acting in the interests of all the United Nations” with the signing of the London Agreement. The IMT’s constitution, jurisdiction and functions were set out in a Charter annexed to the London Agreement. (This “Charter” should not be confused with the United Nations Charter.)
Whereas the phrase 'international military tribunal' purports to indicate that the tribunal was international, it was in reality the creation of only the above four countries. While other countries were able to adhere to the London Agreement after the fact,\textsuperscript{186} the four judges were appointed from the four signatory countries.\textsuperscript{187} The IMT prosecutors were also nationals of the same four countries. Although it purported to be acting on behalf of the international community, the tribunal was not representative of it. Further, the IMT’s mandate was limited only to the prosecution of the major war criminals of the European Axis countries.\textsuperscript{188} As a result, it had no ability to prosecute those who fought for the Allies.

The tribunal was not meant to be permanent. It was an \textit{ad hoc} arrangement that was created in response to the events of World War II. In fact, Article 7 of the London Agreement contemplated a limited temporal existence.

The IMT, which could try and punish persons as individuals or as members of organizations, had subject-matter jurisdiction over crimes against peace, war crimes and crimes against humanity.\textsuperscript{189} The IMT’s jurisdiction was limited in that it applied only to those offences that could not be tied to a particular geographical location ostensibly because of what was considered to be the global nature of the Second World War.\textsuperscript{190} In that regard, the Preamble of the London Agreement contemplated that, where the offences were committed within a particular territory, that territorial state would conduct the trials. The IMT’s seat was to be in Berlin. Its first trial was to be held at Nuremberg and its subsequent trials were to be held “as such places as the Tribunal may decide.”\textsuperscript{191} As well, if a session of the IMT took place on the territory of one of the signatories, the tribunal’s president would be the representative of that signatory.\textsuperscript{192}
In referring to the official positions of defendants, Ward noted that the Charter "specifically rejected defenses based on state sovereignty which domestic courts had used in the trials following World War I. This opened up the possibility of prosecuting leaders who claimed immunity under the acts of state doctrine as well as lower officials who claimed defenses based upon superior orders." While neither the London Agreement nor the IMT Charter refer to the word "sovereignty," it appears Ward's phraseology was based on the inability of a defendant to assert that he was following a government order and the inability of a defendant to rely upon his official position as a defence.

On July 26, 1945, three countries (China, the United Kingdom and the United States) announced their intention to prosecute high-level Japanese officials for the same crimes committed by the Germans in World War II. On September 2, 1945, Japan accepted the terms of the Potsdam Declaration by the Instrument of Surrender at Tokyo Bay which included that the Emperor and the Japanese government were subject to the authority of the Supreme Commander of the Allied Powers. On September 21, 1945, the United States issued a directive ordering the investigation of suspected war criminals. The Supreme Commander of the Allied Powers, General MacArthur, was to create special international courts and prescribe their rules of procedure. General MacArthur proclaimed the establishment of the IMTFE on January 19, 1946. The IMTFE Charter was created on April 26, 1946.

The United States was the main proponent of this tribunal. According to Beigbeder, the United States acted unilaterally in issuing the directive mentioned above and the Charter of the IMTFE was drafted by Americans, and approved by the Supreme
Commander for the Allied Powers (another American) by way of an executive order. The Allies were consulted only after it was already in existence.\textsuperscript{198}

Like the IMT, the IMTFE was an \textit{ad hoc} tribunal with a limited mandate. It was directed at the prosecution of a limited group of Japanese and the tribunal was not meant to be permanent. The IMTFE had an unlimited territorial jurisdiction and it had the same subject-matter jurisdiction as the IMT. The tribunal, however, was in some ways even less "international" than the IMT. General MacArthur as the Supreme Commander appointed the judges of the IMTFE, including the President. As well, the tribunal had one Chief Prosecutor (an American) and ten less powerful associate counsel.\textsuperscript{199}

The primary importance of both \textit{ad hoc} tribunals was that they marked the first time that individuals had been held to be criminally responsible at the international level irrespective of their official status.\textsuperscript{200} Both the IMT and the IMTFE, however, were accused of being \textit{ex post facto} and of being biased. They are often described in the literature as examples of "victors' justice." On the issue of sovereignty, some authors opine that the Germans and the Japanese had voluntarily relinquished their sovereignty with their unconditional surrenders and, as a result, there was no weakening of sovereignty with the creation of either tribunal. Dissenting judgements of the IMTFE and some authors have questioned the legality of the IMTFE's trials and expressed concern about the American decision not to try Emperor Hirohito.

\textbf{International Criminal Tribunal for Former Yugoslavia}

On February 22, 1993, by Security Council Resolution 808, the United Nations Security Council established the ICTY and on May 25, 1993, by a different resolution,
created the tribunal’s statute. On March 14, 1994, the ICTY’s Rules of Procedure and Evidence came into force. Both the ICTY’s statute and the Rules of Procedure and Evidence have been amended numerous times since.

Subject, time and territory limit the ICTY’s jurisdiction. First, it has the power to prosecute individuals for grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity. The tribunal, however, only has the power to prosecute persons for “serious violations of international humanitarian law.” Second, from a temporal point of view, the ICTY can only prosecute the above crimes if they occurred on or after January 1, 1991. As well, while the ICTY’s Statute does not refer to an end date for its mandate, it could conceivably be terminated with a decision of its creator, the Security Council. Third, the ICTY’s jurisdiction is limited to the territory of the Former Socialist Federal Republic of Yugoslavia and it does not sit in that country. The ICTY can only sit at The Hague unless, with the authorization of the President of the Chamber, it is in the “interests of justice” to sit elsewhere.

Although the ICTY shares concurrent jurisdiction with national courts, it has “primacy” of jurisdiction over national courts. In fact the ICTY has the power to request states to defer a trial to the ICTY at any stage of the proceedings, as was done in the Tadic case. Further, the ICTY can try a person who had been tried by a national court if the act was characterized as an ordinary crime or if the national proceedings were not impartial or independent, or were meant to shield the accused from international criminal responsibility or were not characterized by diligent prosecution. It appears that the notion of primacy as contemplated in the original ICTY Statute was, however, diluted with the creation of a later
rule which allows the ICTY, in certain circumstances, to suspend its indictment pending a national court case.\textsuperscript{211}

The judges sitting in both the trial and appeal chambers are international judges with no two being nationals of the same state. The judges are elected via a specific procedure in the ICTY Statute with input from the members of the United Nations, non-member states maintaining permanent observer missions at United Nations headquarters, the Secretary-General and the Security Council.\textsuperscript{212}

The Prosecutor is a separate organ of the ICTY and is appointed by the Security Council after having been nominated by the Secretary-General.\textsuperscript{213} The powers of the Prosecutor are quite broad.\textsuperscript{214} For example, the Prosecutor is required to initiate investigations \textit{ex-officio} or as a result of information received from any source. While there is a check on the powers of the Prosecutor by the requirement that a judge of the Trial Chamber confirm the indictment,\textsuperscript{215} the Prosecutor need only have a "sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal."\textsuperscript{216} Further, the Prosecutor has the power to "question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations."\textsuperscript{217} Further, while there is a requirement under the Statute for cooperation and judicial assistance,\textsuperscript{218} practice has shown that state cooperation has been far from complete.

While the ICTY Statute does not give the ICTY international legal personality, it does allow for certain privileges and immunities to be attributed to its judges, the Prosecutor, the Registrar and their personnel in the course of their work.\textsuperscript{219}

In fact, Carla Del Ponte, the Prosecutor of the ICTY, has announced that cases involving those not most responsible will be transferred to competent national jurisdictions
for prosecution in an effort to finalize matters at the tribunal by 2010. In that regard, further to the ICTY transition strategy, a War Crimes Chamber (WCC) with local and international judges was created within the Court of Bosnia and Herzegovina and a Specialized War Crimes Department (Special Department) was created in the Prosecutor’s Office of Bosnia and Herzegovina. The War Crimes Chamber will try lower or intermediate level accused referred to it by the ICTY until the Court has the requisite capacity to handle such cases. Due to space limitations, a review of the institutional framework associated with this project is beyond the scope of this thesis.

**International Criminal Tribunal for Rwanda**

At the initial request of Rwanda a Security Council resolution created the ICTR on November 8, 1994. It should be noted however that the Rwandan delegation to the United Nations sitting on the Security Council voted against its creation despite Rwanda’s original request for such. Attached to that Resolution was the Statute of the ICTR. The ICTR’s Rules of Procedure and Evidence (which is the ICTY’s Rules of Procedure and Evidence with some variation) were adopted on June 29, 1995. Both the Statute and the Rules of Procedure and Evidence have since been amended. The ICTR is in many ways similar to the ICTY, but there are some differences between them.

Like the ICTY, the ICTR’s jurisdiction is also limited. First, the ICTR has the power to prosecute individuals for genocide, crimes against humanity and violations of Article 3 of the Geneva Conventions and of the Additional Protocol II. Second, the ICTR is limited to violations that occurred between January 1 and December 31, 1994. As well, while the ICTR does not have an end date, it is not considered to be a permanent international tribunal.
It is also reliant upon the Security Council for its mandate. Third, the tribunal only has the power to prosecute "serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States." Accordingly, the territorial jurisdiction of the ICTR is not necessarily limited to Rwanda. It should also be noted that the ICTR does not sit in Rwanda, but in Arusha, Tanzania.

Like the ICTY, the ICTR shares concurrent jurisdiction with the applicable national courts, but has primacy over them and can request that a national court defer a trial to the ICTR at any stage of the proceedings. Despite primacy, the Security Council, however, issued a resolution encouraging domestic prosecutions. The ICTR also has non bis in idem clauses as explained above.

The organization of the ICTR is identical to that of the ICTY except that the ICTY Prosecutor and the Judges of the ICTY Appeals Chamber initially held the same posts in the ICTR. The Prosecutor's powers as noted in the Statute are identical to those in the ICTY Statute. The Statute also requires cooperation and judicial assistance from states. Lastly, like the ICTY, while there is no international legal personality given to the ICTY, its staff is accorded certain privileges and immunities.

Consideration should also be made of the international administrations in Kosovo and East Timor - the United Nations Interim Administration Mission in Kosovo (UNMIK) and the United Nations Transitional Administration in East Timor (UNTAET) - respectively in light of their creation and use of "internationalized" tribunals.
United Nations Interim Administration Mission in Kosovo

After the NATO bombing of Kosovo, the Security Council determined that the situation in the region constituted a “threat to international peace and security.” Accordingly, pursuant to Chapter VII of the UN Charter, the Security Council authorized United Nation member states and relevant international organizations to establish an international security presence (led by NATO and known as KFOR) and authorized the United Nations Secretary-General to establish an international civilian presence. In that regard, the Security Council also authorized the creation of an interim administration in Kosovo where both the international security presence and the international civil presence would closely work together.

While Security Council Resolution 1244, among other things, reiterated “the commitment of all member states to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other states of the region,” it also supported substantial autonomy for Kosovo within the Federal Republic of Yugoslavia and authorized the interim administration to establish provisional democratic self-governing institutions to which then ultimate authority would be transferred subject to the resolution of negotiations on its final status.

In that regard, the Security Council authorized the Secretary-General to appoint a Special Representative of the Secretary-General (hereafter, the SRSG) “to control the implementation of the international civil presence.” The responsibilities of the international civil presence included the protection and promotion of human rights and the maintenance of civil law and order including the establishment of a local police force. “Public safety and order” is an included responsibility of the international security’s
In practice, the responsibilities affiliated with each presence may overlap and, on occasion, conflict with each other.

The situation in Kosovo in 1999 was marked by an incapacitated legal system. It was largely due to the fact that “[t]he pre-existing system, including personnel, court equipment, files, and records, was largely withdrawn to Serbia” and due to the fact that, of the remaining Albanian lawyers and judges, very few had been permitted to practice their profession for the previous ten years. In the course of its work, UNMIK has made extensive efforts to revamp or rebuild the court system, eliminate corruption and intimidation and to try fairly persons accused of crimes with the assistance of both local and international judges and prosecutors.

Initially, an emergency Joint Advisory Council on Provisional Judicial Appointments was created in order to nominate temporary members of the judiciary. Nine national judges and prosecutors were chosen to hear cases throughout Kosovo. Thereafter a commission to advise the SRSG on the structure and administration of the judiciary and the prosecution service in Kosovo was also created. Then an Advisory Judicial Commission was established to recommend the permanent appointment of judges and prosecutors and from January 2000 new judges and prosecutors were sworn into the new regular judicial system.

Officials within UNMIK initially considered establishing a specialized court to deal with war crimes and inter-ethnic crimes that was to be known as the Kosovo War and Ethnic Crimes Court (hereafter, the KWECC). It would have dealt with set offences since 1 January 1998 and “would have operated as an intermediary between local courts and ICTY” with both local and international judges. The proposed KWECC, however, would have been concurrent to but separate from the existing courts with jurisdiction over war crimes and
other serious violations of international humanitarian law and serious ethnically motivated crimes.\textsuperscript{248} In the late summer of 2000, however, the idea was abandoned mainly because of the anticipated cost ("a mini-ICTY") and the prior appointment of international judges and prosecutors because of a crisis on the ground.\textsuperscript{249}

In 2001, the Kosovo Judicial and Prosecutorial Council was established to assist the SRSR on the appointment and sanctioning of judges, prosecutors and lay-judges.\textsuperscript{250} The Council is made up of both local and international members appointed by the SRSR but the ultimate decision on the appointment and sanction of judges, prosecutors and lay-judges lies with the SRSR.\textsuperscript{251}

In Kosovo national judges and prosecutors normally conduct Kosovo’s criminal trials, but international judges and international prosecutors (known as IJPs) are also active in the domestic courts. The ultimate decision on their appointment and/or removal also lies with the SRSR.\textsuperscript{252} Currently, there are twelve international judges and nine international prosecutors working throughout Kosovo.

In line with UNMIK’s mandate, in May 2001 the SRSR, through a Joint Interim Administrative Structure, established Provisional Institutions of Self-Government (hereafter, Provisional Institutions) to which he transferred a number of powers in the legislative, executive and judicial fields.\textsuperscript{253} The intention was that Kosovo be governed democratically through these institutions and in compliance with the regulation’s “Constitutional Framework” and Security Council Resolution 1244.\textsuperscript{254} The Constitutional Framework, however, does not affect the authority of the SRSR or KFOR to fulfill their mandates and the SRSR will oversee the provisional institutions and may take “appropriate measures” when
the provisional institutions act contrary to either Security Council Resolution 1244 or contrary to the Constitutional Framework. 255

While it is contemplated that there will be a gradual transfer of additional responsibilities to those provisional institutions, for now the SRSG has reserved a number of powers so that they will remain exclusively with the SRSG, including: the final decision on whether law adopted by the Assembly should be promulgated; the authority to appoint, remove and/or discipline judges and prosecutors; “exercising powers and responsibilities of an international nature in the legal field”; “concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999); “overseeing the fulfillment of commitments in international agreements entered into on behalf of UNMIK”; and “external relations, including with states and international organizations, as may be necessary for the implementation of his mandate ....” 256 According to Jean-Christian Cady and Nicholas Booth 257, “[j]ustice will remain under the ultimate responsibility of the international community until a functioning and independent justice system is established in Kosovo” 258 and in that regard, at present the Department of Justice remains in the hands of UNMIK.

International judges and international prosecutors become involved in the domestic courts through two different routes: (i) a “Regulation 6 procedure” and (ii) a “Regulation 64 procedure.” First, in a Regulation 6 procedure, international judges and international prosecutors are authorized to select a new or pending case within their appointed jurisdictional area on their own motion. 259 Other than the preamble of Regulation 6 indicating that the regulation is “for the purpose of assisting the judicial process in Kosovo,” the criteria for a Regulation 6 action are not found in any public document. Regulation 6 is
primarily reserved for cases where there may be concerns about the ability to ensure a fair and impartial trial for all involved. Such involvement usually occurs in situations where there may be potential for partiality, corruption and/or intimidation of one or more judges and/or prosecutors. Such cases have covered war crimes, terrorism, serious inter-ethnic crimes, organized crime including trafficking in persons and particularly sensitive cases such as those where criminal charges are laid against those perceived to be war heroes, politicians and, more recently, the most serious offences resulting from the widespread March 2004 riots throughout Kosovo. Second, in a Regulation 64 procedure, an application can be made to the Department of Justice before the commencement of the trial or an appeal for an assignment of an international judge or an international prosecutor if it is considered “necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.”

If the SRSG gives the approval for an international judge and/or an international prosecutor, a panel of three judges (at least two must be international judges) will preside at a trial and may have the assistance of an international prosecutor. While the preamble of the applicable regulation mentions the above-mentioned responsibilities of the international civil presence, it is much more detailed. It states:

Recognizing that the presence of security threats may undermine the independence and impartiality of the judiciary and impede the ability of the judiciary to properly prosecute crimes which gravely undermine the peace process and the full establishment of the rule of law in Kosovo ...

For the purpose of ensuring the independence and impartiality of the judiciary and the proper administration of justice.

This quote is consistent with the informal and unpublished Department of Justice’s criteria for this case selection procedure. Therefore, unlike the situations involving other internationalized tribunals being compared in this thesis, depending upon the attendant
circumstances, IJPs may be involved in the investigation or prosecution of all crimes within the applicable law.

As a result, the international judges and prosecutors may be involved in a case at the outset or may become involved in a case after it has commenced – in effect, taking over after it has been initially handled by their local counterparts. As to the two procedures, it is more difficult to invoke the Regulation 64 procedure as local capacity builds because Regulation 64 cases tend to use more of a very limited number of international judges. In practice, international judges and prosecutors use these powers with caution while appreciating the professionalism that most local judges and prosecutors have and display in their work. Further, when the circumstances that led to their involvement have ceased to exist, cases have been handed back to proceed with only limited or no international involvement. It has been this author’s view that, while local counterparts often engage in cases in a most professional manner, exceptions still exist.

It is also worth remembering that the ICTY has concurrent jurisdiction with the local courts and, accordingly, it is another way to prosecute such crimes. In that regard, Security Council Resolution 1244 also refers to the ICTY.264

Initially, the applicable law in Kosovo was the law prior to March 24, 1999 (the commencement of the NATO bombing) as long as the law did not conflict with internationally recognized human rights standards and the law was not discriminatory in nature. Unfortunately, at the local level, many saw the law in 1999 as part of the Serbian machinery that had been previously used to discriminate and/or harm others. As a result, UNMIK later changed the applicable law to that existing on 22 March 1989 (that is, before
the partial autonomy previously given to Kosovo was abrogated) and specifically set out the international treaties that apply in Kosovo.265

Accordingly, the applicable criminal law in Kosovo, until recently, was a collection of three partly contradictory criminal codes, specified international treaties and UNMIK regulations. That changed in April 2004 when the Provisional Criminal Code of Kosovo and the Provisional Criminal Procedural Code of Kosovo became law. The new criminal codes import a number of common law aspects into the civil law system in Kosovo.266 The intent of UNMIK in conjunction with the Provisional Institutions was to streamline the three criminal codes and to bring them up to international standards. It has already been realized however that these codes will not be the last word on the applicable law as gaps and inconsistencies are found. Since April 2004 UNMIK has continued to create additional regulations in the criminal law sphere and more are expected.

In conclusion, at present, the Kosovo IJP system works both within and outside the local judicial system. At times the IJPs are commingled with their local counterparts and at other times they work separately. Lastly, as part of the Department of Justice’s transition strategy, negotiations are underway for the establishment of a specialized prosecutor’s office that will contain international prosecutors and local prosecutors. To date, there has been no announced plan for a special court.

In October 2005, Kai Eide, Permanent Representative of Norway to the North Atlantic Treaty Organization and Special Envoy as appointed by the Secretary-General delivered a comprehensive review of the situation in Kosovo prior to the commencement of status talks on the future of Kosovo. Specifically, on the rule of law situation in Kosovo, Eide stated:
In light of the limitations of the police and judicial system, there will be a need for a continued presence of international police with executive powers in sensitive areas. A continued presence of international judges and prosecutors will also be required to handle cases related to war crimes, organized crime and corruption as well as difficult inter-ethnic cases. The currently ongoing reduction of international judges and prosecutors is premature and should urgently be reconsidered. The result of such reductions would be a loss of credibility of the justice system and of confidence among the population in general and the minority communities in particular. There is little reason to believe that local judges and prosecutors will be able to fill the functions carried out by international personnel in the near future.²⁶⁷

United Nations Transitional Administration in East Timor (UNTAET)²⁶⁸

Security Council resolution 1272 (dated October 25, 1999) dealt with the international administration in East Timor (now Timor-Leste) in a similar way. The administration was established after internal conflict under the auspices of Chapter VII of the United Nations Charter and its set up paralleled that in Kosovo. UNTAET was “endowed with overall responsibility for the administration of East Timor and ... empowered to exercise all legislative and executive authority, including the administration of justice.”²⁶⁹

Like Kosovo, East Timor also had no real judicial infrastructure left when UNTAET came into the country.²⁷⁰ Notwithstanding the International Commission of Inquiry of East Timor recommendation to do so²⁷¹, the Security Council chose not to create another ad hoc tribunal.²⁷² Instead, through UNTAET it created a Serious Crimes Investigations Unit (SCU) and international judicial panels known as Special Panels for Serious Crimes (Special Panels).

The Special Panels, which were created through the combined operation of a number of regulations²⁷³, had exclusive jurisdiction over "serious criminal offences" (genocide, war crimes, crimes against humanity, murder, sexual offences and torture) and had the ability to
have a case deferred to it at any stage of the proceedings. In other words, the Special Panels had primacy.

The Special Panels' jurisdiction was limited in that they had exclusive jurisdiction only for offences committed between January 1, 1999 and October 25, 1999. The territorial jurisdiction of each panel was not limited to East Timor as it could also cover serious criminal offences committed by or against an East Timorese citizen elsewhere in the world. Non bis in idem provisions were also present. The Special Panels applied the law of East Timor and international law. Further, Special Panel trials and appeals had two international judges and one East Timorese judge.

Despite the efforts of the Special Panels, state cooperation was a significant problem. For example, Indonesia refused to extradite its nationals and others within its borders to East Timor for prosecution and, although Indonesia set up its own Ad Hoc Human Rights Court with jurisdiction over, amongst other things, crimes committed in East Timor in 1999, severe criticism ensued because many considered the Indonesian trials as shams. Like the ad hoc tribunals previous discussed, there were also difficulties associated with the serious crimes process involving the SCU and the Special Panels. Issues included an initial lack of consistent prosecution strategy or focus and lack of adequate resources.

The above framework continued operating when UNTAET transferred its responsibilities to the United Nations Mission of Support in Timor-Leste (hereafter, UNMISET) after Timor-Leste became independent in 2002. Although the present United Nations peacekeeping mission ended on 20 May 2005, the Timor-Leste Constitution allows "the collective judicial instance existing in East Timor, composed of national and international judges with competencies to judge serious crimes committed between 1"
January 1999 and 25th of October 1999", to continue until the cases under investigation are finished. After May 20, 2005 a one-year follow up mission in Timor-Leste, known as United Nations Office in Timor-Leste (hereafter, UNOTIL) was created.

Most recently, a Commission of Experts sent to Timor-Leste and Indonesia after May 2005, issued a report in which it recommended, amongst other things, that the SCU and the Special Panels be "provisionally retained" until such time as the Secretary-General and the Security Council have had an opportunity to examine and make decisions based upon the recommendations set out in their report. In that regard, it further recommended that efforts be made to ensure the continuity of the work of the SCU and the Special Panels until all investigations, indictments and prosecutions are completed. In the alternative, the Commission of Experts "strongly" recommended that the United Nations set up "a mechanism under which investigations and prosecutions of serious violations of human rights could be continued and completed". Specifically, the Commission of Experts recommended "a mechanism, which would allow the Government of Timor-Leste to retain sovereignty over the justice process, facilitate institutional capacity-building and provide avenues for the international community to assist in the process, as appropriate". The Report continued with a variety of other alternative recommendations including the establishment of an international criminal tribunal for Timor-Leste; a creative but controversial use of the ICC; and the exercise of universal jurisdiction by other states.

Special Court for Sierra Leone

In June 2000 the President of the Republic of Sierra Leone requested United Nations assistance in setting up a court aimed at bringing justice to and ensuring a lasting peace in the
country after a particularly brutal and lengthy civil war. In Resolution 1315 (2000) the Security Council acted under Chapter VII of the United Nations Charter but declined to follow the ICTY and ICTR precedents. Instead, the Security Council asked the Secretary General to negotiate an agreement with Sierra Leone to create an "independent special court" consistent with the resolution. The Secretary-General provided his report to the Security Council on October 4, 2000 outlining the results of the negotiations and, on January 3, 2002, Secretary-General Kofi Annan authorized the establishment of the Special Court despite a shortfall in funding. On January 16, 2002, the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (the SCSL Agreement) and the Statute of the Special Court for Sierra Leone (the Special Court Statute) were concluded. According to the Secretary-General, the SCSL is "Sierra-Leone specific" and that "[m]any of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible".

The Court was established on January 16, 2002, officially began on July 1, 2002 and had its first round of judges sworn in that December. The Special Court for Sierra Leone (hereafter, SCSL) is a "treaty-based sui generis court of mixed jurisdiction and composition." The SCSL is to prosecute those "who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone." Subject to certain conditions, peacekeepers and related personnel in Sierra Leone who commit crimes will be prosecuted by the sending state and not by either the SCSL or the Government of Sierra Leone. However, to use language similar to that in the Rome Statute, if the sending state is "unwilling or unable genuinely to carry out
an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons."^205

While there was a high level of Security Council involvement in the creation of the SCSL,^206 the SCSL is not a Chapter VII court despite the Security Council's comments in its August 14, 2000 resolution that "the situation in Sierra Leone continues to constitute a threat to international peace and security in the region."^207 Instead, it is a UN-Sierra Leonean agreement^208 and, while the Security Council is involved in the SCSL, it cannot terminate the SCSL and the SCSL has no Chapter VII enforcement powers.

The SCSL^209 may exercise its functions away from the SCSL’s seat in Freetown.^300 The subject-matter jurisdiction of the court is not identical to that of the ICC. The SCSL will be able to try cases involving (1) crimes against humanity; (2) violations of Article 3 common to the Geneva Conventions of August 12, 1949 for the Protection of War Victims and of Additional Protocol II thereto of June 8, 1977; (3) listed serious violations of international humanitarian law; and (4) listed crimes under Sierra Leonean law.^301

Unlike the ICC, the SCSL's jurisdiction will be retroactive. It will prosecute crimes within its jurisdiction committed after November 30, 1996. The SCSL is expected to function for a minimum of three years. The relationship between the national courts of Sierra Leone and the SCSL is one of limited primacy, not complementarity. While both courts have concurrent jurisdiction, the national courts of Sierra Leone are required to defer to the SCSL at any stage of the
proceedings when formally requested to do so by the SCSL.\textsuperscript{305} The Court’s primacy, however, does not extend to other states.\textsuperscript{306} The Secretary-General contemplated that there would be relationship and cooperation arrangements between the respective courts and that there would also be arrangements between Prosecutor and the National Truth and Reconciliation Commission.\textsuperscript{307} Consideration is also made for non bis in idem.\textsuperscript{308}

The organization of the SCSL is very similar to the ICTY and the ICTR in that it comprises a Trial Chambers and an Appeals Chamber, a Prosecutor and a Registrar.\textsuperscript{309} Although the SCSL initially adopted the ICTR’s Rules of Procedure and Evidence, the SCSL’s judges added their own amendments later.\textsuperscript{310}

The SCSL involves an interesting mix of both Sierra Leonean personnel and non-Sierra Leonean personnel. In particular, the majority of the judges was appointed by the Secretary-General after consultation with the Government of Sierra Leone\textsuperscript{311} with a special emphasis to states of the Economic Community of West African States and the British Commonwealth of Nations.\textsuperscript{312} Similarly, the Secretary-General appointed the Prosecutor after consultation with the Government of Sierra Leone, while the Government of Sierra Leone appointed the Sierra Leonean Deputy Prosecutor in consultation with the Secretary-General and the Prosecutor.\textsuperscript{313}

The SCSL was originally to be funded by voluntary contributions from the international community\textsuperscript{314} despite the Secretary-General’s recommendation to the contrary.\textsuperscript{315} A “management committee” made up of the important contributors to the SCSL, the Government of Sierra Leone and the Secretary-General were, amongst other things, to “provide advice and policy direction on all non-judicial aspects of the operation of the
Since its inception, however, funding has remained an issue and recently the United Nations issued a Subvention Grant to assist the court.317

With respect to the issue of legal personality, the SCSL Agreement permits the SCSL to have the juridical capacity to make contracts, acquire or dispose of property, institute legal proceedings and enter into agreements with states.318 Further, allowance is made for privileges and immunities.319 Although there is no specific wording that acknowledges that the SCSL has an international legal personality, its power to enter into international agreements indicates that it does have such. In fact, SCSL case law has made that finding.320

The SCSL Agreement and the SCSL’s Rules of Procedure and Evidence obligate the Government of Sierra Leone to cooperate with the SCSL at all stages of the proceedings. Under the SCSL Agreement, the Republic of Sierra Leone is obligated to (1) assist the SCSL when it asks for assistance, (2) enforce orders of the SCSL, and (3) recognize the SCSL’s legal personality and privileges and immunities. There are no obligations imposed on non-party states but non-party states are free to enter into agreements or arrangements with the SCSL.321

**Extraordinary Chambers in the Courts of Cambodia**

In 1997, the then co-Prime Ministers of Cambodia, “requested the assistance of the United Nations in bringing to justice persons responsible for genocide and crimes against humanity during the Khmer Rouge regime from 1975 to 1979” whilst citing the examples of the ICTY and the ICTR.322 In 1999, the Group of Experts who had been appointed by the Secretary-General considered the use of international, mixed and domestic tribunals and considered whether to locate a tribunal inside or outside of Cambodia. In the end, the Group
of Experts recommended the establishment of an international tribunal under Chapter VI or VII of the Charter.  The government of the People’s Republic of China, however, indicated that it would veto any attempt by the Security Council to use either power. Ultimately, the Secretary-General commenced negotiations with the government of Cambodia as neither the General Assembly nor the Security Council acted on the recommendation.

Despite United Nations proposals that an international court be established because of concerns about Cambodia’s ability to pursue such trials, Cambodia insisted upon control over the proceedings for reasons of what it termed political stability. In that regard, the Cambodian government approved a law during the negotiations that created a national court with the participation of both foreign judges and prosecutors with the local judges as long as the local judges had in effect a veto power over all decisions.

Of interest to this study, the concept of sovereignty was raised in the rhetoric surrounding the negotiations. For example, in late 2001, the Cambodian government insisted that Cambodian law would take priority if there were a conflict between it and the agreement. According to Hans Corell, UN Legal Counsel, the United Nations had consistently maintained that the United Nations could not be bound by a national law and that such a law would have to meet the terms of the agreement. He further noted that “[t]he question of Cambodia’s sovereignty is not at issue here, since the matter required an agreement to be implemented under the principle of pacta sunt servanda, that is to say that the terms of the agreement are binding on both parties.” As well, in a not unfamiliar refrain heard in the ICC context, Cambodia’s response in 2001 to the United Nations position was the assertion of sovereignty. Prime Minister Hun Sen refused United Nations control “on the grounds of national sovereignty”. Ouch Borith, Cambodia’s ambassador to the United Nations, stated
to BBC News in 2002 that the United Nations had to "respect their sovereignty" and that the government is prepared to go ahead with the court notwithstanding the departure of the United Nations. According to Craig Etcheson, such references to sovereignty were more than simply posturing, but were representative of Cambodia’s history — a history that included colonialism, occupation, intervention, occupation and a transitional authority.

Negotiations continued between the United Nations and Cambodia on a Cambodia-United Nations agreement for the court for three years. In February 2002, however, after a history of very difficult negotiations, the United Nations pulled out of the negotiations because the United Nations was of the opinion that “the Extraordinary Chambers, as currently envisaged, would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations would have.” In other words, the United Nations could not guarantee the presence of international standards of justice. According to Daphna Shraga, Principal Legal Officer, Office of the Legal Counsel, Office of Legal Affairs, United Nations, “it was in fact a conflict of two visions of justice: an independent tribunal meeting international standards of justice, objectivity, fairness, and due process of law, and a politically controlled judicial process.”

Talks, however, later resumed after a fair degree of pressure was apparently put on the United Nations. In March 2003, an agreement was reached between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (hereafter, referred to as “the Cambodian Agreement”) that created a special court within the existing national court structure of Cambodia. After the General Assembly approved it, Cambodia later ratified the Cambodian Agreement in October 2004 and accordingly
amended some of its domestic law. The Cambodian Agreement became effective on 29 April 2005 and the nomination process of judges and prosecutors is underway.

In the course of negotiations with the United Nations, the Cambodian government adopted the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (hereafter Law). An analysis of the Extraordinary Chambers in this thesis similar to that done with the previously mentioned internationalized tribunals is not precluded by the fact that there are differences between the Law and the subsequent Agreement that may likely require amendments to the Law.

The Extraordinary Chambers will handle "crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia." Specifically, those crimes are "the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions and such other crimes as defined in Chapter II of the Law."

The Court will have authority to investigate or prosecute "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations." Further the Court will have jurisdiction over such crimes that were committed between 17 April 1975 and 6 January 1979.

The Cambodian Agreement contemplates a simple structure involving a Trial Chamber and a Supreme Court with the latter acting as the appellate court and both levels will have local and international judges. The Court will sit in Phnom Penh. It is
anticipated that this tribunal will last three years\textsuperscript{346} with costs shared by the Cambodian government and the United Nations.\textsuperscript{347}

It is interesting that, unlike the ICTY and the ICTR, the Cambodian government wanted primacy over the tribunal and that is in effect what it received. Notwithstanding the Kosovo experiences where occasional problems occurred when international judges were outnumbered, and despite the Secretary-General's clear preference for a majority of international judges, the Extraordinary Chamber will be a mixed court with both international and local judges but the majority will be Cambodian. There will also be co-prosecutors (one international and one Cambodian); co-investigating judges (one international and one Cambodian) and decisions will be made by the "supermajority formula" where panel decisions will be made by a majority of the panel members with at least one international judge in assent.\textsuperscript{348} Lastly while the Cambodian Agreement will trump Cambodian law if there is a conflict between the two, the procedure will be governed by Cambodian law unless it conflicts with international standards.

The Cambodian government is obligated to comply 'without undue delay' with 'any request' for assistance from the prosecutors or the Extraordinary Chambers.\textsuperscript{349} As well, if the government of Cambodia changes the structure of the Extraordinary Chambers or violates the Cambodian Agreement, the United Nations can withdraw from the Cambodian Agreement.\textsuperscript{350} Interestingly, however, there is also a provision in the Law that permits the Extraordinary Chambers continue to be run by the Cambodian government if the United Nations withdraws from the Cambodian Agreement.\textsuperscript{351}

Serious concerns have been expressed in the literature about this structure in that, if all the local judges are intimidated, there is no way for the international judges to avert a
miscarriage of justice as they will not be able on their own to make an effective decision given the wording of both the Law and the Cambodian Agreement. As well, there is unease over the fact that, notwithstanding the fact that there is input from the United Nations as to the ultimate appointment of international judges, the final decision on the appointment and dismissal of international judges lies with the Cambodian authorities.\textsuperscript{352}

According to Shraga, it is anticipated that the Extraordinary Chambers will likely “command little credibility” because local judges and prosecutors come from a “weak and politicized criminal justice system.”\textsuperscript{353}

Conclusion

This chapter has given the reader a broader understanding of the general nature of the ICC and the context in which it arose, and helped set the stage for the next chapter in which the ICC and the ICC’s effect on sovereignty is examined in detail.

Chapter Two also helped to ensure that any conclusions made about the ICC are made within the context in which the ICC developed and now currently resides. First, the ICTY and the ICTR, which were created before the Rome Statute was created, still exist. Those tribunals, however, are scheduled to close down within a few years. Notions of primacy and concurrent jurisdiction were initially taken very seriously, but it appears that these were later watered down with amendments to the rules. As well, primacy was rarely invoked in practice and, accordingly, may not sound as severe as it first sounds. In fact, the ICTY in particular is now permitting domestic prosecutions of cases that would have otherwise fallen within the jurisdiction of the ICTY. Second, the newer examples of international courts or tribunals since the signing of the Rome Statute are not entirely consistent with the ICTY and the ICTR or amongst themselves. Many of those are scheduled to terminate in the near
future or have a very limited life span. (For a summary of the main components of the international or internationalized criminal tribunals before and after the creation of the Rome Statute, see Table 1 in the Appendix to this thesis.)

A comparison of these international courts or tribunals and the ICC is an important element to understanding the effect of the ICC because it will minimize conclusions taken out of context. In light of the summary above, one question that must now be addressed in the analysis section in the third chapter is what conclusions, if any, can be drawn from the use of jurisdictional “primacy” at the ICTY and the ICTR; the use of jurisdictional “complementarity” at the ICC; and the use of “primacy” with the SCSL. For example, is the jurisdictional regime set out in the ICC framework is as “revolutionary” as some authors have claimed? Lastly, given the variety of techniques used before and after Rome, can it even be said that there is a trend beyond the current proliferation of such tribunals?

Chapter Three will now analyze the ICC framework in detail using the methodology described in the first chapter. Once that has been done, a comparison will also be made between the ICC and international or internationalized criminal tribunals to see if that how this comparison adds to the present analysis. These questions shall then be revisited in the last chapter of this thesis.
Chapter Three: Detailed Analysis of the ICC Framework

Introduction

Although the word “sovereignty” is not found in the Rome Statute, it was an issue during the negotiation of the treaty and interest has not waned since. This chapter will now use the framework developed in the first chapter to see if it is possible to assess where a sovereignty claim is likely to occur and to re-examine the conclusions of Eric Leonard. In that regard, this chapter will be divided into three parts: the ICC framework, the ICC in practice and the ICC in comparative context. First, in reviewing the ICC framework, consideration will be made of the source of the ICC, its legal status and its territorial scope. Then greater consideration will be made of the ICC’s jurisdiction (subject-matter, territory and time) and the notion of complementarity. It is here that claims of sovereignty are most likely to occur. Special consideration will also be made as to the ICC’s relationship to states including domestic courts. I will also review the effect of the ICC on states parties and non-states parties, and the relationship between the ICC and the United Nations.

The second part of this chapter will then look at the limited ICC practice to date in an effort to minimize the risk of an incorrect interpretation of the framework in the event that the Court’s practice is different from the treaty. Brief reference is made to the investigations involving the Democratic Republic of Congo, Uganda and the Sudan. The only example of the ICC’s practice to date is the issuance of the Office of the Prosecutor’s policy paper in September 2003 that publicized the actual prosecutorial approach to be used by the Office of the Prosecutor (hereafter, the OTP) as it goes about its work. Some aspects of that policy differ from some immediate interpretations of the legal framework surrounding the ICC.
The third part of this chapter will then look at the ICC in conjunction with other available judicial mechanisms including the recent proliferation of other non-domestic tribunals in order to minimize the risk of a wrong interpretation of the significance of the creation of the ICC. That review should put the ICC in its historical and contemporaneous context. Then, in chapter four, I will return to Leonard’s argument and conclusions.

Such a detailed analysis goes beyond that undertaken by Leonard and minimizes the possibility that various articles of the Statute are taken out of context. At times, proponents on both sides of the literature (that is, the ICC is too subservient to the notion of sovereignty versus the ICC is the death knell to sovereignty) do not seem to engage with each other because both sides can find provisions that, taken in isolation, seem to support their positions. An even more intensive analysis would inevitably require a more comprehensive look at the constitutive documents.

**The ICC Framework**

As noted in the first chapter, an extensive and complicated legal framework now accompanies the ICC. For the purposes of this thesis and the conclusions in this part, the ICC framework includes the Statute, RPE, Elements of Crimes, Relationship Agreement, and the Privileges/Immunities Agreement. While the officially announced policy of the OTP of the ICC is technically, in my view, also part of the ICC framework, it will be dealt separately in this chapter.

As previously noted, a multilateral treaty negotiated with the participation of more than 120 states and extensive NGO input created the ICC. Over one hundred states have ratified the treaty; some of the biggest and most powerful nations have not and remain
opposed to its current form. While the treaty was the result of lengthy negotiations and compromise, in the end it was voted upon as a package before it was adopted. On July 1, 2002, after the sixtieth ratification, the ICC came into existence and became the world's first permanent international criminal court.

The ICC is an independent court with an international legal personality. The Statute explicitly says that it has an international legal personality in addition to having a legal capacity in order to exercise its functions and fulfil its purposes. The legal personality of the ICC is also referred to in the Relationship Agreement and in the Privileges/Immunities Agreement.

International legal personality may be inferred when an international organization is intended to be "an autonomous body, capable of occupying a position in certain respects in detachment from its [m]embers" and when it does have the ability to act that way. Remarkably, the Statute is very specific and, accordingly, one need not necessarily look for the existence of these two criteria. Although it is not unusual for an international organization to be given broad autonomy in order to fulfil its mandate, the status of being explicitly made a "subject of international law" is quite rare and it is certainly not something normally given even to a domestic court.

What, however, is the effect of giving the ICC an international legal personality? The ICC can enter into agreements with states and other actors in order to fulfil its duties. Normally such a power would be limited to agreements for the purposes of court. Article 4 of the Statute, however, seems to provide no restrictions to the international legal personality of the court. As a result, it may be unfettered. Whether or not the ICC has an international legal personality broader than its functions, it cannot be forgotten that the Assembly of States
Parties (hereafter, ASP) is the executive body that negotiates the more complex matters. The division of powers within the ICC framework between the ICC, its organs and the ASP mandates that foundational agreements be ruled upon by the ASP and operational agreements in individual cases be handed by the relevant judicial organ(s).\textsuperscript{359}

Nonetheless, in light of some of the general rules that can apply to international organizations with international legal personality, the ICC’s rights will include the right “to enter into international agreements with non-member states on matters within the organization’s province”; “to immunity from jurisdiction of state courts for acts and activities performed by the organization”; and “to protection for all the organization’s agents acting in the territory of a third state in their official capacity as international civil servants.”\textsuperscript{360}

While it remains to be seen how exactly this international legal personality is used in practice, such a status may not be as surprising as it may sound at first, given the jurisdictional regime in the ICC framework (especially that of complementarity) and the attendant need for the ICC and its organs to be in direct contact with states.

**ICC’s Territorial Scope and Jurisdiction**

A number of provisions contemplate the ICC or its organs being situated in and working within the territorial boundaries of states. The ICC may exercise its functions and powers on the territory of any state party or, if there is a special agreement (as provided for in the Statute), on the territory of any other state.\textsuperscript{361} As well, the OTP may conduct investigations on the territory of a state in accordance with the international cooperation and judicial assistance provisions or, in limited cases, without the cooperation of the state party when authorized by the Pre-Trial Chamber to do so.\textsuperscript{362}
Although the Court itself will normally sit in the Netherlands, it "may sit elsewhere, wherever it considers it desirable." The Rules, however, require when it "considers that it would be in the interests of justice" to do so, that the ICC consult with the state where the court is to be located. This cannot be done without the state's consent. The Privileges/Immunities Agreement notes that, where the Court sits in a place other than the Hague, "the Court may conclude with the [s]tate concerned an arrangement concerning the provision of the appropriate facilities for the exercise of its functions." Therefore, while the ICC could sit in a place other than The Hague, its ability to do so is heavily circumscribed. Interestingly, however, as noted above, state consent is not always a precondition to the investigative powers of the OTP. Where a state is unwilling and unable genuinely to investigate or prosecute then the ICC could conceivably exercise its jurisdiction or carry out its functions.

Despite repeated assertions in the literature that the ICC has universal jurisdiction, it does not. Cases may be brought before the Court via three different methods: a referral by a state party, an investigation initiated by the prosecutor on his or her own, or a referral from the Security Council under Chapter VII of the Charter.

The Court will only have jurisdiction over crimes committed after the Statute entered into force (that is after July 1, 2002) and its jurisdiction will be dependent upon a number of preconditions. Further, even when the Court has jurisdiction, the case may still not be admissible under the Statute.

The ICC's subject-matter jurisdiction is limited to four crimes (one of which, the crime of aggression, has not yet been defined) and the Court, through the notion of complementarity, does not have automatic jurisdictional priority over national courts. It is
conceivable that the Statute could be amended in the future to include additional crimes, including the crime of terrorism. The ASP, however, must approve such an amendment.

The Court will only have jurisdiction over individuals eighteen years of age or older irrespective of their official capacity and it will have no power to determine the criminal liability of states. Having said that, however, depending upon the nature of the crimes involved and depending upon the facts of each individual case, states may be at least indirectly implicated.

When it does have jurisdiction, the ICC is to investigate and prosecute “the most serious crimes of international concern.” Where some action has occurred at the state level, the ICC will be concerned with crimes of “sufficient gravity to justify further action.” Further, the Prosecutor has to be satisfied that a prosecution is “in the interests of justice.”

The ICC may exercise its jurisdiction if the alleged crime occurred on the territory of a state party; the alleged crime was committed on board a vessel or aircraft registered in a state party; the person accused is a national of a state party; or a non-state party has made a declaration accepting the Court’s jurisdiction. Security Council Chapter VII referrals, however, have no such pre-conditions. As a result, unlike the International Court of Justice (ICJ) which requires explicit state consent before the ICJ may assert jurisdiction, the ICC could become involved in a case without a state’s specific consent on a case by case basis.

Interesting questions, however, arise when (1) the alleged crime occurred on the actual or deemed territory of a state party, but the accused person is not a national of a state party; and (2) when the United Nations Security Council refers a case to the ICC. In the first
scenario, the consent of the accused person's state is not a necessary precondition to ICC jurisdiction. For example, if an accused, who is not a national of a state party, commits a prescribed crime in the territory of a state party, the ICC may be able to assert jurisdiction even if the non-state party objects. A large part of the literature supporting the American government's opposition to the Statute erroneously claims that the investigation or prosecution of an accused who is not a national of a state party without that state's consent is new and infringes state sovereignty. Such a jurisdictional claim is not new. Jurisdiction can arise in a number of circumstances and is not dependent on the consent of the national government of an accused. States traditionally will prosecute foreigners who commit offences in the state's country. Less likely, but not implausible, is the scenario where a state will prosecute an individual for crimes committed elsewhere in the world - extraterritorial jurisdiction. Even less frequently is the use of the concept of universal jurisdiction. Universal jurisdiction applies to a small number of crimes that any state can investigate or prosecute anywhere in the world given their heinous nature (such as genocide) or the lack of territory associated with the crime (such as piracy).

The same preconditions in the first scenario do not apply to the second scenario - that is, a Security Council referral to the ICC. Conceivably the ICC could after such a referral assert jurisdiction over a case where the crimes were committed by a non-state party national on the territory of a non-state party. While, in the second scenario, it may be argued that state consent is not completely removed from the equation as the Security Council draws its legitimacy from treaty ratifications, it is remarkable that a Court could assert jurisdiction where the crime was not committed on the territory of a state party, where the accused is not a national of a state party and where a non-state party has not accepted the court's
jurisdiction. That precise situation appears to be unfolding with the recent referral by the Security Council of the situation in Darfur. While Sudanese government has signed the Statute, it has not ratified it and, as a result is not a state party within the meaning of the Statute. Notwithstanding that fact, the International Commission of Inquiry on Darfur considers the prosecution of Sudanese nationals possible with a Security Council referral and the Sudanese government sees such action as contrary to law. The Sudanese government has indicated that it will not accept it and accordingly this will likely be heavily litigated in the future.

Even if the ICC asserts jurisdiction in one of the above scenarios, it is not the end of the matter. Despite the ICC asserting such jurisdiction, the Security Council, a state party or a non-state party that would normally exercise jurisdiction over the crimes concerned, may request the deferral of an ICC investigation or an ICC prosecution. In practice, the Security Council has essentially a collective renewable right to seek a deferral. If the Security Council seeks such a deferral, a resolution must be adopted under Chapter VII of the Charter and the deferral would last for twelve months or may be extended for additional twelve-month periods. If a state party or a state that would normally exercise jurisdiction over the concerned crimes asks for a deferral, the request is subject to a review and, depending upon the circumstances, the Prosecutor may still opt to continue with the investigation. In that case, however, there is an appeal process to challenge that decision.

Even if such a deferral is not requested, there are still further restrictions on whether the ICC will be able to handle a case. Specifically, cases will not be admissible before the Court where (a) "the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or
prosecution” [Emphasis added.]; (b) “the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute”; (c) “the person concerned has already been tried for conduct which is the subject of the complaint” unless the trial was done in a manner with the intent that the person not be brought to justice or unless the trial was meant to shield the person from criminal responsibility, or (d) “the case is not of sufficient gravity to justify further action by the Court.” 384

In deciding whether a state is “unwilling” to carry out an investigation or prosecution in a particular case, the ICC, “having regard to the principles of due process recognized by international law,” will look at whether any of the following has occurred: “(a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court,” “(b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; or (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.” 385

In deciding whether a state is “unable” to carry out an investigation or prosecution, the ICC will look at whether “the state is unable to obtain the accused or the necessary evidence and testimony or otherwise [is] unable to carry out its proceedings” because of “a total or substantial collapse” or the unavailability of the states’ national judicial system 386.
Therefore, to summarize, the ICC will not have jurisdiction when a state has the jurisdiction to prosecute and has the ability to prosecute and willingly takes on the task. As well, if the person has been already tried for the conduct in question, or the state has made a decision not to prosecute, the ICC will not have jurisdiction if the process was independent, impartial and furthered the course of justice.

The Statute also provides for challenging the jurisdiction of the Court and challenging the admissibility of a case. Such challenges may be brought by the Court on its own motion, by “an accused or person for whom a warrant of arrest or a summons to appear has been issued,” by “a [s]tate which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted,” or by “a [s]tate from which acceptance of jurisdiction is required.” As well, a state that would “normally exercise jurisdiction over the crimes concerned” may also be able to bring such a challenge. In such instances those who made a referral under Article 13 and alleged victims may also submit observations to the Court.

**Complementarity**

Special mention should again be given to the notion of complementarity which addresses the relationship between states and the ICC. Complementarity, as it has become known, is the manner in which the ICC can affect its jurisdiction while at the same time respecting/complementing the jurisdiction of the states parties and non-states parties. According to Cassese, complementarity “creates a presumption in favour of action at the level of states.”
Newton describes the complementarity principle as “the critical node in ascertaining whether the ICC will trample on the sovereign prerogatives of states, or will coexist in a constructive and beneficial relationship with all nations.”

While the term complementarity is not used in the Statute, the notion is reflected in the combined reading of the Statute and the subsequent documents that form part of the ICC legal framework. The Statute’s Preamble states, “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.” It also emphasizes, “that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”

The rest of the Statute – especially the jurisdiction and admissibility provisions noted above - is replete with efforts to ensure states will handle most such prosecutions unless specific circumstances (and a very limited set of circumstances) allow the ICC to take the case.

The complementarity concept pre-dated the Rome Conference. It may have appeared as early as the 1953 Commission on International Criminal Jurisdiction and certainly by the time of the International Law Commission draft statute in 1993 and 1994.

Earlier in the thesis it was noted that one of the reasons Marc Grossman, United States Under Secretary for Political Affairs, opposed the ICC was because it amounted to a form of judicial review. According to John T. Holmes, however, during the Rome negotiations, “delegations were mindful that the ICC was not envisaged as an appellate body to review decisions of domestic courts” and this was one of the rare areas of consensus from which the United States delegation did not dissent. Grossman’s claim, therefore, is another example of the American government’s position shifting over time.
Notwithstanding the comments of Holmes, it is my opinion that a reasonable interpretation of the combined effect of the complementarity provisions could give rise to an occasion where the ICC may have to rule on the legality of state decisions to investigate and/or prosecute and/or state decisions not to do so. There is, however, a threshold that the ICC must meet. The only way that the ICC can take on a case after a finding of ‘unwillingness’ is if the Court finds that the state had not acted in good faith. Historically, international bodies have been quite loath to accuse national governments of bad faith.

The term complementarity and the accompanying jurisdictional regime have a positive ring to it that at first glance seems to fit nicely with (and is not necessarily against) state interests. On reflection, however, part of complementarity can be seen as positive and parts of it can be considered negative. In other words, the concept has two different prongs to it – one that fits side by side with the jurisdiction of states and one that inevitably conflicts with the jurisdiction of states. It is the latter scenario that will no doubt give rise to sovereignty claims. Specifically, the latter scenario will occur when the ICC decides that a state has been ‘unwilling’ and all other jurisdictional preconditions have been met. Further, while the authority of the ICC to determine the adequacy of the state actions or non-actions lies completely with the Chambers of the ICC, its procedural decisions can then be appealed to the ASP and then, if necessary, to the International Court of Justice (hereafter, ICJ).

The exact nature of the ICC’s position when it takes on a case after a finding of ‘unwillingness’, however, is not entirely clear. It is not one of clear superiority in a vertical or hierarchical point of view. The relationship between the ICC and states (whether a state party or not) is much more complicated. For example, even if the ICC properly exercises its
jurisdiction after having ruled that a state was 'unwilling', a state may still interfere with that result by either prosecuting the case or asking for a deferral.

Therefore, the notion of complementarity evokes three different potential types of relationship between the ICC and states – one where the states prosecute and the ICC may, if necessary assist or cooperate with them (that is, a horizontal relationship); one where the ICC 'reviews' a decision of a state to or not to prosecute and, upon a finding of unwillingness and the satisfaction of other preconditions, where the ICC prosecutes with no state or Security Council response (that is, a vertical relationship); or one where the ICC has taken on the prosecution, but a state or the Security Council either defers it or the state takes on the prosecution itself (that is, a vertical on top of a vertical relationship). What makes the concept even more complicated is that the ICC could be acting in different relationships with different states at the same time in relation to allegations all over the world. In other words, I agree with Patricia McKeon who noted that, "[t]he difficulty with complementarity arises in its application".397

The precise meaning of complementarity, however, will become known with practice. As one expert said in the course of OTP's consultation process, complementarity raises more questions than it answers.398 The literature has, however, focused on complementarity in its positive form and failed to consider in detail the exceptions. In the positive situation – that is when a state is able to prosecute and makes a legitimate decision to prosecute or not - there is no obvious need for ICC involvement and no potential for conflict between the ICC and a state. The implication upon the state's monopoly is effectively nil. But when a state makes a decision with which the ICC does not agree and where the ICC acts in response, sovereignty claims are likely to occur because the final authority has now moved to the ICC.
Obligations and Effects on States Parties

Beyond the Preamble of the Statute which states, "it is the duty of every [s]tate to exercise its criminal jurisdiction over those responsible for international crimes," the Statute also creates a set of obligations upon states parties. These obligations to cooperate with the ICC are primarily found in Part 9 of the Statute. The Rules also contain chapters dedicated to the issues of international cooperation and judicial assistance and enforcement.\textsuperscript{400}

States parties are obligated, in accordance with the Statute, to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court,"\textsuperscript{401} including compliance with requests for arrest and surrender.\textsuperscript{402} The Statute further requires that there are national procedures in place to facilitate that cooperation.\textsuperscript{403}

The Court is authorized to 'request' cooperation from states parties.\textsuperscript{404} Non-states parties may provide assistance "on the basis of an ad hoc arrangement, an agreement with such state or any other appropriate basis."\textsuperscript{405} Failure on the part of a state party or a non-state party to cooperate or assist may result in notification of the ASP or, in the case of a Security Council referral, notification of the Security Council.\textsuperscript{406}

States parties are required to give effect to Court imposed fines and forfeiture orders.\textsuperscript{407} Only states that indicated a willingness to accept persons sentenced by the Court may be asked to assist in the enforcement of prison sentences.\textsuperscript{408}

I agree with Antonio Cassese’s argument that the cooperation provisions of the Rome Statute have a largely state-oriented approach and that the ICC is not a “supra-state” model.\textsuperscript{409} Cited examples include the fact that, in competing requests between states and the
ICC for the surrender of persons, the ICC does not automatically win and the fact there is built-in protection for national security information.\textsuperscript{410}

While I do not agree that the ICTY and the ICTR are in the end "supra-states" for the reasons explained below, the state-oriented approach to these provisions is as one would expect given the nature of the crimes being investigated and prosecuted. Simple consideration of this factor alone unfortunately does not assist us in discerning the real effect of the ICC.

Additional Implications for States Parties

Assuming for the sake of argument that the territorial integrity of a state is discernable and watertight,\textsuperscript{411} do the provisions within the ICC framework delve into or affect the internal affairs or territorial integrity of that individual state?

First, the Preamble, amongst other things, reaffirms "the Purposes and Principles of the Charter of the United Nations, and in particular that all states shall refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" and emphasizes "in this connection that nothing in this Statute shall be taken as authorizing any state Party to intervene in an armed conflict or in the internal affairs of any state."\textsuperscript{412}

Conceivably, if the ICC were to prosecute an individual under the Statute after he or she had been previously acquitted or convicted in a particular state, there would on the face of it be an interference with the internal affairs of the state. The ability of the ICC to do that, however, is limited. For example, no one previously convicted or acquitted of genocide, crimes against humanity or war crimes can be tried by the ICC unless that earlier trial was
"for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court" or the trial was "not conducted independently or impartially in accordance with the norms of due process recognized by international law and [was] ...conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice." Otherwise the ICC framework will have to respect the state’s decision.

In the Statute, efforts are also made to ensure there is no infringement of a state party’s laws and a state party is not put in a position where it may have to violate international agreements or other international law obligations. As well, the Statute specifically considers the laws of a state party when there is a request for assistance and the request is "prohibited in the requested state on the basis of an existing fundamental legal principle of general application." As well, the execution of a request from the Court may be postponed if it would interfere with another ongoing investigation or prosecution. Lastly, as noted above, there is also a specified procedure for protecting national security information otherwise subject to disclosure under the Statute.

Although no reservations were permitted with this treaty, some would argue that there remains an “escape” from the Statute by virtue of the withdrawal provisions. It remains to be seen however whether any state will actually use that provision. The political repercussions would likely be much worse than the negative publicity the United States received for “unsigning” this treaty – a treaty to which the United States Senate had not consented and thus remained un-ratified.
Implication for Non-States Parties

While there is no question in law that a treaty cannot create obligations or rights for a state without the consent of the state, the literature on the ICC is quite split as to whether the Statute places obligations on non-states parties. For example, David Scheffer, Madeline Morris and others argue that the ICC improperly affects non-party states whereas Michael Scharf arrives at the opposite conclusion.

As previously mentioned, ICC investigations and prosecutions against nationals of a non-state party (subject to certain conditions) can occur without the consent of the non-state party. Gennady Danilenko, in my view, correctly points to the distinction between being bound by the treaty and being affected by it. Non-parties to the Statute are “affected” and fall into the latter category. In particular, the ability of the ICC to assert jurisdiction over non-party nationals “will implicate vital legal interests of non-[m]ember [s]tates” and that “will affect an essential element of state sovereignty, namely criminal jurisdiction of all [s]tates over their nationals.” He further stated, that the ICC “will also affect all [s]tates’ governmental structures and decision-making processes.”

If the situation in Darfur goes to trial in the ICC, it is likely that this precise issue will be litigated. In the Darfur situation, however, the crucial event for jurisdiction is the Security Council referral which affects even non-states parties to the Rome Statute.

Lastly, while a state may not be a party to the Statute and may not be bound by it, it may still be affected by the existence of the ICC. A state cannot properly ignore it given the incredible support for the ICC from around the world. Further, as previously noted, both international and domestic courts are citing the provisions of the Statute and likely will cite its jurisprudence down the road. In fact, a state may amend its domestic law so as to comply
with international standards so as to avoid the possibility of falling within the hands of the ICC.

**ICC, the United Nations and Security Council**

While there has also been some speculation as to whether the Security Council could alter or affect the ICC by either limiting or expanding the ICC’s jurisdiction, the Relationship Agreement precludes such action.\(^{425}\)

According to Mundis: “the United Nations recognizes the Court as “an independent permanent judicial institution” and the Court recognizes the “responsibilities of the United Nations under the Charter. The Relationship Agreement seeks to elaborate on this general principle, adding that the parties agree to cooperate and to “consult each other on matters of mutual interest.”\(^{426}\)

With respect to the relationship between the United Nations and the ICC, the term “mutual respect” may imply that the two international organizations remain at arms length. Unfortunately, however, a true arms length arrangement will not be possible. For example, the Security Council may actually refer a case to the ICC; the Security Council may suspend an ICC investigation; and the Security Council may be needed to help investigate and/or enforce orders of the ICC.

While in theory the relationship between the Security Council and the ICC is one of mutual respect, it may not always be a harmonious one. What happens if the Security Council defers a case? What happens if the Security Council takes its own action under Chapter VII and sets up a court to deal with alleged atrocities and there is an overlap between
its jurisdiction and that of the ICC? How does that affect the earlier “vertical on top of vertical” relationship?

Conceivably there may also be an overlap between the ICC and the role of the Security Council when it comes to the as yet undefined crime of aggression. Acts of aggression are the fundamental cornerstone of Chapter VII of the United Nations Charter.427

**Is the International Criminal Court supranational?**

According to Helfer and Slaughter, “supranational” involves “a larger transfer of or limitation on state sovereignty” with the establishment of an international organization.428 According to Grieves, “[t]he term “supranational” signifies that signatory states have transferred to an international institution certain limited decision-making powers normally exercised only by the governmental organs of a sovereign state.”429

In my opinion, the ICC is clearly an international entity with respect to its jurisdiction, but it is not supranational. No governmental qualities are handed over. When the ICC exercises its jurisdiction in the case of a state that is either unable or unwilling to investigate or prosecute a crime under the ICC’s jurisdiction, the ICC has quite obviously not dismantled the domestic government.

Simply, the ICC, in a limited set of circumstances, may prosecute persons for a limited number of very specific crimes. The ICC framework is replete with checks and balances upon the power of the ICC organs. The ICC’s negotiating power is effectively circumscribed to its mandate which is to be the court of last resort only if no other court can or will take action. The ICC itself is also largely dependent upon states for its continued survival. The ICC organs need the cooperation of states to help investigate, find and arrest perpetrators and to enforce court orders.
While it is my conclusion that the ICC is heavily circumscribed in its reach, it does have the potential of becoming less so and can, in some circumstances, go against the wishes of states. For example, if a state is held to be “unwilling” to prosecute persons for crimes and the ICC is permitted under the complicated framework to take on the case, the ICC could judicially review the behaviour of the state. Specifically, the ICC comes closer to being supranational when the following exceptional circumstances crystallize: if the ICC disagrees with the decision of a state not to prosecute and if the ICC then prosecutes the perpetrator that the state would not.

**ICC in Practice: the Democratic Republic of Congo, Uganda, the Central African Republic and Darfur**

At present, given the young age of the ICC, the only indicators of its practice are its policy paper and its regulations.

Notwithstanding the fact that the ICC has not yet heard a case, there has been a lot of action in the OTP since its creation. In addition to having received close to 500 communications within its first year of operation, the OTP received a referral from the Security Council in relation to the situation in Darfur and has had three referrals from states, namely the Democratic Republic of Congo (DRC), Uganda and the Central African Republic. The referrals from the DRC and Uganda have resulted in the commencement of investigations by the ICC. The circumstances under which the DRC and Uganda referrals were made elucidate the current approach or policy of the OTP.

First, in July 2003, the Prosecutor, Luis Moreno Ocampo, stated that he would “closely follow” the situation in the DRC and that his office would give it priority. Later,
the Prosecutor announced that the first situation “which merits to be closely followed by the Office” is the situation in Ituri, DRC.432

The Prosecutor then said that, while the OTP was conscious of the peace process and hoped that efforts to stop the violence would be successful, “I hope the national system can be reinvigorated with assistance from the international community in order to enable the Congolese themselves to investigate and prosecute those responsible.” But then Mr. Ocampo continued: “[i]f necessary, however, I stand ready to seek authorization from a Pre-Trial Chamber to start an investigation under my proprio motu powers” and seek the support of national or international forces.433 Interestingly, Mr. Ocampo then suggested a referral or active support from the DRC itself and stated that, “[t]he Court and the territorial [s]tate may agree that a consensual division of labour could be an effective approach,” for example, the ICC could prosecute “the leaders who bear the most responsibility for the crimes” and the national authorities “with the assistance of the international community could implement appropriate mechanisms to deal with other individuals responsible.”434 Mr. Ocampo also indicated that he would be sending letters to all states parties and other countries, including the ones concerned, and asking for their cooperation.435

In March 2004, the President of the DRC referred to the OTP the situation of crimes within ICC jurisdiction.436 On July 5, 2004, the Pre-Trial Chamber I of the ICC decided that there was a reasonable basis to initiate an investigation437 and thereby commenced the ICC’s first investigation.

On 23 July 2004, the OTP announced its decision to open an investigation of crimes committed in the DRC, not only the Ituri region. Mr. Ocampo stated that, “[t]he decision to launch an investigation has been taken with the cooperation of the DRC, other governments
and international organizations.” Subsequent to that, the OTP and the Registry of the ICC made an official visit to the DRC and met with “senior political and judicial Congolese authorities in order to discuss mechanisms of cooperation between the DRC and the Organs of the ICC.”

In December 2003 (in the midst of the DRC case above) the President of Uganda referred a situation to the OTP concerning the Lord’s Resistance Army (LRA). By the end of January, 2004, the OTP announced the fact that there “is a sufficient basis to start planning for the investigation of the ICC” and that “[d]etermination to initiate the investigation will take place in the coming months.” On the same day as the decision to initiate an investigation into the DRC, Pre-Trial Chamber II of the ICC decided that it would analyze the situation in Uganda and seek additional information.

In a letter dated December 22, 2004, a representative of President Bozizé of the Central African Republic asked the OTP to “investigate crimes within the jurisdiction of the Court that may have been committed since 1 July 2002 anywhere on the territory of the Central African Republic”. On January 7, 2005, the OTP announced that it would analyze the situation in order to determine whether the office would seek to commence an investigation or seek further information. On January 19, 2005, the President of the ICC, assigned this situation to another pre-trial chamber.

More recently, the OTP received a referral from the Security Council in relation to the situation in Darfur following an earlier recommendation for such from the International Commission of Inquiry on Darfur to the United Nations Secretary-General. As the Security Council considered that the situation in Darfur continues to be a threat to international peace and security, it issued the resolution under Chapter VII of the United Nations Charter. While
eleven members of the Security Council voted in favour of the resolution and no members voted against it, four members (including the United States) abstained.\textsuperscript{442}

The Security Council also decided that the Government of Sudan and all other parties to the conflict in Darfur, “shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.” Further, the resolution recognized that non-states parties have no obligation under the Statute, and urged all states and concerned regional and other international organizations to cooperate fully.\textsuperscript{443}

As well, similar to the OTP’s prior requests in relation to the state referrals, the Security Council also invited “the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity” and encouraged “the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur.”\textsuperscript{444}

On 1 June 2005, the OTP decided to open an investigation into the situation in Darfur, Sudan.\textsuperscript{445} Shortly after that, the Government of Sudan announced that it would establish a new specialized tribunal to deal with some of the persons suspected in relation to crimes committed in Darfur. Not surprisingly, the OTP did not cease its investigation. The OTP instead announced that it would follow the work of that tribunal as part of its on-going admissibility assessment “in order to determine whether it is investigating, or has investigated or prosecuted, the cases of relevance to the ICC, and whether any such proceedings meet the standards of genuineness as defined by article 17 of the Rome Statute.
Interestingly, the ICC as part of its work in relation to the situation in Darfur has commenced negotiations towards a relationship agreement between the ICC and the African Union.\footnote{446}

**Assessing the Practice**

Were state referrals to the ICC from states against themselves contemplated by the negotiators of the Rome Statute when they came up with the notion of complementarity? On the contrary, few if anyone expected that the first two cases before the ICC would involve states referring cases about events involving their own nationals in their own state. In fact, with the benefit of hindsight, it appears that there is nothing in the Statute to prevent a state party from making such a referral even if there is no “unwillingness” and no “inability” on the state to investigate or prosecute.

Further to the earlier conclusion that the notion of complementarity evokes three different potential types of relationship between the ICC and states, practice has shown us a fourth type of relationship. Earlier, the first three types of relationship were described as (a) one where a state prosecutes and the ICC, if necessary, assists or cooperates with it (that is, a horizontal relationship); (b) one where the ICC ‘reviews’ a decision of a state to or not to prosecute and, upon a finding of unwillingness and the satisfaction of other preconditions, where the ICC goes against the state decision and prosecutes the perpetrator (that is, a vertical relationship); and (c) one where the ICC has taken on the prosecution, but a state or the Security Council either defers it or a state takes on the prosecution itself (that is, a vertical on top of a vertical relationship). The fourth type of relationship allows for an ICC investigation or prosecution in a non-vertical, but horizontal relationship. In the cases of the DRC and Uganda, the OTP is investigating a matter after a state party referred a situation to the OTP involving incidents in the state’s own territory and/or with its own nationals. In
other words, depending upon the underlying circumstances that led to the ICC receiving jurisdiction, an investigation or prosecution may be horizontal in some cases and vertical in others.

While it is obvious that the OTP was following the specific rules in the Statute in terms of notifying those involved and states parties and in terms of seeking judicial authorization, it is interesting to note that the OTP may also have been using the media as a tool in order to encourage state cooperation. In the DRC case above, while the OTP indicated it clearly preferred the DRC be able to prosecute the case and asked for its support, the OTP also sought the assistance of the international community and indicated that, if necessary, it would exercise its *propris motu* power and investigate the case. One may view the OTP’s actions as being done in the full spirit of the notion of complementarity in so far as the OTP put the state in question on notice that the issue was being investigated, of the OTP’s intentions to exercise its own powers and gave the state one last chance to avoid a ruling that the state was “unwilling” or “unable.” One may, however, also consider that the DRC was pressured into giving the referral to the ICC by the OTP press releases and announcements. The pressuring of a state by an international organization may be indicative of a rather proactive approach by the OTP in the assertion of ICC jurisdiction notwithstanding its outward deference to states.

As noted previously, the United States remains opposed to being bound by the ICC and had limited success in trying to get immunity from the ICC via Security Council Resolutions. When the most recent efforts failed, it focused on Article 98(2) immunity agreements. It is of interest that the Darfur resolution specifically decided that “nationals, current or former officials or personnel from a contributing [s]tate outside Sudan which is not
a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing [s]tate for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing [s]tate." 447

The United Nations Press Release relating to the Darfur referral explained that the United States government remained opposed to the ICC and that it preferred the use of a hybrid tribunal.448 Specifically, Anne Woods Patterson stated that the American government abstained from the vote because it did not agree with a Security Council referral to the ICC but that it did not veto the resolution as it felt that the resolution’s wording protected American nationals from the jurisdiction of the court and that the international community assistance was needed in order to end the climate of impunity.449

It appears likely this language was, given the American government’s opposition to the ICC, the only way of avoiding a veto from the United States. Such a veto would have ensured that there was no referral from the Security Council. It remains to be seen, however, whether a precedent was created by the inclusion of such language in the Security Council resolution.

**ICC Policy Paper**

The Prosecutor of the ICC has publicly stated that, “[a]s a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.450 In other words, the
OTP considers one of its main functions will be to help states meet their obligation to investigate and prosecute. The approach of encouraging national governments to prosecute the cases themselves, however, will not work in the unwilling state scenario.

The OTP conducted extensive “expert consultations” and public hearings with selected international experts so that they could comment on a draft policy paper and regulations for the OTP. One of the key themes was “respecting national sovereignty” - therefore sovereignty is still very much on the discussion agenda.

The Summary of Recommendations provides some information about the intended approach of the OTP. First, the “presumption in favour of [s]tate action enshrined in the Statute is principally based on a recognition of the duty of [s]tates to investigate and prosecute.” Second, no deferral to national jurisdiction will occur where there is a Security Council referral under Chapter VII of the Charter. Third, the OTP will work closely with states, inter-governmental organizations, governmental organizations as well as prosecutors. For example, the OTP has said that it will continue “to assist territorial [s]tates with national investigations and prosecutions even where the Office is acting concurrently with regards to key leaders” in an effort to minimize what has been called by some as the “impunity gap.” Fourth, the OTP has announced that it is considering the issue of having “shared caseloads” between international and national jurisdictions “particularly in the context of transitional justice in post-conflict [s]tates.” Further, the OTP has also contemplated sharing of information between the ICC and national authorities and vice versa.

After the public hearings noted above, the OTP issued a policy paper outlining the Office’s general strategy and priorities. With its issuance, the OTP sought public debate on
it. A number of important points were raised that may not have been apparent from reading the Statute and its accompanying documents.

First, the OTP recognized that it operates on a different basis and in a different environment than national prosecution systems and emphasized the need for state support and close cooperation between the OTP and all parties.\(^{455}\) Second, because of the OTP’s limited resources, its permanent structure will involve a small number of senior staff, it will use external resources whenever possible (including national investigators and prosecutors) and it will have a variable number of investigation teams in different regions.\(^{456}\) Third, the OTP will use what it terms a ‘two-tiered approach’. The OTP will focus its efforts and resources on “those who bear the greatest responsibility, such as the leaders of the [s]tate or organization allegedly responsible for those crimes”\(^{457}\) and it will “encourage national prosecutions, where possible, for the lower-ranking perpetrators” or, with the international community, seek to ensure that the offenders are brought to justice by some other means.\(^{458}\) Fourth, the OTP will undertake investigations only when there is a clear case of failure to act by the [s]tate or [s]tates concerned.\(^{459}\) “The Prosecutor will encourage [s]tates and civil society to take ownership of the Court” and anticipates close interaction between [s]tate authorities and the OTP including information sharing in both directions in order to assist the work of each.\(^{460}\) Fifth, on the issue of complementarity, the OTP considers the absence of trials by the ICC as a major success if the absence was due to the effective functioning of national systems.\(^{461}\) Lastly, the OTP is of the view that, “[t]here is no impediment to the admissibility of a case before the Court where no state has initiated any investigation”\(^{462}\) and further held that despite the view that complementarity is based on the duty of states to prosecute those responsible for international crimes, the OTP foresees ICC prosecutions
where (1) the parties who would otherwise have jurisdiction see the ICC as the only neutral and impartial venue and (2) all parties agree that the ICC is the more effective forum. This latter scenario was not foreseen by this author upon a simple reading of the Statute. Accordingly, the jurisdiction of the ICC may not be as limited as first thought, but it nonetheless will be inextricably tied to the notion of complementarity.

The OTP general strategy (at least at this point in time) seems to be to work closely with state authorities and to be more enmeshed and integrated with them than first thought by most working in this area. In my opinion, this early strategy allows the Office to establish networks and set up a foundation of cooperation. The OTP has chosen its first cases as ones that are not on its face antagonistic to state authorities. States referred the cases to them. I doubt that this will remain the long-term approach; as the Darfur experience has shown, there will also be scenarios that lack full cooperation from the state in which the incident occurred or whose nationals have been charged.

No test as to whether this is an accurate assessment of the OTP’s orientation can be made at this time due to the lack of an established track record. Further, whether the OTP’s announced policy will be set in stone or will vary upon the individual circumstances of each alleged atrocity or set of atrocities cannot be known and should be the subject of future research once a larger number of OTP actions can be examined and once a body of jurisprudence has developed.

It is this author’s opinion, however, that the OTP has chosen an initial policy that aims to cooperate and work with states. This is a critical foundation to maximizing a new court’s credibility as it corresponds with the Statute. Legitimacy within the international community will help maximize the political will of states to avoid crimes against humanity,
war crimes and genocide and, if such highly condemned crimes should occur, to ensure international cooperation for the prosecution of those responsible. Further, a court that is respected by and respectful to states will help allay some of the deeply held concerns of those states opposed to the court and, perhaps, convince them to ratify the Statute or agree to be bound by it.

**Comparing the ICC with Other Tribunals**

While there is debate as to whether the IMT and the IMTFE were truly international or were simply "'victors' justice," there is no question of the international character of the ICTY and ICTR. As a result, that is where the real comparisons with the ICC will begin.

As an aside, it is interesting to note that some of the literature on prior *ad hoc* tribunals considered the issue of sovereignty with similar evocative language as found in the ICC-sovereignty literature. Bodley, for example, concluded that the ICTY weakened state sovereignty and found it surprising that there was not "more vociferous objection by the international community for its potential use against other states that might in the future encounter troubles similar to those in the former Yugoslavia."\(^{464}\) Bodley considered the ICTY's significant powers "to investigate, demand the extradition of, and prosecute the citizens of the former Yugoslav States without their consent" as "a substantial incursion into the sovereignty of the states ... which has been weakened and undermined by the ... suspected and demonstrated non-cooperation by ... states."\(^{465}\)

In the course of her analysis, Bodley also noted that, while the appellate decision in *Blaskic*\(^{466}\) is "cloaked in the language of respect for sovereignty" as the ICTY could not issue a subpoena against a state, states could receive "orders or requests" from the ICTY.\(^{467}\) In that
regard, she continued, "[i]n spite of this purportedly cabined stance vis-à-vis sovereign states, it is noteworthy that the judgment in fact extends the Tribunal's reach beyond the power to indict, try, and imprison individuals; it also strengthens the Tribunal's claim to demand the loosely-defined "cooperation" of states." This analysis, however, forgot that the ICTY and the ICTR are children of, or subsidiary organs of, the Security Council.

The ICTY did have occasion to deal directly with the issue of sovereignty when it was argued that Yugoslavia's sovereignty was violated with the establishment of the ICTY. In that regard, it may be recalled that Yugoslavia did not consent to the creation of the ICTY.

In the ICTY's seminal decision in *Prosecutor v. Dusko Tadic*, the Appeals Chamber made some interesting comments on jurisdiction and the notion of sovereignty. The Appeals Chamber decided that it had the jurisdiction to hear and decide on the appeal and interpreted the concept of jurisdiction at the international level in a very broad fashion and advocated what it called a "modern vision of the administration of justice." It also held that the trial court erred in using "a narrow concept of jurisdiction ... limited in its scope "in time and space and as to persons and subject-matter." The appellate court considered jurisdiction as something more than an ambit or sphere or "competence." To the Appeals Chamber, jurisdiction is legitimate legal power "to state the law ... within this ambit, in an authoritative and final manner."

Further, the Appeals Chamber held that a narrow concept of jurisdiction was not warranted in the international law context because of the lack of an integrated judicial system and a centralized structure internationally: "[i]n international law, every tribunal is a self-contained system (unless otherwise provided)." It also held that a narrow concept of
jurisdiction presupposes a certain division of labour that does not exist at the international level. Further, the Appeals Chamber noted that, while the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, it could "only do so to the extent to which such limitation does not jeopardize its "judicial character"... Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself." Further, the Appeals Chamber noted that "a major part of the incidental or inherent jurisdiction of any judicial or arbitral tribunal" consisted of its "jurisdiction to determine its own jurisdiction" [termed "la compétence de la compétence" in French]. This is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court – as of any other judicial body – is to ascertain its own competence."\footnote{474}

The Appeals Chamber allowed Tadic to allege a violation of state sovereignty as part of his defence. In response, the appellate court gave the following ruling:

... Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty.\footnote{475}

The Appeals Chamber further held that,

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.
Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as “ordinary crimes”..., or proceedings designed to shield the accused,” or cases not being diligently prosecuted....

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.476

Further, the Appeals Chamber also adopted the Trial Chamber’s view that the crimes over which it had jurisdiction were “not crimes of a purely domestic nature” but were crimes of a universal nature that transcended “the interest of any one State.”477

The Appeals Chamber noted that, even without certain provisions of the United Nations Charter, with the unique set up of the ICTY, “matters can be taken out of the jurisdiction of a [s]tate” and relied upon the Republic of Bosnia and Herzegovina’s and the Federal Republic of Germany’s consent to the International Tribunal’s jurisdiction and collaboration with it and the universal character of the crimes.478

In an unprecedented fashion, both the ICTY and the ICTR were created under Chapter VII “to maintain or restore international peace and security.”479 The Security Council resolutions that created both tribunals bind all member states under the United Nations Charter. Further, both resolutions required that all states would comply. Although some think that the ICTY and the ICTR “enjoyed legitimacy and authority vis à vis sovereign states immediately upon their inception”480 there was nonetheless a fair bit of debate as to whether the Security Council had the authority to set up legal bodies in such a manner and whether or not there was a real threat to international peace and security. The ICTY and the ICTR were created without input from one affected state (Yugoslavia) and with the clear
opposition of another (Rwanda). Accordingly, these tribunals were not the result of consensus and were created in a non-'complementary' fashion. The structure was imposed from outside of the concerned state and, therefore, to some, both tribunals interfered with a state's domestic affairs.

Both tribunals were limited in mandate and scope. While the statutes did not give the ICTY or the ICTR an international legal personality, it did allow for certain privileges and immunities to be attributed to its judges, the Prosecutor, the Registrar and their personnel.\(^481\)

The powers of the Prosecutor are quite broad - much broader than that of the ICC Prosecutor.\(^482\) For example, the Prosecutor is required to initiate investigations \textit{ex officio} or as a result of information received from any source.

Unlike the ICC, both the ICTY and the ICTR invoke notions of primacy. Despite the creative use of Chapter VII to create both tribunals, they have been the subjects of significant controversy. Initially, in addition to a lack of Security Council enforcement\(^483\) and their huge cost,\(^484\) criticisms have also focused on the inefficiencies of the tribunals and the slow pace of prosecution. Those criticisms have especially fallen upon the ICTR after it was subject to a damning internal review and resulting reorganization. Some states continue to refuse to comply with court orders or otherwise cooperate with either tribunal.

As noted previously, the primacy originally given to the ICTY and the ICTR was watered down with subsequent amendments to the rules. The ICC, however, does not explicitly invoke the notion of primacy. Instead it relies upon the notion of complementarity. But complementarity can, in certain circumstances amount to primacy – the situation where the ICC disagrees with a state's decision not to investigate or prosecute and the ICC does it instead.
As both the ICTY and the ICTR had been created by Security Council resolutions, both tribunals will cease to exist upon a decision to that effect from the Security Council. The future of the ICC, however, is not dependent upon a Security Council resolution. Accordingly, at least in that regard, the ICC is more removed from the Security Council than either the ICTY or the ICTR and, therefore, is possibly more independent. It should not be forgotten, however, that the Security Council nonetheless still has an important relationship to the ICC. The Security Council may refer a situation to the OTP and the Security Council may repeatedly delay an investigation or a prosecution. Also, without the assistance of the Security Council, the Court’s enforcement abilities may be seriously weakened.

Specifically, in relation to the previously cited decision of the Appeals Chamber of the ICTY in the *Tadic* case, it remains to be seen whether the ICC will see jurisdiction in as broad a fashion. In my opinion, times have changed since that decision was released. While there is still no overall centralized structure in international law, the creation of the ICC has set up, to use the words from the *Tadic* decision, “an integrated judicial system operating in an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others.” In other words, the ICC and its notion of complementarity have set up an integrated judicial system. The ICC is only self-contained in a certain set of circumstances – essentially if it has allegations of one of its defined core crimes and a state is unwilling to prosecute.
Special Court for Sierra Leone

Although the Agreement and the Statute of the Special Court for Sierra Leone (hereafter, the SCSL) use some language identical or similar to the Rome Statute, the SCSL differs in many ways from the ICC. The notion of complementarity does not exist in the SCSL legal framework. Instead, the SCSL – a court created with international involvement post-Rome – contains primacy and concurrency provisions.

Although it is a young court, the SCSL has already issued a number of decisions about the legality of its existence, the nature of its jurisdiction, the impact upon the sovereignty of Sierra Leone and the ability of the United Nations to delegate authority. These decisions are of interest in that they see the SCSL as being something very different than that of the ICTY or the ICTR or other internationalized criminal tribunals.

The fact that the SCSL enjoys primacy over national courts does not necessarily represent a trend away from the use of complementarity in the area of international criminal law. In fact, it should not be forgotten that the government of Sierra Leone asked for the SCSL in the first place.

Early case law of the SCSL considered whether it should be considered a domestic or an international court. First, in the Prosecutor v. Kallon, Norman and Kamara, defence counsel argued that granting the SCSL concurrent jurisdiction with national courts and primacy violated the Constitution and that it was a domestic court not an international court. Although the SCSL was established by an agreement between the United Nations and the government of Sierra Leone, the SCSL found that it “is not anchored in any existing system and is therefore outside the national court system” and that it “acts only in an international sphere”. The SCSL also came to that conclusion because the Special Court is not part of
the judiciary of Sierra Leone; it possessed the juridical capacity necessary to enter into agreements - a power not given to national courts and is a treaty-based organ. In the end, the SCSL concluded that the issuance of concurrent and primary jurisdiction did not amend the constitution.

The Appeals Chamber of the SCSL in a later decision cited the Secretary-General’s Report which proposed a Special Court which was “a treaty-based organ not anchored in any existing system” and relied upon the higher level involvement of the Security Council in the establishment of the SCSL before it concluded that the SCSL “is not a national court and is not a part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone.” Further, the Appeals Chamber adopted the following similar conclusions of Professor Sands that:

(a) The special Court is established by treaty and has the characteristics associated with classical international organizations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members).

(b) The competence and jurisdiction ... are broadly similar to that of the ICTY and the ICTR and the ICC....

(c) Accordingly, there is no reason to conclude that the Special Court should be treated as anything other than an international tribunal or court, with all that implies for the question of immunity for a serving Head of State.

The court then held that as the SCSL was an international criminal court and not a national court, the equality of sovereign states was not applicable. Consequently, state-issued immunity could not negate a prosecution.

Second, in the case of Prosecutor v. Kondewa, in a separate opinion, Justice Robertson opined that, although the SCSL had been established by a treaty, the SCSL existed “in another dimension: it may be situated in Sierra Leone but it is not part of the court system
established and regulated by the constitution and other local laws of that country; it has no power from Sierra Leonean law and is not a part of the system of that state; and that while "it has certain rights and obligations under local law," the "Special Court for Sierra Leone is not a Special Court of Sierra Leone." [Italics added].

Mr. Justice Robertson, also noted that the court's authority did not derive from national law and that it "doesn't operate in any sense as a national court." More particularly, he felt that the term "hybrid" did not apply to the SCSL as a hybrid denotes the offshoot of two species but that the SCSL is simply the creation of international law and "derives no juristic authority from national law and does not operate in any sense as a national court subject to the Constitution of Sierra Leone". Justice Robertson described the SCSL as "an international court onto which a few national elements have been grafted" or a "court with international jurisdiction plus."

Justice Robertson commented on the rarity "of a state agreeing to grant to an international court some power to prosecute its own citizens under its own national law". Interestingly (and in this author's opinion, wrongly), in the course of his opinion, Justice Robertson also stated that there is no "exact precedent" for the SCSL and the ICC in the sense that the ICC does not mean that a state party has invested the ICC with its own judicial power.

Third, the Appeals Chamber in Prosecutor v. Gbao decided that the establishment of the SCSL "did not involve a transfer of jurisdiction or sovereignty by Sierra Leone" and that "the judicial power exercised by the Special Court is not that of Sierra Leone, but that of the Special Court itself reflecting the interests of the international community." It further held that the SCSL was a completely new organization established by an international treaty and
that it was not a transfer of jurisdiction but the creation of a new jurisdiction operating in the sphere of international law.\footnote{496}

The SCSL also concluded that there was nothing illegal in the United Nations having made the SCSL beyond the control of the United Nations and that there was no improper delegation of its authority. According to Justice Robertson, "[t]here is nothing in the UN Charter which precludes such arrangements, if they are genuinely conducive to the maintenance or restoration of peace and security" and there is no difference if it is done by an agreement with a single state, by unilateral action or by an agreement with many states.\footnote{497}

These three decisions are of concern to this study for the following three reasons. First, it may be a different type of interaction than what we see with the ICC and national courts, but it is still nonetheless an interaction. Therefore, although the SCSL has held that it is an international tribunal, it is also an internationalized tribunal according to the definitions used in this thesis. Second, the SCSL's limited primacy and concurrence do not take it to "another dimension" removed from national courts. There is still an interaction between the SCSL and national courts. Third, irrespective of the label issue an international tribunal stands for the proposition that different rules apply between international courts and national courts for at least the issue of official immunity. If the court is an international court under current international law, a state's decision for an amnesty or immunity is not enforceable. The question then to be asked in future research is exactly what rules apply in a mixed-up environment like the ICC where courts may share cases and/or jointly try accused as contemplated by the OTP policy paper.
UNMIK (Kosovo) and UNTAET (East Timor (now Timor-Leste))

While some might argue that UNMIK and UNTAET should not be included in this list, this author disagrees. Both stand out as examples where a separate tribunal was not created. Instead, international personnel in both UN administrations worked within the domestic legal system as prosecutors and/or judges. In particular, international judges sat in special panels in East Timor with two international judges and a local judge. In Kosovo international judges were the only international judge, the majority of or the entire assigned panel of judges depending on the procedure used. Notwithstanding the importance of being aware this unusual arrangement in the midst of the recent proliferation of international criminal tribunals, very little has been written about either approach. I hope the present discussion ensures that they become part of the debate.

While the judicial solution used by the Security Council in these instances was not the creation of a Chapter VII court, both arrangements were subject to close scrutiny by the Security Council. The UNMIK and UNTAET models are also closer to the state than the ICTY, ICTR and the ICC in their location and mixed use of staff and law. In my opinion, Ruffert correctly notes that both SRSGs and their missions are “subsidiary organs of the Security Council or at least of the organization as a whole” while “[a]t the same time, acting as organs of the territories concerned.” 498

Not only were both administrations temporary because they were meant to end once certain preconditions were in place, but they could also conceivably be terminated at the wish of the Security Council. Ruffert has some difficulty classifying them into extant categories such as a “state,” “protectorate,” “modern protectorate” and “internationalized territory.” He ultimately concluded that neither has a functional legal personality. 499 I agree.
Further, legislative and executive authority, including the administration of the judiciary was vested in each administration and was exercised by the respective SRSGs. Both issued regulations that set out, among other things, rules on the appointment of local and international judges and prosecutors. Both the SRSGs were authorized by the Security Council to issue regulations and, accordingly, UNMIK is and UNTAET was less proximate to the Security Council than the ICTY, the ICTR, the SCSL and the ICC. The use of international judges and prosecutors in Kosovo and East Timor demonstrate that the creation of a specific court may not be the only available judicial mechanism to combat impunity. While both were experiments and the subject of criticism, it remains to be seen if their models or variants of their models are used elsewhere.

Aptly, according to Ruffert UNMIK and UNTAET are representative of “a territorial legal system from an international source” that could also be characterized as “a UN legal system, but with reference to specific territory.” It may be that the intended OTP approach in the ICC is generally going to fall into those lines unless the ICC disagrees with a state and prosecutes anyway.

Additional UN missions created in the future may overlap with the ICC especially where they create what might be considered to be an additional system of justice within a state or territory. Such a scenario would obviously complicate an analysis of the effect of the ICC framework.

The situation in Cambodia involves yet a different set up. The Extraordinary Chambers, are very limited in jurisdiction, time and are crisis-specific. There is increased state control as compared to other models. As things currently stand there will be no overlap between the Extraordinary Chambers and the ICC, as the ICC cannot handle crimes that
occurred before 2000. The presence of other international and internationalized tribunals, however, highlights the fact that there is the possibility that the ICC will have to share its space with them as well as states.

Conclusion

The ICC, unlike the other courts discussed, is permanent. Its mandate is not restricted to one particular conflict or area of the world. It is an independent institution separate from the United Nations and has an international legal personality. It is, as a result, not dependent on states and, specifically, the Security Council, for its survival. It will, however, have to have a close relationship both with states and the Security Council as both could conceivably hamper its ability to do its work. As well, the ICC will also need the cooperation and assistance of states and, specifically, the United Nations Security Council, if it is to be effective.

The above analysis clearly illustrates some of the aspects of the ICC that, at first blush, seem to be radical may in fact not be. For example, while the ICC has the ability potentially to review a state decision not to prosecute and possibly prosecute a perpetrator, the Rome Statute also has incredible built in respect for state prosecutions. In fact, the ICTY and the ICTR may have been the high-water mark of going beyond state courts with their original version of primacy.

My review has indicated the 1998 Rome Statute (and the associated but later creation of the ICC) has not stopped the creation of additional international or internationalized courts or tribunals. Examples studied above include the Kosovo Courts and UNMIK, the Special Panels affiliated with UNTAET, the SCSL and the Extraordinary Chambers in Cambodia.
The comparison has also shown the existence of the ICC will not prevent the creation of other courts and that their form will not necessarily mirror that of the ICC. (A summary of the comparisons to be made between the ICC and these international and internationalized criminal tribunals can be found in Table 2, in the Appendix to this thesis).

My review has also indicated that there is no apparent consistent model used with such courts either before or after 1998. As a result, it cannot necessarily be said that the creation of the ICC is a "trend" that operates in one direction. While the ICC is certainly an institution that is different than any of the other available legal mechanisms, it is not a given that priority treatment will be given to states (complementarity) when other international or internationalized tribunals enter the picture.

Although the SCSL and the ICC are very different, the ICC could handle some or all the same crimes as the SCSL. Accordingly, it is worth reviewing the opinion of Leonard that the ICC is an example of a "transformation" from state-centered to non-state-centered global governance.

In Kosovo, the International Judges and the International Prosecutors (hereafter, IJPs) under the specific procedures operated separately but within the domestic legal system with the ability, if necessary, to disregard decisions made by local prosecutors or local judges. In East Timor, a similar arrangement was made but no special procedure had to be followed.

The SCSL also has limited primary and concurrent jurisdiction with domestic courts. The SCSL, however, was not a Chapter VII creation. The SCSL was created neither directly by a Security Council resolution (such as the ICTY and the ICTR) nor indirectly by a Security Council resolution (such as in Kosovo and East Timor). Instead, the SCSL was the result of a negotiated agreement between the United Nations and Sierra Leone and, for that
court's purposes, it starkly moves away from the notion of complementarity with Sierra Leone's domestic courts.\textsuperscript{502}

Another important revelation of this chapter's review has been to show that the jurisdiction of the ICC is not affixed to traditional boundaries. While the ICC and the national courts are concurrent and the latter have a jurisdictional primacy that is rebuttable, there may be times when the ICC will be able to assert its jurisdiction in their place. In other words, it is not guaranteed that national courts will keep that primacy.

The jurisdictional space occupied by the ICC is not fixed in time, space or territory. As well, the jurisdictional space of the ICC is highly contingent and is not necessarily hierarchical in nature. At times, the ICC and a domestic court may even share personal jurisdiction with the ICC assisting or handling the more senior leaders and the domestic court handling others at a lower level.

To allow an international organization to exercise itself in an area traditionally seen to be within the sole prerogative of states is remarkable but it is not necessarily new. Compared to other international courts, the ICC's international legal status and aspects of the ICC's precise relationship with states (as complicated as it is) are new. With an overview of other international and internationalized tribunals, however, it is not necessarily clear whether it may be called a trend.
Chapter Four: A Transformation From State-Centered Governance to Non-State-Centered Governance?

This thesis has shown that the first permanent international court to investigate and prosecute international crimes will operate in a controlled environment, subject to strict rules and qualified powers. The ICC’s jurisdiction is limited and is based on a presumption that states will prosecute the core crimes whenever possible. State consent requirements fill the Statute as does the need for state (and Security Council) assistance in investigating and enforcing the law. In most instances, the ICC will likely permit states to prosecute or respect their decisions not to prosecute alleged perpetrators. The ICC may, however, also assist a state if requested to do so. As a result, in that sense, the ICC is “complementary” to states. It shows what might be described as the positive side of complementarity namely, a situation where there is cooperation between the ICC and states.

On the other hand, this thesis has also shown that the ICC will be able to prosecute individuals for a limited number of crimes when a state is “unable” or “unwilling” to prosecute or subject persons accused of such crimes to a meaningful trial. In other words, there will be occasions where the ICC may review state actions and/or inactions and prosecute those responsible contrary to the wishes of a particular state. While I expect that those provisions will be interpreted narrowly and rarely, the potential is there for ICC action that illustrates what might be termed negative complementarity or at least the less positive side of complementarity.

This thesis went beyond and updated Leonard’s work by first embarking upon a detailed analysis of the jurisdictional provisions of the Statute and the notion of complementarity. Then the third chapter looked at the ICC framework that has been
established since 1998 in the context of other international and internationalized criminal tribunals. The previous chapter then looked at the limited practice of the Court and the announced prosecution strategy of the Office of the Public Prosecutor. In light of the above, it is now time to re-examine the conclusions of Eric Leonard in order to determine whether exclusive authority has been ceded to the ICC, its type and its extent.

As may be recalled, Leonard in his first work concluded that the formation of the ICC was an example of a transformation from state-centered governance to non-state-centered governance. Leonard opined that states had ceded some of their authority to the ICC (a new sphere of authority), but retained much of their power. Further, he felt that, while states still had an important or critical role, they would not control the actions of the Court, as the state was no longer the final arbitrator in questions of authority. Speaking from a postinternationalist perspective, Leonard stated that he had seen a shift “from the Westphalian state to multiple spheres of authority, both at the sub-national and the supranational level” and considered the creation of the ICC as an example of such.

On the issue of transformation, I can concur that by creating a new institution there will by definition be a transformation or a shift. It is the exact nature of the transformation, however, that is worthy of deeper consideration.

By describing a movement beyond the modern state to a “third face of sovereignty” in his more recent work, Leonard seems to see the transformation as permanent and unidirectional. It is my opinion, however, that it is not a given that the transformation is fixed despite the fact that the ICC is now a permanent institution. As well, it is not a given that the transformation involves a movement in only one direction
More specifically, the third chapter has shown that the ability of the ICC to assert jurisdiction (what one could call a jurisdictional shift) may be temporary and may go both ways. For example, it is only in a limited set of circumstances that the ICC can assert jurisdiction and there is no guarantee that the ICC will maintain it. In one case, ICC jurisdiction could revert back to a state or go to a different state under the principle of complementarity. In another case, ICC jurisdiction could effectively be temporarily or permanently vetoed by a state or a Security Council deferral respectively. As a result, in some cases the state may still control the actions of the court and may still be the final arbitrator in questions of authority.

Further, the jurisdictional shift may not be a complete shift. It may phase in and phase out such as, for example, when a state successfully defers ICC proceedings. Such a deferral can only be done for a limited period of time. Another example would be, as contemplated in the OTP policy paper, where the ICC and states co-prosecute persons that fall under the Statute or where the ICC commences proceedings, assists the state so that it is "able" to prosecute and then the ICC later sends the matter back to the state to prosecute.

By creating the ICC, states parties have obviously ceded some authority to the ICC. The handing over of such authority, however, is not necessarily permanent. For example, a state party has the right to withdraw from the Statute and has limited opt-out provisions. As well, the ultimate future of the ICC is largely dependent upon the ASP - a body of states that can conceivably widen or restrict the power of the ICC.

I agree with Leonard's conclusion that states still have an important or critical role even within the ICC structure. This thesis, however, has disproved Leonard's sweeping statement that the state is no longer the final arbitrator in questions of authority. The state
has retained that authority in most cases. It is only in a very limited circumstance that the
ICC could conceivably review a state decision not to investigate and/or prosecute. It is that
judicial review component that is perhaps the most remarkable facet of the ICC framework.

In assessing the ultimate conclusion of Leonard that the creation of the ICC is an
eample of a transformation from state-centered governance to one of non-state-centered
governance, one must remember that the type of change varies from situation to situation.
This thesis has shown that there are in fact four different types of relationship between the
ICC and states. First, a horizontal relationship occurs where a state prosecutes and the ICC,
if necessary, assists or cooperates with it. Second, a vertical relationship occurs where the
ICC 'reviews' a decision of a state to or not to prosecute and, upon a finding of unwillingness
and the satisfaction of other preconditions, where the ICC goes against the state decision and
prosecutes the perpetrator. Third, a vertical on top of vertical relationship can occur where
the ICC has taken on the prosecution, but a state or the Security Council either defers it or a
state takes on the prosecution itself. Fourth, a different type of horizontal relationship occurs
where states parties refer situations in their own territory to the ICC such as was done in the
cases of the DRC and Uganda. And yet another type of horizontal relationship exists when
the ICC and a domestic court share personal jurisdiction with the ICC handling the more
senior leaders and the domestic court handling others at a lower level.

In other words, depending upon the underlying circumstances that led to the ICC
receiving jurisdiction, an investigation or prosecution may be horizontal in some cases and
vertical in others. Further, it should be noted that, as the ICC takes on matters and asserts
jurisdiction in individual situations or cases, it is also conceivable that the ICC may be using
one or more of the above relationships around the world simultaneously. Accordingly,
Leonard's conclusion is too simplistic. The jurisdictional space occupied by the ICC is not fixed in time, space or territory and it is highly contingent and is not necessarily hierarchical in nature.

When the ICC framework and practice is considered in conjunction with other international or internationalized criminal tribunals, it is difficult to see any particular trend. In fact, on some levels the ICC involves a lesser transfer of authority than perhaps the other tribunals discussed in this thesis. The ICC is arguably on the whole more deferential to states than all of the other discussed tribunals.

In his more recent work, Leonard found that the jurisdiction of the ICC is quite broad whilst noting that, except for a Security Council referral, the trigger mechanisms limit the jurisdiction of the court and its ability to use its power. Leonard also concluded that by virtue of the notion of complementarity, the ICC can only assert jurisdiction "when the state failed to act according to the principles of international justice". Lastly, similar to his previous conclusions, Leonard also considered the ICC as an example of a trend towards non-state authority wherein the state, although still a crucial agent, is no longer the privileged one. To him, the state "no longer holds supreme authority in the area of humanitarian law."^503

It may also be recalled that Leonard asked and briefly answered three questions in that analysis as follows:

1. Q. Does the ICC undermine the principles of state sovereignty?
   A. Yes, it undermines the concept of state sovereignty but not sovereignty.

2. Q. What are the implications of this institution on sovereignty?
   A. Sovereignty has changed and evolved so as to involve non-state authority.

3. Q. Can we consider the authority structure of the ICC a new form of sovereignty?
A. Complementarity is a new form of sovereignty in a limited way. Specifically, he stated, the ICC maintains supreme authority with no higher authority and a clear set of spatial boundaries only within the realm of humanitarian law.\footnote{504}

In response to Leonard's newer work, this thesis has shown that the three core crimes that fall within the ICC's mandate are not broad. Instead they are narrow. All the same, however, the mechanisms that trigger such jurisdiction severely limit the jurisdiction of the court and its ability to exercise its power. In my opinion, Leonard was also wrong when he interpreted complementarity as limiting the court's jurisdiction so that it could only assert jurisdiction when a state failed to act according to the principles of international justice. In fact, practice has shown that the ICC has accepted jurisdiction when the affected state referred a case involving its own territory or its own nationals and that the notion of complementarity need not necessarily be applied to a Security Council Chapter VII referral as was done in relation to the situation in the Sudan. In addition the OTP foresees ICC prosecutions as possible in more situations including where (1) the parties who would otherwise have jurisdiction see the ICC as the only neutral and impartial venue and (2) all parties agree that the ICC is the more effective forum.

Lastly, it is difficult to determine whether the creation of the ICC is indicative of a "trend" and, in particular, an example of a change from state-centered governance to non-state-centered governance. Admittedly, in a limited set of circumstances one could arrive at this conclusion especially if one focuses on the vertical relationship scenario discussed above. But before one arrives at a final answer on this point, one should look to the rest of the ICC framework and practice as well as developments post-Rome. The ICC framework and practice clearly indicates a considerable respect for and deference to state actions.
Since Rome, other international and internationalized criminal tribunals have been created and, when they are compared with the ICC, it is much more difficult to discern a “trend”. The creation of the ICC has not stopped the creation of other international and internationalized tribunals and their form (which has not remained consistent) has not necessarily mirrored that of the ICC and their set up in some ways is more deferential to the state courts and other ways less deferential to the state courts. No discernable trend can also be seen from their source, status, jurisdictional limits (subject-matter, territorial and temporal), life span and their fit either inside or outside the domestic courts.

As well, even if any trend could be discerned, looking at the events before Rome (including the creation of the ICTY and the ICTR), it may be argued that except for the limited circumstance noted above, there is a trend back towards state-centered governance. In fact, the ICTY and the ICTR may have been the high-water mark of going beyond state courts with their original version of primacy.

While the ICC is certainly an institution that is different than any of the other available legal mechanisms, it is also not a given that priority treatment will be given to states (complementarity) when other international or internationalized tribunals enter the picture. This is an area that will become clearer over time.

While I agree with Leonard’s opinion that there are now multiple spheres of authority, he was in my view partially incorrect when he said that the state had been subsumed by the ICC. That assessment over-simplified a complicated relationship and, by doing so, ignored the fact that the state was still inextricably part of the process. As well, this thesis has shown that those spheres of authority are not necessarily exclusive and “interaction” is likely to occur.
In my opinion there is now no permanent absolute autonomy of the ICC or states in the field of international criminal justice. The authority may at times lie with a state or with the ICC and at times the final authority may be shared because of an overlap. Prescient comments by Mireille Delmas-Marty can, therefore, close this thesis:

complementarity means neither the absolute autonomy of national and international systems of criminal justice, nor the strict subordination of one to the other. As a result, it is difficult to understand the whole system by reference to traditional concepts of legal systems based on hierarchical principles.  

Where Do We Go From Here?

This thesis has attempted to contribute to the research in this field by critically examining the ICC framework, taking into account the limited available indicia of its practice, in order to ascertain its effect. Consideration was also made of the recent proliferation of other international or internationalized tribunals so as to minimize inaccurate generalizations and to include contextual variables that are rarely considered in the study of the ICC.

First, a literature review revealed that the literature easily links the ICC with the notion of sovereignty but does not engage in sophisticated critical analysis either of sovereignty or the related notion of jurisdiction. Further, more often than not state-centric vocabulary enters into the equation and, in particular, the idea that sovereignty is an absolute, exclusive, intransigent concept that will not change over time and that is linked to the state in time and territory. After having reviewed the American position on the ICC, it became evident that a good part of the literature simply echoes that view and reflects the theoretical stance upon which it is based.
Second, an attempt was then made to examine the ICC framework in detail through adding to the research of Eric Leonard. That analysis showed that in fact the relationship between states and the ICC is more complicated than first thought. In addition to its international legal personality, the ICC may exercise jurisdiction in conjunction with or in contradiction to the state.

There are, however, a number of areas that this thesis could not cover. First, because of the complexity of the ICC framework and space limitations, a true analysis of the proliferation of courts and tribunals outside of the criminal context was not possible. Fascinating work is currently being done by the Project on International Courts and Tribunals. In this regard the project is currently looking at the proliferation of courts and bodies outside the criminal arena including specialized tribunals, economic-related tribunals and regional courts. Similarly, apart from specific international and/or internationalized courts and their comparison to the ICC, this thesis does not discuss the impact of domestic courts practicing international law within their jurisdictions and their interpretation of international law and the inevitable cross-fertilization that may occur in each direction. As well, this thesis did not address the inter-relationship between the ICC and international and internationalized criminal tribunals despite the fact that there is little doubt that we will have the ICC and national courts and international criminal tribunals and internationalized criminal tribunals all working at the same time around the world.

Second, there were some serious limitations to this study because of the very nature of the two subjects chosen – sovereignty and the ICC. In that regard, sovereignty remains a contested subject and to some is indefinable. The criteria upon which efforts were made to look for it were based on the traditional notion of sovereignty, as it would be the easiest to
discern. Litfin, however, is correct, in my opinion, when she states that sovereignty is a multidimensional concept. Should better measuring vehicles be available, this research should be supplemented with further study. As well, the ability to study the ICC is somewhat hampered by virtue of the fact that it is so new and does not yet have a record upon which to assess its performance including its legitimacy and effectiveness.

Third, while the focus of this study was primarily the ICC and the state, future research should be done on the inter-relationship between the ICC and states and other non-state actors including, for example, the Security Council and international and internationalized tribunals.

The ICC causes one to reconsider the boundary between domestic and international law and to ask whether that boundary is really as clear as we normally assume it to be. Is it simply a fiction created because of the underlying theoretical premises of political science, domestic law, international relations and international law?

The Secretary-General in August 2004 described the creation of the ICC as "undoubtedly, the most significant recent development in the international community’s long struggle to advance the course of justice and rule of law." Further, the Secretary-General stated that, "[i]t is now crucial that the international community ensure that this nascent institution has the resources, capacities, information and support it needs to investigate, prosecute and bring to justice those who bear the greatest responsibility for war crimes, crimes against humanity and genocide, in situations where national authorities are unable or unwilling to do so. The Security Council has a particular role to play in this regard, empowered as it is to refer situations to the International Criminal Court, even in cases where the countries concerned are not [s]tates parties to the Statute of the Court." I am excited
about the future prospects of the ICC especially if, with that necessary political will, it will more often than not work side by side and together with national courts so that the net closes in on those who commit the most heinous of acts. In closing, I hope this thesis has demonstrated that more questions should be asked about the jurisdictional impact of the ICC and what that means for states and non-state actors around the world.

Endnotes

2 Ibid, pp. 387-388.
3 Piracy, for example, is an exception. Piracy, by its nature, occurs beyond a state's territory. Universal jurisdiction was therefore exercised. Although there are only a handful of crimes that fall into this universal jurisdiction category, there is still no consensus as to the total list. While some of the core crimes in the Rome Statute do fall within the list, this thesis will focus on jurisdictional bases other than that of universal jurisdiction for that reason. It should also be noted that, while states had the monopoly on prosecution, a prosecution did not necessarily require that the crime be committed within a particular state's territory. Jurisdiction may arise for a number of reasons and the extraterritorial application of the law can arise. For an excellent discussion of the concept of universal jurisdiction see Bruce Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford: Oxford University Press, 2003), pp. 105-127.
8 See McGoldrick in McGoldrick et al. (2004), pp. 440-441.
10 Decision Assigning the Situation in the DRC to Pre-Trial Chamber I, ICC-01/04 (5 July 2004) Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, ICC-02/04 (5 July 2004); Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III, ICC-01/05 (19 January 2005) respectively.
Security Council Resolution 1593, UN Doc. S/RES/1593 (2005) and Decision Assigning the Situation in Darfur, Sudan to Pre-Trial Chamber I, ICC-02/05 (21 April 2005).


11 19


23 Ibid, p. 61.

24 Ibid, p. 75.


26 Ibid, footnote 27, at p. 82.


33 Ibid, p. 539.


Ibid, p. 73.
Ibid, p. 29.


Litfin developed her analytical framework by varying the proposed framework for analysis offered by Janice E. Thomson, “State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research” International Studies Quarterly 39 (1995), pp. 213-233, which involved five criteria instead of three. Thomson’s five criteria were (1) recognition, (2) the state, (3) authority, (4) coercion and (5) territory.


Litfin, p. 208.


Ibid, pp. 284, 286 and 289.
Ibid, p. 304.


Ibid, p. 5.
Ibid, p. 2.
Ibid, p. 43 and the footnotes thereon.
Ibid, pp. 59-60.
Ibid, pp. 187-188.

Ibid, p. 325.


Ibid, pp. 2-3 and 16.

Ibid, p. 325.


Ibid, pp. 277 and 315-316.

Ibid, p. 325.


Ibid, pp. 277 and 315-316.

Ibid, p. 100.

Ibid, pp. 94 and 101-102.

Ibid, p. 103.

Newton, p. 73.


Elements of Crimes, ICC-ASP/1/3 (09/09/02).


Cesare Romano, André Nollkaemper and Jann K. Kleffner (Eds.), Internationalized Courts Sierra Leone, East Timor, Kosovo and Cambodia (Oxford, UK: Oxford University Press, 2004) – despite this informative book’s interesting and varied content, it did not contain an analysis like the one used in this thesis.


Lawrence, KS: University Press of Kansas, 1999) at p. 193, Article VI of the Genocide Convention "introduced the world community to the concept of complementarity in international law." The notion of complementarity will be discussed later in this thesis.

Ball, p. 23.

Beigbeder, p. 28.


As well as Control Council Law No. 10 whereby the four major Allies held their own courts in their respective jurisdictions in Germany - Cassese (2003), p. 331.

General Assembly Resolution 95, UN Doc. A/64/Add.1, at 188 (11 December 1946).


An excellent summary of the various proposals is found in Berg, pp. 65-83 as well as in his chapter dealing with the ILC's 1994 Draft Statute.


With respect to the number of judges, the specific qualifications of the judges and the appointment procedure see Statute, Article 36.

Statute, Articles 34, 38 and 39.

Statute, Article 43, paragraph 6.


Statute, Articles 34, 38 and 39.

Statute, Article 43, paragraph 6.

Statute, Article 42, paragraph 4 regarding the Prosecutor and the Deputy Prosecutor(s) and Statute, Article 36, paragraphs 9 and 10 and Statute, Article 37 regarding the Judges.

Statute, Articles 11, paragraph 1, 22, 24 and 126. Statute, Article 11, paragraph 2 also states that, if a state becomes a party to the Statute after it enters into force, the Court may only exercise jurisdiction over crimes after the entry into force of the Statute and before the state became a party, if the state has made an Article 12, paragraph 3 declaration giving the Court such jurisdiction. It should be noted, however, that Article 124 permits a state party to opt out of the Court's jurisdiction over war crimes for a period of 7 years after the entry into force of the Statute. The state may only opt out of such if the war crime(s) was (were) by its nationals or on its territory. That Article is described as a "transitional provision" and the Article further notes that it will be reviewed at the Review Conference that is to be held 7 years after the entry into force of the Statute.

Statute, Article 5. Each of the first three crimes is then respectively defined in Articles 6, 7 and 8. It is interesting to note that Article 1 has noted, in a wording different than Article 5, that the Court will exercise jurisdiction for "the most serious crimes of international concern." On the definition of the crimes other than
the crime of aggression, reference should also be made to the text of the Elements of Crimes, found in the ASP Report, pp. 108-155.

127 See Eighth Preparatory Commission, PCNICC/2001/L.3/REV.1 Annex III regarding possible variations as to the definition and a preliminary list of possible issues relating to it. Following up on the work of the Preparatory Commissions, the ASP also established a working group on the crime of aggression: Report of Assembly of States Parties, First Session, 3 – 10 September 2002, ICC-ASP.1.3 and –ASP/1/3/Corr.1, pp. 5-6 (hereafter referred to as the ASP Report).

128 Statute, Articles 13 and 14.

129 Statute, Articles 13 and 15. A decision to investigate imposes notice obligations upon the OTP and must be authorized by the Court.

130 Statute, Article 13.

131 Statute, Article 12, paragraphs 2 and 3. The same conditions do not seem to apply to a Chapter VII Security Council referral.

132 Statute, Articles 17 to 19.

133 Statute Preamble, paragraph 10 and Statute, Article 1. Accordingly, the Statute thus created the undefined notion of “complementarity.”

134 Statute, Article 17, paragraph 1.


136 Statute, Article 2.

137 The Assembly of States Parties is the executive body that negotiates the more complex documents and must approve foundational documents regarding amendments to the Statute.
fearful of losing control of the adjudicatory or prosecutorial process because they believe that sovereignty requires it, that their own constitutions require it or that this loss of control may produce adverse results”; Joel Cavicchia, “The Prospects for an International Criminal Court in the 1990s” Dickinson Journal of International Law 10 (1992), p. 229: “Some nations expressed concern that … establishment [of international criminal court] would be inconsistent with national sovereignty …”, and Ward, pp. 1130-1131. Gerry J. Simpson, “Politics, Sovereignty, Remembrance” in McGoldrick et al. (2004), p. 54. See also Simpson (1999), p. 135. It should be noted that Mr. Simpson was an advisor to the Australian Government on the establishment of the ICC and part of the Australian delegation at the Rome Conference. See also Newton, pp. 44-47.

Duffy, p. 5.

151 Benedetti and Washburn, pp. 26-27.

152 Ward at pp. 1127-1128.


161 Madeline Morris, “Foreword” Law and Contemporary Problems 64 (2001), p. 1, quoting Associate Press, “Clinton’s Words: ‘The Right Action,’” New York Times (Jan. 1, 2001), p. A6: In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not …

162 Article 112, paragraph 1.


164 In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not ...


noted by David Sheffer. For example, the European Union expressed its “disappointment” and regret of the decision of the United States whilst noting that the American decision “may have undesirable consequences on multilateral Treaty-making and generally on the rule of law in international relations.”

To date, this author has only been able to see a part of the bilateral agreement between the United States and East Timor and the persons covered are extremely broad – namely, any national of either party to such an agreement. When Romania signed a bilateral agreement with the United States it caused a fair degree of consternation in the European Union. Ultimately, the EU issued “guiding principles” whereby it would allow EU members to sign such agreements as long as certain conditions were met – a guarantee that the persons would be investigated and/or prosecuted by the Americans and that the persons covered be narrowed: reference may be made to “U.S. Bilateral Agreements Relating to ICC” American Journal of International Law 97 (2003) 200-203; McGoldrick in McGoldrick et al. (2004), pp. 409-413 and 423-433.


Security Council Resolution 1422, UN Doc. S/RES/1422 (2002) (unanimous); Security Council Resolution 1487, UN Doc. S/RES/1487 (2003) (not unanimous). While the resolutions claimed that it was done pursuant to Chapter VII of the United Nations Charter “in the interests of international peace and security”, and asserted that it was further to Article 16 of the Rome Statute, both were highly criticized. Reference may be made to: Weller, pp. 707-708; and Danesh Sarooshi, “The Peace and Justice Paradox: The International Criminal Court and the UN Security Council” in McGoldrick et al. (2004), pp. 115-120. In particular, I am of the view that, notwithstanding their wording, both resolutions were contrary to Article 16 of the Rome Statute.


American Servicemember’s Protection Act, HR 4775. 107th Congress (hereafter known as ASPA). An earlier version of this Act in 2001 caused a lot of controversy because of its more radical content. It prohibited American cooperation with the ICC, prohibited military assistance to the Statute’s states parties and authorized “the use of “all means necessary and appropriate” to free accused individuals held by or on behalf of the court.” It should also be noted that European delegates at the Preparatory Commission commented negatively on the U.S. support of the ASPA and noted that the Act might alienate America’s allies and erode support for the post–September 11th coalition. Reference may also be made to McGoldrick in McGoldrick et al. (2004), pp. 435 to 437.

ASPA, § 2015.

Zappalà, Cassese et al. (2002), p. 521. Cf this quote, however, should be read in conjunction with the functional immunities that have accrued under customary international law, personal immunities granted by international customary or treaty rules and, immunities granted under national legislation. Whether such immunities apply to international crimes depends upon the source of the immunity: see Antonio Cassese, International Criminal Law (Oxford: Oxford University Press, 2003), pp 264 to 274.

It should be noted that there has been a recent proliferation of international courts and tribunals in a variety of areas apart from international criminal law. A very interesting website outlining a chart of past, present and
proposed international courts and tribunals (including criminal ones) is run by the Project on International Courts and Tribunals (hereafter, known as PICT) available at www.pict-pict.org. The creator of the chart, however, is careful to note that it does not represent an international judicial system: Cesare P.R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" *International Law and Politics* 31 (1999), p. 723. Darryl Mundis in "New Mechanisms for the Enforcement of International Humanitarian Law" *95 American Journal of International Law* (2001), pp. 934-952, summarizes a lot of the actions post-1998 discussed in this chapter of the thesis. At p. 951 he states, "[a]s a result of different circumstances and the need to accommodate various international and domestic pressures, these mechanisms have taken different forms. … All of these judicial mechanisms were the product of political decisions and, as with all political decisions, compromise was necessary." Reference may also be made to other articles located in that special issue on the proliferation of international courts and tribunals. The implications of such are largely beyond the scope of this thesis because it draws attention away from the ICC focus of this thesis. The implications of the recent proliferation may, however, form the basis of future research. As this thesis focuses only on the ICC and internationalized criminal tribunals, the relationship of the ICC to other non-criminal courts such as the International Court of Justice, the European Court of Justice or the European Court of Human Rights, must, as a result, be left to future research.


In that regard, I have adopted the approach of Romano et al. (2004), p. x. Specifically, Romano felt that the terms mixed or hybrid tended to eliminate the role of the international community in their creation and/or implementation.


London Agreement, Article 2.

London Agreement, Article 5. According to Berg, p. 56 and Beigbeder, p. 32, nineteen countries later adhered to the London Agreement.

**Charter**, Articles 2 and 3.


**Charter**, Article 6.


**Charter**, Article 22.

**Charter, Article 4, paragraph (b).**

Ward at p. 1126 referring to London Agreement, Articles 7 and 8.

**IMT Charter, Articles 7 and 8.**

Beigbeder, p. 54 citing the Potsdam Declaration.

**Proclamation of General Order No. 1** by the Supreme Allied Commander, 19 January 1946, am. 26 April 1946. T.I.A.S. No. 1589. See also Beigbeder, pp. 54-58.

Ball, p. 76.
Beigbeder, p. 55. Note should also be made to Berg, p. 58 where he notes that, on its face, the IMTFE was more international because of its larger number of judges but that in practice it was not truly "international."

King and Theofrastous, pp. 47, 52.


ICTY Statute, Articles 2-5.

Ibid, Article 1.

Ibid, Article 8.

In fact, Carla Del Ponte has announced that cases involving those not most responsible will be transferred to competent jurisdictions and indicated an intention to finalize matters at the tribunal by 2010: (hereafter known as the Eleventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/58/297-S/2003/829 (20 August 2003). [ICTY 2003 Report].

Ibid, Article 8.

Article 31 and Rule 4.

Article 9 and Rules 9-11.

Article 10. This Article and similar provisions relating to the ICC and other tribunals in other legal frameworks that severely limit a tribunal’s or a court’s ability to prosecute those who have already been tried by state courts are known as “ne bis in idem” clauses in civil jurisdictions and the double jeopardy rule in common law jurisdictions. As will be noticed most of the ad hoc tribunals and their internationalized counterparts and the ICC refer to the principle under the former term. As this term is referred to in the thesis, it is mean to refer to both contexts especially given the convergence of both legal systems occurring around the world especially with the intermingling of domestic and international law in these bodies.

Rule 11bis.

Article 12, 13quater.

Article 16.

Article 18 and for example, Rules 37-42.

Article 19.

Rule 47.

Article 18.

Article 29.

Article 30.


Reference may be made to Article 14 of the ICTR Statute.


Articles 2 to 4. It should be noted that there are some differences between the definitions in the ICTY Statute and the ICTR Statute as amended.

Article 1.

Ibid.

Article 8.

Security Council Resolution 978

Article 9.

Articles 10 to 13.

Articles 15 and 17.

Article 28.

Article 29.


I repeat an earlier comment that the views in this thesis are my personal views and ought not to be attributed to UNMIK or the United Nations.

The debate over the involvement of NATO without prior Security Council approval – part of the sovereignty versus humanitarian intervention debate - lies beyond the scope of this thesis.

Security Council Resolution 1244 (June 10, 1999), Preamble and paragraphs 1, 5 to 7, 10 and 17.

Ibid, paragraphs 1 and Annex 1 and 2. Sovereignty issues loom large in both Kosovo and the remaining parts of the Former Socialist Republic of Yugoslavia and Kosovo’s status remains an unresolved issue. Yanos, pp. 68 and 69, a former policy adviser to the SRSG, describes the status issue as the “most prominent challenge for the mandate” and notes that “[i]n practice, UNMIK has interpreted its mandate from its very early days as being virtually unrestrained by considerations of sovereignty”: The issue of Kosovo’s status, however, is beyond the scope of this thesis.


Ibid, paragraph 11 (i) and (j).

Ibid, paragraph 9(d).

For a summary of those efforts as well as other efforts by UNMIK reference may be made to: Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (March 12, 2001), S/2001/218.

UNMIK/REG/1999/5 (4 September 1999).

UNMIK/REG/1999/7 (7 September 1999).

Jean-Christian Cady and Nicholas Booth, “Internationalized Courts in Kosovo: An UNMIK Perspective”, Chapter 4 in Romano et al. (2004), p. 60; and “The Criminal Justice System in Kosovo”, (February to July 2000), Legal Systems Monitoring Section, OSCE, pp. 71-72. This chapter and Michael Hartmann, International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping, Special Report No. 112 (United States Institute of Peace, 2003) summarizes the development of the international judges and international prosecutors (hereafter, IJP) program. It commenced in one city and then expanded across Kosovo to deal with concerns of potential miscarriages of justice.


UNMIK/REG/2001/8 “On the Establishment of the Kosovo Judicial and Prosecutorial Council” (6 April 2001), Section 1.2. See also UNMIK/REG/1999/1 as amended, section 1.2. This regulation repealed earlier regulations that had created the Advisory Judicial Commission to do approximately the same tasks: UNMIK/REG/1999/7 as amended by UNMIK/REG/2000/57 and UNMIK/REG/1999/18 as repealed by UNMIK/REG/2001/8. And see also UNMIK/REG/2001/9 “A Constitutional Framework for Provisional Self-Government in Kosovo” (15 May 2001), chapter 9, sections 9.4.7 and 9.4.8.

UNMIK/REG/2001/8 (April 6, 2001), Section 2.1.


Respectively, former Deputy Special Representative of the Secretary-General (hereafter, DSRSG) for Police and Justice, UNMIK and Senior Adviser to the DSRSG for Police and Justice.

Cady and Booth in Romano et al. (2004), p. 62.

UNMIK/REG/2000/6 as amended by UNMIK/REG/2000/34 and UNMIK/REG/2001/2 (hereafter known as Regulation 6). Initially this regulation only applied to one judicial district, but it was later expanded to all five judicial districts of Kosovo. See also UNMIK Press Releases UNMIK/PR/159 and UNMIK/PR/161 and UNMIK/PR/163. Later, international prosecutors were, subject to preconditions, also given the authority to resurrect a case that had been withdrawn so that international prosecutors could remedy potential injustices that had occurred without their knowledge – see UNMIK/REG/2001/12, sections 1.4 to 1.6 and 7. This last regulation’s preamble stated that it was “for the purpose of enhancing the judicial process and the proper administration of justice.”


Regulation 64 as amended, Preamble.

In other words, the promotion of human rights and the maintenance of civil law and order.

Regulation 64 as amended, Preamble.

Ibid.
Sections 2 and 3, UNMIK/REG/1999/1 as amended by UNMIK/REG/1999/24 (12 December 1999), UNMIK/REG/1999/25 (12 December 1999), UNMIK/REG/2000/54 (27 September 2000) and UNMIK/REG/2000/59 (27 October 2000). The fact that the SRSG had to by Regulation set out what laws were applicable to Kosovo establishes that the Kosovo did not have an international legal personality.


A good summary of the history leading up to United Nations involvement in Timor-Leste (then East Timor) is found at Report of the International Commission of Inquiry of East Timor A/54/726, S/2000/59 (January 2000).


Strohmeyer, pp. 50-51. See also Anthony Goldstone, “UNTAET with Hindsight: The Peculiarities of Politics in an Incomplete State” in Special Issue, Global Governance 10 (2004), pp. 83-98. Mr. Goldstone was the senior political affairs officer in UNAMET, UNATET and UNMISET.


Ibid, Section 3.1.

Ibid, Section 22.
Both are now in force via Sierra Leone’s Special Court Agreement, 2002 (Ratification) Act, 2002.

The Secretary-General explained such in his October 2000 Report, p. 3.

First Annual Report of the President of the Special Court for Sierra Leone (2 December 2002 to 1 December 2003).

Report, p. 3.

Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, paragraph 1; Statute of the Special Court for Sierra Leone, Article 1, paragraph 1.

SCSL Statute, Article 1, paragraph 2 gives, subject to preconditions, primary jurisdiction to the sending State.

SCSL Statute, Article 1, paragraph 3.

Charles Ghankay Taylor, Case Number SCSL-2003-01-I, 31 May 2004, Decision on Immunity from Jurisdiction (Appeals Chamber), paragraph 36.

Ibid.

A series of letters between the President of the Republic of Sierra Leone and the President of the Security Council are interesting with respect to the negotiation that led to the agreement – see the SCSL website.

SCSL Agreement, Article 10. Article 10 allows for the Court to sit outside Sierra Leone if certain preconditions are met.

Rule 4.

SCSL Statute, Articles 2-5.

SCSL Agreement, Article 1, paragraph 1; SCSL Statute, Article 1, paragraph 1. The October 2000 Report clearly explains the rationale for the date of November 30, 1996 – see pp. 5-6.

Article 23 of the SCSL Agreement allows for the termination of the Special Court with the agreement of the Government of Sierra Leone and the United Nations “upon completion of the judicial activities of the Special Court.” Letter dated 12 January 2001 from the Secretary General addressed to the President of the Security Council (New York: United Nations, January 2001), UN Doc. S/2001/40, paragraph 12. See also Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, paragraph 28 which noted that the life of the court would be determined by “a subsequent agreement between the parties upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources”.

October 2000 Report, paragraph 9, p. 3 and paragraph 39, p. 8.


October 2000 Report, paragraph 10, p. 3.

Ibid, p. 2.

SCSL Statute, Article 9.

SCSL Agreement, Articles 2-4; SCSL Statute, Articles 11.


SCSL Agreement, Article 2, paragraphs 2 and 3; SCSL Statute, Article 12, paragraph 1; SCSL Agreement, Article 3, paragraph 4; SCSL Statute, Article 15, paragraph 4.

SCSL Agreement, Article 2, paragraph 3.

SCSL Agreement, Articles 3, paragraph 1 and 2; SCSL Statute, Article 15, paragraphs 1 and 4.

SCSL Agreement, Article 6.

October 2000 Report, pp. 12-13. In particular, the Secretary-General stated that the court would not viable or sustainable if it were based on voluntary contributions. The Secretary-General recommended assessed contributions whilst noting that that “would for all practical purposes transform a treaty-based court into a United Nations organ.” According, the Secretary-General then asked that the Security Council consider an alternative namely, a “national” court with international assistance. That latter recommendation was obviously not accepted.

SCSL Agreement, Article 7. Dougherty, pp. 324-328 describes the funding arrangements as “scandalous”.

Second Annual Report of the President of the Special Court for Sierra Leone, p. 4.

SCSL Agreement, Article 11.
SCSL Agreement, Articles 12-15. See also Special Court Agreement, 2002 (Ratification) Act, 2002, section 2.

This is discussed in detail later in the thesis.

Agreement, Article 17; Rule 8 of Rules, Rule 58.


Shraga in Romano et al. (2004), p. 17.


Corell, ibid.


Craig Etcheson, in Romano et al. (2004), p. 183. This is a very interesting article that details the politics behind the creation of the Extraordinary Chambers.

Reference may be made to Corell regarding Cambodia’s accusations of delays. See also statements attributed to Cambodian Prime Minister Hun Sen in “Khmer Rouge leaders to stay in jail”, BBC News Online, November 16, 2001. Internet: http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1659000/1659536.stm.

Shraga in Romano et al. (2004), p. 18.

Etcheson in Romano et al. (2004), pp. 203 to 205


UNGA Res 57/228 on Khmer Rouge Trials (22 May 2003); 2004 Khmer Rouge Trials Report, p. 2 and Addendum A/59/432/Add.1 at p. 1.


Law NS/RKM/0801/12, adopted in its final version by the National Assembly on 11 July 2001, approved by the Senate on 23 July 2001, pronounced as being fully in accordance with the Constitution by the Constitutional Council in its Decision 043/005/2001 KBth Ch (7 August 2001) and signed by the Cambodian king on 10 August 2001. Internet translation in English: http://csf.colorado.edu/beas/main-cas/camb-law.htm/ and www.derechos.org/human-rights/seasia/doc/krlaw.html.

Ernestine E. Meijer “The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal”, Chapter 11 in Romano et al. (2004), compares in detail the differences between the Law and the
Agreement and considers where there may be need for amendment of the law and where there may be problems with clarity and/or with the application of the documents so as to ensure a fair trial.

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Articles 1 to 8 of the Law; Preamble, paragraph 3 and Article 1, Article 2, paragraph 1, Article 9 of the Agreement.

Articles 1 and 2 of the Law; Preamble, paragraph 3 and Articles 1, 2, 5 and 6 of the Agreement.

Articles 1 to 8 of the Law; Preamble of the Agreement. See also Meijer in Romano et al. (2004), pp. 207 and 211.

Article 3, paragraph 2 of the Agreement.

Article 43 of the Law.

Report of the Secretary-General on Khmer Rouge Trials (31 March 2003), pp. 16 and 17.

Articles 15 to 17 of the Agreement; and Report of the Secretary-General on the Khmer Rouge Trials, supra, at p. 4.

Article 3, Article 5, paragraph 1, Article 6, paragraph 1 and Article 7 of the Cambodian Agreement; Articles 16 and 23 of the Law.

Article 25 of the Agreement.

Article 28 of the Agreement.

Article 46 of the Law.

See Meijer in Romano et al. (2004), pp. 220-221.

Shraga in Romano et al. (2004), p. 29.

Statute, Preamble, paragraph 9 and Articles 1 and 4.

Statute, Article 4, Privileges/Immunity Agreement, Article 2; and Negotiated Relationship Agreement, Article 2.

Antonio Cassese (2001), pp. 70-72.


Statute, Article 4; Privileges/Immunities Agreement, Article 2.

Gallant, pp. 561-569.

Cassese (2001), pp. 73-75. Specifically see Statute, Article 48 and Privileges/Immunities Agreement, Article 3.

Statute, Article 4, paragraph 2.

Statute, Article 54, paragraph 2, Article 57, paragraph 3 (d) and Part 9 of the Statute.

Statute, Article 3, paragraph 3. See also Article 62: “Unless otherwise decided, the place of the trial shall be the seat of the Court.”

Rule 100.

Statute, Article 12.

The possibility of giving the ICC universal jurisdiction was discussed at length at Rome, but dismissed: see for example, Gennady M. Danilenko, “ICC Statute and Third Parties” Chapter 48 in Cassese et al. (2002), p. 1876.

Statute, Article 13(a) and the procedure for such a referral is set out in Articles 14 and 18, paragraph 1.

Proprivo motu meaning of their own accord: Article 13(c) and the required procedure for such is found in Statute, Articles 15 and 18, paragraph 1.

Statute, Article 13(b) and no specific procedure is articulated in the Statute.

Statute, Article 11, paragraph 1, Article 22, Article 24 and Article 126. Statute, Article 11, paragraph 2 also states that, if a state become a party to the Statute after it enters into force, the Court may only exercise jurisdiction over crimes after the entry into force of the Statute and before the state became a party, if the state has made an Article 12, paragraph 3 declaration giving the Court such jurisdiction.

Reference may also be made to the Chapter 3 of the Rules which deals with jurisdiction and admissibility and with Statute, Articles 11-19.

The Statute invokes the concept of complementarity and primacy. Primacy means having the first right (should that be the wish) to prosecute an alleged perpetrator. The term complementarity will be analyzed in detail later in this chapter.
Statute, Article 1, Article 25, paragraphs 1 and 2 and Articles 26 and 27.

See Statute, Article 33 which deals with the criminal responsibility of a person who, pursuant to a Government order, commits a crime within the Court's jurisdiction, is not relieved of criminal responsibility. Reference may also be made to the definition of crimes against humanity (Statute, Article 7(2)(a) "attack directed against any civilian population" and Statute, Article 7(2)(i) "enforced disappearance of persons") where state involvement is a prerequisite.

Statute, Article 1. It should be noted that the wording is slightly different in paragraphs 4 and 9 of the Preamble which state: "the most serious crimes of concern to the international community as a whole."

Statute, Article 17, paragraph 1(d).

Statute, Article 53, paragraphs 1 and 2. In arriving at a decision about the "interests of justice", the Prosecutor is required to take into account all of the circumstances, "including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime."

Statute, Article 12(2) and (3).

The historical use of Chapter VII of the Charter of the United Nations has been very limited. Most recently, it was used to create the International Tribunal for the former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR). This raises some very interesting questions as to the kind of cases that may end up before the Court assuming there is no veto by any of the permanent members.

International Commission Report, paragraphs 583 to 589; Press Release relating to the Darfur Security Council Resolution and particularly strong language against the referral as an indication of the Sudanese government's position.

Statute, Article 16.

Statute, Article 18, paragraphs 1, 2 and 3.

Statute, Article 18, paragraph 1.

Statute, Article 17, paragraph 1.

Statute, Article 17, paragraph 2 and 3.

Statute, Article 17, paragraphs 2 and 3.

Statute, Article 19.

Statute, Article 19, paragraph 1.

Statute, Article 19, paragraph 2.

Reference may be made to the cumulative effect of Statute, Article 18, paragraphs 1, 2, 4 and 7.

Cassese (1999), p. 158.

Newton, pp. 26-27.

Statute, Preamble, paragraphs 4 and 10. Reference may also be made to Statute, Articles 1 and 15, 17, 18 and 19 is the framework.


Holmes in Cassese et al. (2002), p. 673.


McKeon, p. 555.


Statute, Preamble, paragraph 6

Rules, Chapters 11 and 12.

Statute, Articles 86 and 93.

Statute, Article 89.

Statute, Article 88.

Statute, Article 87, paragraph 1.

Statute, Article 87, paragraph 5.
As may be evidenced elsewhere in this thesis, I do not accept the idea that boundaries are fixed and that states are watertight.
Security Council Resolution 1564, UN Doc. S/RES/1564 (2004) (hereafter the Darfur Report). The Darfur Report, paragraphs 568 to 570, found that the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders and recommended that there be a referral by the Security Council to the ICC and that a Compensation Commission be created to provide compensation to the victims.


Ibid.


Ibid.

The Darfur Report, however, specifically rejected the possibility of expanding the mandate of an existing ad hoc tribunal; rejected the possibility of creating a new ad hoc tribunal; rejected the possibility of establishing mixed composition courts; and did not recommend the use of other state courts – see paragraphs 573 to 582 and paragraphs 604 to 616.


Statement of Mr. Luis Moreno Ocampo, Ceremony for the Solemn Undertaking of the Chief Prosecutor (June 16, 2003).

While there has also been some speculation as to whether the Security Council could alter affect the ICC by either limiting or expanding the ICC’s jurisdiction, the ICC-UN relationship precludes otherwise.

Summary of recommendations received during the first Public Hearing of the Office of the Prosecutor, convened from 17-18 June 2003 at The Hague, Comments and Conclusions of the Office of the Prosecutor. Both the policy paper and draft regulations are available at the ICC website.

Verbatim transcripts of the hearing are available at the OTP website found on the ICC website.

Summary, pp. 2-4.

ICC Prosecutor Report, p. 5.

Paper on some policy issues before the Office of the Prosecutor (September 2003), p.2.

Ibid, pp. 3 and 8-9.


Ibid, pp. 2-3.

Ibid, p. 2.

Ibid, pp. 2-3.

Ibid, p. 4.

Annex to the “Paper on some policy issues before the Office of the Prosecutor” Referrals and Communications (OTP-ICC 2003).

Ibid, p. 5.

Bodley, p. 439.


Bodley, p. 463.


“Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction”, Prosecutor v. Dusko Tadic, Case No.: IT-94-1-IAR72, Appeals Chamber, 2 October 1995. Judges Li, Abi-Saab and Sidhwa appended separate opinions to the Decision of the Appeals Chamber. While this thesis only cites the main decision (unless noted otherwise), the separate opinions also provide for an interesting read.

An interlocutory appeal is an interim appeal before the completion of a trial. While the above decision involved an interlocutory decision by the Appeals Chamber, it has since been held to have the same status as a final decision on appeal: “Judgement”, “Celebici Case”, Case No.: IT-96-21-A. Appeals Chamber, 20 February 2001, paragraph. 122.
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Tadic, paragraph 6.
Ibid, paragraph 10.
Ibid, paragraphs 11-12 and 18.
Ibid, paragraphs 55.
Ibid, paragraph 58.
Ibid, 59 quoting Decision at Trial, para. 42.
Ibid, paragraphs 56 and 57. The ICTR shares same appeals chamber as ICTY, therefore Tadic decision also bind the ICTR. See also Prosecutor v. Kanyabashi (Jurisdiction) (18 June 1997) ICTR-96-15-IT.
Newton, p. 41.
For example, ICTY Statute, Article 30.
Article 18 and for example, Rules 37-42.
Bodley, pp. 447 to 452 outlines some of the problems with state cooperation.
Paragraphs 49 to 52.
The preamble to Security Council Resolution 1315, UN Doc. S/RES/1315 (2000), it “made clear that the Special Court was established to fulfill and international mandate and is part of the machinery of international justice.”
Ibid, paragraph 41.
Ibid, paragraph 16.
Ibid, paragraphs 15, 17 and 18. This case also shows the difficulty with trying to label and classify items and place them in their respective pigeon-holes. For example, to the SCSL, the SCSL is an international court. To Doherty, supra, the SCSL is a hybrid and to Archibald, the SCSL is a national court: Archibald, International Criminal Courts Practice, Procedure and Evidence (Sweet & Maxwell Limited, 2003, London) sees SCSL as a not an international tribunal – “spearheaded by the national system, with an injection of international assistance. An international tribunal is thus not imposed or instituted to replace the domestic system” at p. 30.
Ibid, paragraphs 19, 26 and 27.
Ibid, pp 622, 626 and 630.
Ruffert, pp. 627-630.
Ruffert, pp. 622 and 623. It should be noted that Ruffert, however, also notes at p. 623 that “[f]rom another perspective the fabric woven by the manifold regulations establishes the legal system of the territories concerned; it is the law of Kosovo or law of East-Timor” and that the “UN-legislation and municipal legal provisions are complementing each other”.
The question of how the ICC inter-relates with other existing international or internationalized tribunals is an interesting one and beyond the scope of this thesis.
Ms. Frulli's view that the different route taken may have been to ensure that the state concerned was involved as much as possible is likely correct.

Leonard, at pp. 94 and 101-102.

Ibid, p. 103.


Ibid.
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*Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III, ICC-01/05 (19 January 2005).*

*Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, ICC-02/04 (5 July 2004).*


*Celebici Case*, Judgment, Case No.: IT-96-21-A, Appeals Chamber (20 February 2001).


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<tbody>
<tr>
<td><strong>Status</strong></td>
<td>Tribunal separate from state</td>
<td>Tribunal separate from state</td>
<td>Special international or mixed panels separate from but within domestic court system as defined by the United Nations; no specialized tribunal</td>
<td>Special mixed panels separate from but within domestic court system as defined by the United Nations, no specialized tribunal</td>
<td>'Court' separate from domestic courts</td>
<td>'Court separate from domestic courts</td>
</tr>
<tr>
<td><strong>International versus internationalized</strong></td>
<td>International</td>
<td>International</td>
<td>Internationalized</td>
<td>Internationalized</td>
<td>International</td>
<td>Internationalized and likely international</td>
</tr>
</tbody>
</table>

1 This Chart does not include the IMT or the IMTFE as both ceased to exist decades ago and given the criticisms that they were ‘victor’s justice’ as noted above. This Chart also does not include the recently created War Crime Chamber (WCC) and the Special War Crimes Department in Bosnia and Herzegovina as a separate tribunal given its relation to the ICTY. Other tribunals have been recommended in other parts of the world and this list may grow in the near future.

2 See also the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.
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<tbody>
<tr>
<td>Jurisdiction</td>
<td>Grave breaches of the Geneva conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity; serious violations of international humanitarian law committed in the territory of the former Yugoslavia; not conflict specific and not limited to any particular side</td>
<td>Genocide, crimes against humanity and violations of Article 3 of the Geneva Conventions and of the Additional Protocol II (Articles 2-4); serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states; not conflict specific and not limited to any particular side</td>
<td>Domestic law and UNMIK regulations; when local judges/prosecutors cannot or ought not to do it, not conflict specific and not limited to any particular side</td>
<td>Serious criminal offences (genocide, war crimes, crimes against humanity, murder, sexual offences and torture); committed in East Timor or by an East Timorese citizen or where the victim was an East Timorese citizen; not conflict specific and not limited to any particular side</td>
<td>Crimes against humanity, violations of Article 3 common to the Geneva Conventions of August 12, 1949 and of Additional Protocol II of June 8, 1977, listed serious violations of international humanitarian law and listed crimes under Sierra Leonean law; to prosecute those who bear the greatest responsibility for the above crimes committed in the territory of Sierra Leone; not conflict specific and not limited to any particular side</td>
<td>The crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute and grave breaches of the 1949 Geneva Conventions and such other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001; senior leaders of Democratic Kampuchea who were most responsible for the above crimes; conflict specific</td>
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<td><strong>b. territory</strong></td>
<td></td>
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<td>Planning to sit in the territory of Former Socialist Federal Republic of Yugoslavia, but it can sit elsewhere with permission</td>
<td>Rwanda and offences committed in the territory of neighbouring states, but it sits in Tanzania and it can sit elsewhere with permission</td>
<td>Territory of Former Socialist Federal Republic of Yugoslavia and sits in Kosovo but the panels can hear evidence in other jurisdictions</td>
<td>East Timor and sits in East Timor (especially Dili) but the special panels could hear evidence in other jurisdictions</td>
</tr>
<tr>
<td><strong>c. temporal</strong></td>
<td></td>
<td></td>
<td>Retroactive and open ended</td>
<td>Retroactive and one month</td>
<td>Retroactive and open ended</td>
<td>Retroactive</td>
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<td>No</td>
<td>Yes because part of an interim administration</td>
<td>Yes as part of an interim administration</td>
<td>Yes as part of an interim administration</td>
<td>Yes</td>
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<td><strong>Relationship with domestic courts</strong></td>
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<td>• Not within the domestic court system</td>
<td>• Beside and within the domestic court system as defined by the United Nations</td>
<td>• Beside and within the domestic court system as defined by the United Nations</td>
<td>• Not in domestic court system</td>
<td>• Not within the domestic court system</td>
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<td></td>
<td>• Concurrent</td>
<td>• Concurrent</td>
<td>• Concurrent jurisdiction^</td>
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^ Also concurrent with ICTY and ICTY has primacy over Kosovo Regulation 6 and 64 panels.
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<td>• Primacy and later changed to limited primacy by rule amendment and completion strategy</td>
<td>• Primacy and later changed to limited primacy by rule amendment and completion strategy</td>
<td>• Primacy</td>
<td>• Primacy</td>
<td>• Primacy towards Sierra Leonean courts, but no primacy to other states</td>
<td>• Primacy</td>
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### Table 2

**COMPARISON OF THE INTERNATIONAL CRIMINAL COURT WITH OTHER INTERNATIONAL AND INTERNATIONALIZED CRIMINAL TRIBUNALS BEFORE AND AFTER THE 1998 ROME STATUTE**

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<tbody>
<tr>
<td><strong>Status</strong></td>
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<td>Special mixed panels located within the domestic court system as defined by United Nations, no specialized tribunal</td>
<td>‘Court’ separate from domestic courts</td>
<td>‘Court’ separate from domestic courts</td>
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<tr>
<td><strong>Duration</strong></td>
<td>I. Temporary</td>
<td>Temporary</td>
<td>Temporary</td>
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<td>II. Temporary</td>
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<td><strong>International or</strong></td>
<td>I. International</td>
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<td>International</td>
<td>Internationalized and</td>
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* See also the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.
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<tr>
<td>International legal personality</td>
<td>Both no</td>
<td>Yes but part of interim administration</td>
<td>Yes but part of interim administration</td>
<td>Yes</td>
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<td>Relationship with national courts</td>
<td>Both</td>
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<td>Beside and within the domestic court system</td>
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<td>Complementarity</td>
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<td>• Concurrent jurisdiction</td>
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<td>• Concurrent jurisdiction</td>
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<td>• Limited primacy as, in limited circumstances can judicially review state decisions and assert jurisdiction</td>
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<td>• Primacy and later changed to limited primacy by rule amendment and completion strategy</td>
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<td>primacy can, however, dissolve if states or the Security Council seek an ICC deferral</td>
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<td>• Primacy with a Security Council referral</td>
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primacy can, however, dissolve if states or the Security Council seek an ICC deferral

• Primacy with a Security Council referral
ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

PREAMBLE

The States Parties to this Statute,

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

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

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

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

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

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

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

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

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

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

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

Have agreed as follows:
PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

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

Article 2

Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3

Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.
PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the Jurisdiction of the Court

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

   (a) The crime of genocide;
   (b) Crimes against humanity;
   (c) War crimes;
   (d) The crime of aggression.

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

Article 6

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

   (a) Killing members of the group;
   (b) Causing serious bodily or mental harm to members of the group;
   (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   (d) Imposing measures intended to prevent births within the group;
   (e) Forcibly transferring children of the group to another group.
Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would
be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes,
historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscription or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

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

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.
Article 9

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11

Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

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

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

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

**Article 13**

**Exercise of jurisdiction**

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

**Article 14**

**Referral of a situation by a State Party**

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.
Article 15

Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.
Article 17

Issues of admissibility

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

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

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

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

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

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

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

   (b) There has been an unjustified delay in the proceedings which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice;

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

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.
Article 18

Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.
Article 19

Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
   
   (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
   
   (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
   
   (c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.
8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21

Applicable law

1. The Court shall apply:

   (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

   (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

   (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

**Article 23**

Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

**Article 24**

Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

**Article 25**

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27

Irrelevance of official capacity

1. 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.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.
Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.
Article 30

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:
   
   (a) In relation to conduct, that person means to engage in the conduct;

   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

   (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

   (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

   (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32
Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33
Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34
Organ of the Court

The Court shall be composed of the following organs:
(a) The Presidency;
(b) An Appeals Division, a Trial Division and a Pre-Trial Division;
(c) The Office of the Prosecutor;
(d) The Registry.

Article 35
Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36
Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

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

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

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

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

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

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

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:
(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

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

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

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

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

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

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

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

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

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

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

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more
than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

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

   (i) The representation of the principal legal systems of the world;

   (ii) Equitable geographical representation; and

   (iii) A fair representation of female and male judges.

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

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

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

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

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

Article 37

Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.
Article 38

The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

   (a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

   (b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39

Chambers

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

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

   (b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;
(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40

Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.
Article 41

Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

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

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

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

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

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

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

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

Article 43

The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.
3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44

Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.
Article 45

Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46

Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

   (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

   (b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

   (a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

   (b) In the case of the Prosecutor, by an absolute majority of the States Parties;

   (c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.
Article 47

Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48

Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

   (a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

   (b) The Registrar may be waived by the Presidency;

   (c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

   (d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.
Article 49

Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50

Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

   (a) Any State Party;

   (b) The judges acting by an absolute majority; or

   (c) The Prosecutor.

   Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52

Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 53

Initiation of an investigation

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

   (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

   (b) The case is or would be admissible under article 17; and
(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

   (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

   (b) The case is inadmissible under article 17; or

   (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

   (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.
Article 54

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:
   
   (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
   
   (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
   
   (c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:
   
   (a) In accordance with the provisions of Part 9; or
   
   (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:
   
   (a) Collect and examine evidence;
   
   (b) Request the presence of and question persons being investigated, victims and witnesses;
   
   (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
   
   (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
   
   (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
   
   (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.
Article 55

Rights of persons during an investigation

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

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

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

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

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

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

   (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

   (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

   (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

   (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity
1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.
(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

   (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

   (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

   (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

   (d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.
(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58

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

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

   (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

   (b) The arrest of the person appears necessary:

       (i) To ensure the person's appearance at trial,

       (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

       (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

   (a) The name of the person and any other relevant identifying information;

   (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

   (c) A concise statement of the facts which are alleged to constitute those crimes;

   (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

   (e) The reason why the Prosecutor believes that the arrest of the person is necessary.
3. The warrant of arrest shall contain:

   (a) The name of the person and any other relevant identifying information;

   (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

   (c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

   (a) The name of the person and any other relevant identifying information;

   (b) The specified date on which the person is to appear;

   (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

   (d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59
Arrest proceedings in the custodial State
1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

   (a) The warrant applies to that person;
   (b) The person has been arrested in accordance with the proper process; and
   (c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

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Article 60
Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.
2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

**Article 61**

**Confirmation of the charges before trial**

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

   (a) Waived his or her right to be present; or

   (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

   In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

   (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

   (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.
The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:
   (a) Object to the charges;
   (b) Challenge the evidence presented by the Prosecutor; and
   (c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:
   (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
   (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
   (c) Adjourn the hearing and request the Prosecutor to consider:
      (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
      (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice
to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62

Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63

Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64

Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

   (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

   (b) Determine the language or languages to be used at trial; and

   (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

   (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

   (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

   (c) Provide for the protection of confidential information;

   (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

   (e) Provide for the protection of the accused, witnesses and victims; and

   (f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.
8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65
Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt,
together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

   (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

   (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

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**Article 66**

**Presumption of innocence**

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

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**Article 67**

**Rights of the accused**

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.
Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.
Article 69

Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

   (a) The violation casts substantial doubt on the reliability of the evidence; or

   (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State’s national law.
Article 70

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

   (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

   (b) Presenting evidence that the party knows is false or forged;

   (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

   (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

   (e) Retaliating against an official of the Court on account of duties performed by that or another official;

   (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

   (b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.
Article 71
Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72
Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;
6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

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

(b) In all other circumstances:

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

Article 73

Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74

Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.
Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76

Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.
3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 77

Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

   (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

   (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

   (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

   (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest
individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79

Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80

Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

Article 81

Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
(i) Procedural error,
(ii) Error of fact,
(iii) Error of law, or
(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.
Article 82

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

   (a) A decision with respect to jurisdiction or admissibility;

   (b) A decision granting or denying release of the person being investigated or prosecuted;

   (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

   (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83

Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

   (a) Reverse or amend the decision or sentence; or
(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84

Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.
2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85

Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.
Article 87

Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of
cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 89

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

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

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;
(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

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

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

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

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

**Article 90**

**Competing requests**

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person’s surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

   (a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

   (b) The Court makes the determination described in subparagraph (a) pursuant to the requested State’s notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has
determined that the case is inadmissible. The Court’s determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

   (a) The respective dates of the requests;

   (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

   (c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person’s surrender:

   (a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

   (b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.
Article 91

Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

   (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

   (b) A copy of the warrant of arrest; and

   (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

   (a) A copy of any warrant of arrest for that person;

   (b) A copy of the judgement of conviction;

   (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

   (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.
Article 92

Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

   (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

   (b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

   (c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

   (d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93

Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

   (a) The identification and whereabouts of persons or the location of items;
(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production
of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (1), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.
(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

   a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

   b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

   a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

   b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94
Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the
requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

**Article 95**

**Postponement of execution of a request in respect of an admissibility challenge**

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

**Article 96**

**Contents of request for other forms of assistance under article 93**

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

   (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

   (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

   (c) A concise statement of the essential facts underlying the request;

   (d) The reasons for and details of any procedure or requirement to be followed;

   (e) Such information as may be required under the law of the requested State in order to execute the request; and

   (f) Any other information relevant in order for the assistance sought to be provided.

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3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

**Article 97**

**Consultations**

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, *inter alia*:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

**Article 98**

**Cooperation with respect to waiver of immunity and consent to surrender**

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

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.
Article 99

Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

   (a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

   (b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.
Article 100

Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

   (a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

   (b) Costs of translation, interpretation and transcription;

   (c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

   (d) Costs of any expert opinion or report requested by the Court;

   (e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

   (f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101

Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.
Article 102

Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 103

Role of States in enforcement of sentences of imprisonment

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

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

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

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

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

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

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;
(b) The application of widely accepted international treaty standards
governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

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

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

Article 104

Change in designation of State of enforcement

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

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

Article 105

Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance
with article 103, paragraph 1 (b), the sentence of imprisonment shall be
binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for
appeal and revision. The State of enforcement shall not impede the making of
any such application by a sentenced person.

Article 106

Supervision of enforcement of sentences and
conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the
supervision of the Court and shall be consistent with widely accepted
international treaty standards governing treatment of prisoners.
2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108

Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.
Article 109

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

   (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

   (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

   (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.
5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

**Article 111**

**Escape**

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

**PART 11. ASSEMBLY OF STATES PARTIES**

**Article 112**

**Assembly of States Parties**

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;
(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

   (a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

   (b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.
10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113

Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114

Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115

Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116

Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.
**Article 117**

**Assessment of contributions**

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

**Article 118**

**Annual audit**

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

**PART 13. FINAL CLAUSES**

**Article 119**

**Settlement of disputes**

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

**Article 120**

**Reservations**

No reservations may be made to this Statute.

**Article 121**

**Amendments**

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

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

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

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

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

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

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

Article 122

Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall
promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123

Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124

Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.
Article 125

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126

Entry into force

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

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

Article 127

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the
withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 128

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

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