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# The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute

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## I. INTRODUCTION

On July 17, 1998, members of the international community that converged at the United Nations (UN) Diplomatic Conference of Plenipotentiaries (held in Rome, Italy, from June 15 to July 17, 1998) voted 120 to 7 in favor of adopting the Rome Statute of the International Criminal Court (ICC Statute).[1] The ICC Statute established a *sui generis* permanent international criminal court and became the first multilateral legal document in recent years to detail the investigation and prosecution of

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1. *See* The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (July 17, 1998), *reprinted in* 37 I.L.M. 999 (1998) [hereinafter ICC Statute]. The States that voted against the ICC Statute include the U.S., China, India, Iran, Iraq, Israel, and Libya. The U.S. and Israel signed the Statute on December 31, 2000, and on May 6, 2002, and August 28, 2002, respectively, informed the U.N. Secretary-General that they have no legal obligations arising from their signatures of the Rome Statute on December 31, 2000. *See* Multilateral Treaties Deposited with the Secretary-General, available at <http://untreaty.un.org/English/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp> (visited March 13, 2006) [hereinafter Multilateral Treaties].

international crimes such as genocide, war crimes, and crimes against humanity.[2]

Also, the ICC Statute confirms and codifies the principle of individual criminal liability by unequivocally providing that a person who commits a crime within the jurisdiction of the Court shall be held individually responsible and liable for punishment.[3] This principle, which was first propagated by the Nuremberg tribunal, evidences the recognition by the international community that gathered at the Rome Conference[4] that crimes against international law are committed by individuals, not abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[5]

According to the Statute of the ICC, the Court was established to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished."[6] Also, the ICC was created to realize the determination of the international community "to put an end to impunity for the perpetrators of these crimes, and thus to contribute to the prevention of such crimes."[7] Therefore, it is the hopeful expectation of supporters of the Court that it serves as "a deterrent to future interna-

2. ICC Statute, *supra* note 1, art. 5(1). The Court may exercise jurisdiction over the crime of aggression when "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." *Id.* art. 5(2). Also, terrorism and drug related crimes were adopted into the text in an annexed resolution and will become part of the crimes under the Court's jurisdiction once it is defined at a review conference in the future. *See* Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex 1, Res. E, U.N. Doc. A/CONF.183/10 (1998). Under this process, the earliest time aggression, terrorism and drug related crimes could be included in the Court's jurisdiction as a crime is seven years after the statute entered into force. *See* ICC Statute, *supra* note 1, arts. 121, 123, detailing the process of amending the ICC Statute.

3. *Id.* art. 27.

4. About 160 countries and a wide representation of non-governmental organizations participated in the Rome Conference. For a complete list of states and organizations represented at the Conference, see Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/10, Annex II, III (1998).

5. *See* International Military Tribunal (Nuremberg) Judgment and Sentences, 41 A.J.I.L. 172, 220-21 (1947).

6. ICC Statute, *supra* note 1, preamble, para. 4.

7. *Id.* preamble, para. 5. The United Nations also suggested that the Court was needed to *inter alia*, "to achieve justice for all," "to end impunity," "to help end conflicts," "to remedy the deficiencies of ad hoc tribunals," "to take over when national criminal justice institutions are unwilling or unable to act," and "to deter future war criminals." *See* Establishment of an International Criminal Court – Overview, available at: <http://www.un.org/law/icc/general/overview.htm> (visited on March 6, 2006).

tional crimes, a contributor to stable international order, and a reaffirmation of international law."[8]

The establishment of the ICC and the entry into force of the ICC Statute on July 1, 2002,[9] 129 years after the idea was first suggested in 1872 by Gustave Moynier, a Swiss diplomat and one of the founders of the International Committee of the Red Cross[10] was one of the remarkable achievements of the twentieth century. However, the understandable euphoria surrounding the establishment of the ICC obscured the fact that many compromises that were necessary to reach a successful conclusion significantly diluted the original aspirations. The reality is that the ICC Statute cut down on the ability of the Court to exercise jurisdiction through the principle of complementarity. The ICC could act only in those cases where States were unwilling or unable to investigate or prosecute the accused. The Prosecutor could not act without prior approval of the Pre-trial Chamber. Also, absent UN Security Council action, the Court can only exercise jurisdiction after it has passed through the layer of procedural rules requiring the Prosecutor to obtain the consent of either the State on whose territory the crime is committed or the State of nationality of the accused.[11] Furthermore, the UN Security Council has authority to halt prosecutions if, in its opinion, such prosecution will not be compatible with its responsibilities under Chapter VII of the UN Charter.[12]

This paper highlights some of the inherent bottlenecks in the exercise of ICC jurisdiction that may diminish the Court's ability to uphold the principle of individual criminal liability. In particular, this paper will analyze the principle of complementarity between the ICC and States Parties to the ICC Statute. Additionally, the legality of the so called Article 98 Immunity Agreement will be discussed. This paper without equivocation contends that the conclusion of Article 98 immunity agreement by ICC States Parties is a clear violation of their obligation to cooperate with the Court and to arrest and surrender suspects to the Court. Preceding the

8. Alison McIntire, *Be Careful What You Wish for Because You Just Might Get It: The United States and the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 249, 259 (2001).

9. *Id.* art. 126, provides that the Statute shall come into force when ratified by 60 countries. By the end of June 2002, more than 60 States had ratified the Statute and as of March 2006, about 139 States had signed the Statute and 100 of those States had ratified it. *See also,* Multilateral Treaties, *supra* note 1.

10. Gustave Moynier, *Note sur la création d'une institution judiciaire internationale proper à prévenir et à reprimer les infractions à la Convention de Genève*, BULLETIN INTERNATIONAL DES SOCIETES DE SECOURS AUX MILITAIRES BLESSES, NO. 11, Apr. 1872, at 122, *translated in* Christopher Keith Hall, *The First Proposal for a Permanent International Criminal Court*, 322 INT'L REV. RED CROSS 57, 72 (1998).

11. ICC Statute, *supra* note 1, art. 12.

12. *Id.* art. 16.

discussion on the bottlenecks in Court jurisdiction is a brief discussion of the provisions of the ICC Statute regarding individual criminal responsibility.

In conclusion, this paper will argue that while the establishment of the ICC is one of the remarkable events of the twentieth century, the highlighted obstacles are capable of restricting the reach and effectiveness of the ICC as an institution designed to bring an end to the culture of impunity. Consequently, this paper advocates the elimination of said bottlenecks.

## II. THE PRINCIPLE OF INDIVIDUAL CRIMINAL RESPONSIBILITY

The principle of individual criminal responsibility is firmly established in Part III of the ICC Statute. Generally, it provides that an individual is criminally responsible for his or her conduct.[13] The individual's criminal responsibility extends to the commission of the crime, whether as an individual or as a group, and includes ordering, soliciting or inducing the commission of a crime that in fact occurs or is attempted; or facilitating the commission of a crime, or aiding, abetting or otherwise assisting in its commission or attempted commission.[14] Also, individual criminal responsibility attaches in other ways, for instance, where the individual intentionally contributes to the commission or the attempted commission of a crime by a group of persons acting with a common purpose, when that contribution is 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 is "made in the knowledge of the intention of the group to commit the crime."[15]

In cases of genocide, an individual would also have criminal responsibility for direct and public incitement.[16] Further, an individual is criminally liable for attempting to commit a crime so long as the individual has taken substantial steps toward commission of the crime, even if the crime does not occur because of circumstances independent of the individual's intention.[17] However, a timely withdrawal resulting in complete and

13. ICC Statute, *supra* note 1, art. 25(3).
14. *Id.* art. 25(3)(a-c).
15. *Id.* art. 25(3)(d).
16. *Id.* art. 25(3)(e).
17. *Id.* art. 25(3)(f).

voluntary abandonment of the criminal purpose shall excuse punishment under the Statute.[18]

The Court's jurisdiction extends to all persons regardless of their official capacity.[19] This means that any member of Government or Head of State shall be subject to the jurisdiction of the ICC.[20] Therefore, the official position of the individual, or any immunity or special procedural rules that may attach to the individual because of his or her official capacity, will not bar the jurisdiction of the Court.[21] In essence, national amnesties, pardons or similar measures of impunity for crimes under the Court's jurisdiction, which prevent the discovery of the truth and prevent accountability in a criminal trial, cannot bind the Court.[22]

However, it is not unlikely that the Court may consider the outcome of credible alternative measures of accountability such as the Truth and Reconciliation Commission. The Court may do this before or after the completion of investigation, if the Prosecutor, taking into account all circumstances including the gravity of the crimes, the interests of victims, and other strategic factors,[23] determines that it is not "in the interests of justice" to investigate or prosecute.[24] According to Judge Kau, this question is not simply theoretical because the "Prosecutor operates in the context of ongoing conflicts, often at the same time as peace negotiations are taking place, purely legal considerations may not always be the sole basis for deciding whether or not to prosecute."[25] The Trial Chamber may, on its own initiative, review the Prosecutor's decision not to

18. *Id.*

19. *See id.* art. 27(1) which provides that the Statute:

> shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity whether as a Head of State or ..... [any other capacity] 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.

20. *Id.*

21. *Id.* art. 27(2). Article 27 (2) provides that: "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."

22. Amnesty International, *The International Criminal Court: Checklist for Effective Implementation* 6, AI Index: IOR 40/011/2000, 1 August 2000, available at: <http://web.amnesty.org/library/index/engior400112000?open&of=eng-385> [hereinafter *Checklist for Effective Implementation*].

23. Hans-Peter Kaul, *Developments at the International Criminal Court: Construction Site For More Justice: The International Criminal Court After Two Years*, 99 A.J.I.L. 370, 375 (2005) (observing that examples of factors that might be considered are the protection of victims, the potential impact of investigations on the conflict in question, and the question of the existence of national criminal prosecution initiatives).

24. ICC Statute, *supra* note 1, arts. 53(1)(c), 53(2)(c). *See also,* Annex to the "Paper on Some Policy Issues Before the Office of the Prosecutor": Referrals and Communications 1 (Apr. 23, 2004) [hereinafter Paper on Some Policy Issues].

25. Hans-Peter Kau, *supra* note 23, at 375. Judge Kaul is a Judge of the International Criminal Court, and President of the Pre-Trial Division.

proceed with an investigation or prosecution on the grounds that it will not serve the interest of justice.[26]

Regarding command responsibility, the ICC Statute provides that command responsibility is a form of criminal responsibility in addition to other forms of responsibility and that military commanders are not immune from responsibility for the acts of their subordinates.[27] Also, command responsibility extends to any superior in a nonmilitary setting.[28] Thus, Article 28 deals with the responsibility of military commanders and other superiors with respect to the criminal acts of subordinates under their "effective authority and control."[29] The military commander or other superior is liable if he or she knew or should have known that his or her subordinates were committing or about to commit crimes prohibited by the Statute and failed to take reasonable steps to "prevent or repress... or to submit the matter to the competent authorities."[30]

The ICC Statute prohibits both "superior orders" and "prescription of law" as grounds for excluding criminal responsibility, unless (1) the person was under a legal obligation to obey such orders, (2) the person did not know that the order was unlawful, *and* (3) the order was not manifestly unlawful.[31] The application of this exception is limited because the ICC Statute makes it clear that orders to commit genocide or crimes against humanity are manifestly unlawful.[32]

Also, mental incapacity as a result of mental disease or defect, involuntary intoxication, self defense, defense of others and defense of property essential for survival during war times, as well as duress are grounds for excluding criminal responsibility.[33] Also, mistake of fact or law may be grounds to exclude criminal responsibility if it negates the mental element required by the crime.[34] However, "superior orders" and "prescription of law" are not grounds for excluding criminal responsibility unless the person was under a legal obligation to obey such orders, the person

26. ICC Statute, *supra* note 1, art. 53, para. 3(b); Regulations of the Court, Reg. 48, Doc. ICC-BD/01-01-04 (May 26, 2004) [hereinafter ICC Regulations].
27. *Id.* art. 28(a).
28. *Id.* art. 28(b).
29. *Id.* The words "effective authority and control" are intended to superimpose in a civilian setting the requirements of the same types of relationships between superior and subordinate in the military.
30. *Id.*
31. *Id.* art. 33(1)(a-c) (emphasis in the original).
32. *Id.* art. 33(2)
33. *Id.* art. 31.
34. *Id.* art. 32.

did not know that the order was unlawful, *and* the order was not manifestly unlawful.[35] The exception offers little or no defense as orders to commit genocide, or crimes against humanity, or war crimes are generally manifestly unlawful.[36]

## III. BOTTLENECKS IN THE EXERCISE OF ICC JURISDICTION

### A. THE COMPLEMENTARITY PRINCIPLE

The principle of complementarity which permeates the ICC Statute confers jurisdictional primacy on national courts over the ICC.[37] In other words, the Court has no jurisdiction over a case when the matter "is being appropriately dealt with by a national justice system."[38] National sovereignty led to the introduction of the principle of complementarity in the operation of the ICC.[39] Article 17 provides that the ICC will defer its jurisdiction to a national court except in situations where national courts have been genuinely unable or unwilling to investigate and/or prosecute the accused.[40] Article 17 is applicable even when the State's leaders are themselves implicated.[41]

The Prosecutor is duty-bound to notify all States that might normally exercise jurisdiction of his or her intention to commence an investigation.[42] Thereupon, any State with jurisdiction over the case, whether a State Party or not, may within one month of receipt of such notice inform the Court that it is investigating or has investigated the situation domestically.[43] Such notice may be accompanied with a request that the Prosecutor stop his or her own investigation in the case.[44] On receipt of the request, the Prosecutor must defer to the State's investigation, but may still

35. ICC Statute, *supra* note 1, art. 33 (emphasis added).

36. *Id.* art. 33(2).

37. *Id.* preamble, para. 10, arts. 1, 17. (Article 1 of the Statute provides that the Court 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 jurisdiction).

38. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 85 (2nd ed. 2004).

39. *See* David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 59-60 (Nov. 2001-Feb. 2002) (noting that Article 17 was ostensibly drafted to accommodate and protect the United States' interest).

40. ICC Statute, *supra* note 1, art. 17(a).

41. *Id.* art. 28.

42. *Id.* art. 18(1).

43. *Id.* art 18(2).

44. The request must be made in writing and must contain information regarding the State's investigation. *See*, ICC, Rules of Procedure and Evidence (adopted by the Assembly of States Parties, First Session, New York, 3-10 Sept. 2002), U.N. Doc. PCNICC/2000/1/Add. 1, ICC-ASP/1/3, Rules 53 & 54, available at:
<http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf> (visited March 3, 2006).

make an application to the Pre-Trial Chamber which may decide to authorize the investigation.[45] To the extent that the Prosecutor has no choice in the matter but to comply, "the 'request is really not a request. It is a demand or an assertion by the State of its right to primacy."'[46]

Therefore, the complementarity notion in the ICC Statute replaces the primary jurisdiction of international tribunals as was the case with ad hoc tribunals such as the Nuremberg[47] and Tokyo[48] war tribunals, the International Criminal Tribunal for the Former Yugoslavia[49] (ICTY), the International Criminal Tribunal for Rwanda[50] (ICTR), as well as the mixed tribunals in Sierra Leone, Timore-Leste, and Cambodia with priority for national courts.[51] This deference to national courts suggestively makes the ICC a court of last resort.[52]

Thus, under the complementarity provision, any State with jurisdiction can effectively prevent the ICC from exercising jurisdiction over its nationals by informing the Court of its willingness to investigate the allegation under Article 18(2).[53] In the event that the Pre-trial Chamber rejects such a request, Article 18(4) allows the requesting State to appeal an adverse ruling of the Pre-trial Chamber to the Appeals Chamber.[54] In

45. ICC Statute, *supra* note 1, art. 18(2).

46. *See* Daniel D. Ntanda Nsereko, *Article 18 Preliminary Rulings Regarding Admissibility, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 395, 401 (Otto Triffterer, ed. 1999) [hereinafter COMMENTARY ON THE ROME STATUTE].

47. The International Military Tribunal at Nuremberg was established by an agreement between four victorious Allied Powers at the end of World War II. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, *reprinted* in 39 A.J.I.L. 257 (1945) [hereinafter Nuremberg Charter].

48. The International Military Tribunal for the Far East was established in Tokyo pursuant to the Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 BEVANS 20.

49. *See* Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25,1993), *reprinted in* 32 ILM 1192 (1993).

50. Statute of the International Criminal Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994), *reprinted in* 33 ILM 1602 (1994).

51. *See* Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals,* 23 YALE J. INT'L L. 383, 385 (1998) (noting that ICTY and ICTR raised for the first time the appropriate relationship between the jurisdiction of national courts and that of an international criminal court which was clearly to resolve the jurisdictional conflict in favor of the International Tribunal).

52. John Seguin, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute* 18 B.U. INT'L L.J. 85, 94 (2000); James L. Taulbee, *A Call to Arms Declined: The United States and the International Criminal Court,* 14 EMORY INT'L L. REV. 105, 129 (2000).

53. ICC Statute, *supra* note 1, art 18(2).

54. *Id.* art 18(4).

addition, under Article 18(7) a State which has challenged a ruling of the Pre-trial Chamber may challenge the admissibility of the case under Article 19 on grounds of additional significant facts or significant change of circumstances.[55] With these arrangements, the possibility that the ICC would exercise its jurisdiction without hindrance from one State or the other is exceedingly remote because no State will wish the Court to remove a case from its jurisdiction where it intended to conduct the investigation and prosecution itself.[56]

In view of this development, the complementarity provisions have watered down the jurisdiction of the Court and created an avenue whereby a State may use the complementarity provisions to shield its nationals from the Court's jurisdiction.[57] The Security Council referral of the situation in Darfur, Sudan exposes this concern as it promises to test the effect of such a referral. Already, the Sudanese Government has left no one in doubt that it has no intention of cooperating with the Court and will not surrender any of their nationals to the Court regarding this referral.[58] Thus, after the referral, the Government of Sudan created a special court to prosecute individuals suspected of perpetrating crimes in Darfur.

The Sudanese Government has not made any pretension as to its intentions in creating the special court. Indeed, as an official of the Sudanese Ministry of Justice averred, "ICC Article 17 stipulates that it can refuse to look into any case if investigations and trials can be carried out in the countries concerned except if they are unwilling to carry out the prosecutions."[59] Consequently, the Sudanese Government has gone ahead to

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55. *Id.* art. 19(2) (b), provides that Challenges to the admissibility of a case under Article 17 or challenges to the jurisdiction of the Court may be made by a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted the case.

56. *Id.*

57. Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1 (2002).

58. *See, ICC Delegation to Visit Sudan's Darfur*, SUDAN TRIBUNE, February 27, 2006, available at: <http://www.sudantribune.com/Article.php3?id_Article=14271> (reporting that the Sudan's Justice Minister Mohamed al-Mardi told Reuters in an interview on Dec. 13, 2005 that Moreno Ocampo's investigators would not have any access to Darfur, where ethnic cleansing has resulted in killings, rape and the uprooting of 2 million refugees. The paper quoted the Justice Minster as saying that "the ICC officials have no jurisdiction inside the Sudan or with regards to Sudanese citizens," and that "they cannot investigate anything on Darfur.").

59. *See* Wim van Cappellen, *Sudan: Judiciary Challenge ICC over Darfur Cases*, INTEGRATED REGIONAL INFO. NETWORKS, June 24, 2005 (reporting that the Sudanese Council of Ministers avowed a total rejection of Security Council Resolution 1593 and that Sudan's Justice Minister, Ali Mohamed Osamn Yassin, has been quoted by local media as stating that the new domestic institution would be a substitute to the International Criminal Court).

allegedly prosecute some security officials over the Darfur conflict.[60] This contrasts with the position of the UN Special Rapporteur on Sudan, who has argued that the special court is not able to try Sudanese officials responsible for violating international crimes in Darfur.[61] Therefore, the alleged prosecution is nothing but a charade to shield Sudanese nationals from the reach of the Court by taking advantage of Article 17.

In situations like this, the Court can only assume jurisdiction if it determines that the State is unwilling or unable genuinely to carry out the investigation or prosecution.[62] The ICC Statute provides guidelines on how to determine the "unwillingness"[63] or "inability"[64] of a State to conduct an investigation or prosecution. However, the word "genuinely" is not defined by the ICC Statute but appears to evoke a requirement of good faith on behalf of the State.[65] In other words, a State should not proceed to conduct an investigation for the sole purpose of depriving the Court of its jurisdiction without a good faith belief in its willingness, or a good faith assessment of its ability, to conduct the investigation or prosecution.

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60. *See*, Agence France Presse, *Sudan Hands UN Darfur Suspects List*, SUDAN TRIBUNE,February 26, 2006, available at: <http://www.sudantribune.com/Article.php3?id_Article=14276> (reporting that the head of the Governmental Human Rights Advisory Council (HRAC) Abdel Monim Osman Taha Gave a UN official in charge of human rights in the Sudan, Sima Samar, a list individuals of the regular services who have been tried for perpetrating crimes connected with the Darfur conflict).

61. Reuters, *Sudan Unable to Try Darfur Suspects - UN Official*, REUTERS,March 6, 2006, available at: <http://www.alertnet.org/thenews/newsdesk/MCD652175.htm> (quoting Sima Samar, the U.N. Special Rapporteur on Sudan to the effect that "Sudan's special court for Darfur is not able to try Sudanese officials responsible for war crimes and authorities continue to abuse freedom of expression." Ms. Samar said the courts had not yet tried anyone with command responsibility for crimes in Darfur and that she had only been given a list of 15 officers from the police and army who had been tried for crimes between 1991 and 2003, before the Darfur conflict even began. "We did ask for information and they didn't provide much information so that means that maybe they are not able to bring anybody to justice," she said).

62. ICC Statute, *supra* note 1, art. 17(1)(a)(b).

63. *Id.* art 17(2) provides that a State is unwilling if one or more of the following situations is 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.

64. *See id.* art. 17(3) provides that:

> 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.

65. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 418 (2000).

The process of determining whether a State is "unwilling" or "unable" to investigate or prosecute invites judicial review of the States's decision and/or its national judicial system. Ordinarily, States see judicial review of its national court decisions by an outside judicial organ as an unwelcome challenge to its sovereignty. As such, it remains to be seen how States would respond to a decision by the Court that the State's decision not to investigate or prosecute was based on its inability or unwillingness. Probably, a decision based on "inability" to investigate or prosecute may be easier to justify as it generally stems from a breakdown of, or unavailability of, institutions of legal enforcement.[66] On the other hand, "unwillingness" to prosecute involves a deliberate decision of the State not to hold the accused person accountable.[67]

It has been suggested that a State may be unable to prosecute if it lacks the required manpower and institutions to carry out a meaningful criminal prosecution.[68] Such a situation could have arisen after the genocide in Rwanda, where very few lawyers and judges survived the 1994 massacre.[69] On the other hand, a State may be unwilling to prosecute a perpetrator if it demonstrates that it lacks the political will to do so. This may occur where the accused is a member of the State Government, or exerts influence over or accepts favors from those in Government.

Certainly, the situation in Darfur fits into this latter category as the Government has been identified as an active Party in the crisis and has done nothing to disarm militias or end the "culture of impunity" there.[70] The Human Rights Watch notes that "the Sudanese government's systematic attacks on civilians in Darfur have been accompanied by a policy of impunity for all those responsible for the crimes," and requests that "[s]enior Sudanese officials including President Omar El Bashir must be held accountable for the campaign of ethnic cleansing in Darfur."[71]

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66. ICC Statute, *supra* note 1, art. 17(3).

67. *Id.* art. 17(2).

68. David Rider, *Canadian Judge Pans New International Court: Arbour Says Rules Shield World's Worst Criminals*, THE OTTAWA CITIZEN, Jan. 21, 2002, at A7 (quoting Justice Louise Arbour of the Supreme Court of Canada and former ICTY/ICTR prosecutor).

69. *Id.*

70. *See* Human Rights Watch Report, *Entrenching Impunity Government Responsibility for International Crimes in Darfur*, Dec. 12, 2005, Vol. 17, No. 17A available at: <http://hrw.org/reports/2005/darfur1205/>; (visited March 14, 2006) (documenting the role of more than a dozen named civilian and military officials in the use and coordination of "Janjaweed" militias and the Sudanese armed forces to commit war crimes and crimes against humanity in Darfur since mid-2003).

71. Human Rights Watch, *UN: Put Sudan's Top Leaders on Sanctions List: ICC Should Investigate Darfur Officials*, available at: <http://hrw.org/english/docs/2005/12/09/sudan12186.htm> (visited March 14, 2006) (quoting Peter Takirambudde, Africa director at Human Rights Watch).

Whether the Government and military officials of Sudan will be held accountable or will hide under Article 17 protection is anyone's guess.

A related matter concerning Article 17 is that, under the guidelines for determining "unwillingness" or "inability" to prosecute or investigate, it is difficult to imagine a situation where an investigation or prosecution carried out by western countries with an advanced judicial system and history of criminal prosecution would be considered fraudulent. Developing countries, to the contrary, are less likely to benefit from the complementarity provision since their legal systems and political climate could easily be judged unable or unwilling to undertake satisfactory and successful prosecutions. As has been observed by Justice Arbour, "states with relatively developed legal systems will have a 'major trump card' to evade justice and will clash with developing countries that don't."[72] Justice Arbour rightly posits that such a clash will be intensely political and will risk the ICC becoming the true default jurisdiction for developing countries, while subjecting the Court to major political and legal battles with everyone else.[73] This may result in the Court being viewed suspiciously by developing countries – as a vestige of western countries – thereby tainting the Court as an independent judicial institution.[74]

While this paper questions the rationale for primary jurisdiction of national courts over the ICC, it nonetheless suggests that assessments concerning a government's unwillingness to prosecute should not be based on lack of action in a single case, but rather on a systematic pattern of judicial inaction in pertinent cases.[75] Where a judicial system is considered unable to conduct trials, the ICC should not concern itself with assuming jurisdiction; rather the international community should offer assistance and training to overcome any shortcomings.[76] In this way, the ICC would retain the integrity of developing governments' judicial systems. This is necessary, considering the fact that governments constitute

72. David Rider, *supra* note 68.

73. *Id.* (quoting Justice Louise Arbour).

74. *See*, Fred Bridgland, *Darfur Sanctions Deadlock as ICC Considers Prosecutions*, INSTITUTE FOR WAR AND PEACE REPORTING (IWPR), Feb. 28, 2006, available at: <http://www.iwpr.net/?p=acr&s=f&o=259927&apc_state=henh> (visited Feb. 28, 2006) (reporting that the ICC's main work is so far concentrated on Darfur, northern Uganda and the Ituri region of the Congo, and that this heavy concentration on one continent has perplexed many Africans. They argue that it would have made public relations sense for such a new and important international court to have cast its net over several continents, including Europe from where it operates).

75. *See* Wilton Park Conference, *Towards Global Justice: Accountability and the International Criminal Court (ICC)*, Feb. 4-8, 2002, at <http://www.wiltonpark.org.uk/web/welcome.html> (last visited Feb. 18, 2003).

76. *Id.*

the courts' national partners, and their cooperation and compliance are integral to its functioning.[77]

Also, since States are likely to perceive the process by which the Court determines a State unable or unwilling to investigate or prosecute as a challenge to their sovereign powers, the Court is likely to refrain from making such determination.[78] Conferring the Court with primary jurisdiction, *ratione personae,* over all cases within the Court's jurisdiction, *ratione materiae,* would avoid the need for the Court to judicially review a State's national legal system and avoid the likelihood that it would abdicate its responsibility in order to avoid confrontation with a State anxious to defend its sovereignty.

As poignantly argued by the Appeals Chamber of the ICTY, jurisdictional primacy is a functional necessity for an international criminal tribunal.[79] According to the Appeals tribunal:

> 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 characterized as "ordinary crimes" or proceedings being "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.[80]

The Appeals Chamber rightly noted that States and/or their national courts may not be able to handle the trial of some high profile persons. For instance, in spite of the U.S. support, the Iraqi Special Tribunal has not been able to conduct a hitch free trial of Saddam Hussein and some

77. *Id.*

78. In a related development, the general approach followed by the Office of the Prosecutor with respect to its *proprio motu* powers indicates a clear preference for initiating investigations of alleged core crimes, wherever possible, on the basis of a referral by a State Party pursuant to Article 14 or by the Security Council pursuant to Article 13(b). While this predilection does not mean, of course, that the Prosecutor will never exercise the authority to initiate investigations *proprio motu,* the Prosecutor seems inclined not to use these powers unless absolutely necessary, for example where states have failed to refer an objectively serious situation. *See* Paper on Some Policy Issues, *supra* note 24; Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court (Sept. 8, 2003).

79. Prosecutor v. Tadic, No. IT-94-1, P 58-59 (ICTY Oct. 2, 1995) (Appeal on Jurisdiction) [hereinafter Prosecutor v. Tadic, Appellate Decision on Jurisdiction].

80. *Id.*

members of his Baath Party.[81] The chaotic scenes that have marred the trial so far have prompted one commentator to suggest that the whole trial is being undermined and to observe:

> I think it was a big mistake that this trial was held in Iraq because the judge, you cannot find a person, one individual today in Iraq - judge, lawyer, prosecutor who is impartial vis-à-vis Saddam Hussein. Either they are with him or against him.[82]

Therefore, the Court is in a better position to withstand the political pressure associated with prosecuting high level individuals and avoid allegations of unfairness that may be leveled against a State. The Court will also hold individuals to a worldwide standard of international justice.[83] This approach would promote universal and uniform individual criminal responsibility for the crimes concerned because any person accused of a core crime would normally be tried by the ICC, not by national courts.[84]

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81. *Saddam Walks Out in Trial Uproar*, BBC NEWS, January 29, 2006, available at <http://news.bbc.co.uk/2/hi/middle_east/4659274.stm>.

82. *Id.* (referring to Saad Djebbar, an international lawyer and commentator on Middle East politics).

83. *See* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 60 (1997) (noting that "[a] permanent system of international criminal justice based on a preexisting international criminal statute would allow any person from any nation to be held accountable for violations. Equal treatment for violators would be guaranteed.").

84. *See* Amnesty International, *International Criminal Court: The Failure Of States To Enact Effective Implementing Legislation*, AI Index: IOR 40/019/2004, 1 Sept. 2004, [hereinafter AI: *Failure of States to Enact Effective Implementing Legislation*] available at: <http://web.amnesty.org/library/Index/ENGIOR400192004?open&of=ENG-385> (observing that not many States have enacted national legislation implementing the ICC Statute, and that the few States that have done so, enacted flawed and inconsistent legislation.). The report notes that the most common problems that are emerging in draft legislation now being prepared or considered are:

> · weak definitions of crimes;
> · unsatisfactory principles of criminal responsibility and defenses;
> · failure to provide for universal jurisdiction to the full extent permitted by international law;
> · political control over the initiation of prosecutions;
> · failure to provide for the speediest and most efficient procedures for reparations to victims;
> · inclusion of provisions that prevent or could potentially prevent cooperation with the Court;
> · failure to provide for persons sentenced by the Court to serve sentences in national prisons; and
> · failure to establish training programs for national authorities on effective implementation of the Rome Statute.

*Id.* at 2.

Also of concern is the failure of some of the implementing legislation to provide adequate procedural guarantees, including the right to fair trial. Further, some national implementing legislation allows the imposition of the death penalty. This is contrary to Article 77 of the ICC Statute which provides that the maximum penalty the Court may impose is life imprisonment. It is therefore inap-

Further, it should be borne in mind that the Court's jurisdiction is designed to target a limited number of "persons for the most serious crimes of international concern."[85] In addition, the high threshold requirements for the crimes under the ICC Statute, limit the Court's jurisdiction to crimes against humanity, committed as part of a "widespread or systematic attack,"[86] or war crimes when such crimes have been committed as part of a plan or policy or have taken place on a particularly large scale.[87] The Prosecutor is also required under the ICC Statute to satisfy the Court that the case is of "sufficient gravity to justify further action by the Court."[88]

In view of the above, the Court will not occupy the field. It will target only a small portion of perpetrators who are highly responsible for atrocities and will decline to exercise its inherent jurisdiction in cases in which deferral to national jurisdiction would be more appropriate. Thus, the States would still exercise concurrent jurisdiction by prosecuting others responsible at a lower degree.

### B. SUSPENSION OF THE COURT'S JURISDICTION BY THE UN SECURITY COUNCIL

One concern throughout the negotiations for the ICC Statute, expressed mostly by the permanent members of the Security Council, was the possibility of conflict between the jurisdiction of the Court and the functions of the Council. It was argued that there may be situations in which the investigation or prosecution of a particular case by the Court could interfere with the resolution of an ongoing conflict by the Security Council. Also, the permanent members of the Security Council wanted to preserve a central role for the Council in the new Court.[89] To this extent, some lobbied for a provision that would automatically exclude the Court's jurisdiction over any situation under consideration by the Council. Most States regarded this proposal as too sweeping and feared it would undermine the Court, for situations could remain pending before the Council indefinitely without its taking any final or serious action. In the end, a compromise provision was reached, which provided that the Security Council, acting under Chapter VII of the UN Charter, could adopt a resolution requesting deferral of an investigation or prosecution for a period

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propriate that national courts should impose a more severe penalty for a crime under international law than the one chosen by the international community itself. *Id.* at 25, 27.

85. ICC Statute, *supra* note 1, preamble 9, arts. 1, 5.
86. *Id.* art. 7.
87. ICC Statute, *supra* note 1, art. 8.
88. *Id.* art. 17(1)(d).
89. John Seguin, *supra* note 52, at 95-96.

of twelve months and that such a request could be renewed at twelve-month intervals.[90]

Article 16 is an unnecessary limitation on the jurisdiction of the Court because it allows the Security Council, by resolution, to stop a prosecution initiated by a State or the ICC Prosecutor from going forward for an initial period of twelve months if, in the opinion of the Security Council, the prosecution will interfere with the Council's efforts to maintain international peace and security under Article VII of the UN Charter. The Security Council can renew its request indefinitely, in twelve month segments, under the same conditions.[91] In other words, the UN Security Council may perpetually intervene to suspend a case before the ICC at every twelve month interval on identical grounds because Article 16 does not limit the number of times the UN Security Council may request the suspension of a case for security reasons.[92] This provision was a result of a compromise suggestion by Singapore to appease the U.S.[93]

One of the main reasons for the creation of the ICC was to end the culture of impunity by holding individuals criminally responsible for egregious violations of crimes prohibited by international law.[94] Therefore, the rationale behind the establishment of the ICC is that it would help end or at least reduce the commission of genocide, war crimes, crimes against humanity, and other related atrocities that shock the conscience of humankind. Thus, it is an irony of a sort to suggest that the Court's exercise of jurisdiction to investigate or prosecute individuals accused of genocide, crimes against humanity and war crimes may impede the Security Council's efforts to maintain international peace and security under Article VII of the UN Charter.

It is plausible to suggest that only States that are permanent members of the Security Council stand in a better position to use this provision to perpetually forestall the prosecution of a case concerning their nationals. Members of the Security Council may choose to use this provision to stop investigations into situations concerning nationals of member States and would likely do so at the urging of one of its powerful permanent members. Indeed, in 2002, the U.S. threatened to withdraw its nationals

90. ICC Statute, *supra* note 1, art. 16.
91. *Id.*
92. *Id.*
93. John Washburn, *The International Criminal Court Arrivers - The U.S. Position: Status and Prospects*, 25 FORDHAM INT'L L.J. 873, 878 (2002) (citing Lionel Yee, *The International Criminal Court and the Security Council, in* THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE - ISSUES, NEGOTIATIONS, RESULTS 143 (Roy S. Lee ed., 1999) [hereinafter THE MAKING OF THE ROME STATUTE].
94. ICC Statute, *supra* note 1, preamble.

from UN peacekeeping missions unless the Security Council passed a resolution grating immunity to U.S. nationals from ICC prosecution. The Security Council yielded to U.S. pressure and passed Resolution 1422 in July 2002 which deferred the Court's jurisdiction for one year over personnel of non-State parties participating in peacekeeping missions or operations authorized by the UN.[95] Resolution 1422 was renewed for another year by Resolution 1487 in June 2003.[96]

While Resolution 1422 was adopted unanimously in 2002, France, Germany and Syria abstained from voting for Resolution 1487 in 2003. In 2004, the U.S. withdrew their request to renew Resolution 1487 because it failed to receive the necessary votes to again defer the Court's jurisdiction.[97] However, the Security Council has created a precedent that may be latched onto by other States in the future to demand similar exemptions. To forestall this unnecessary hindrance to the Court's jurisdiction, it is suggested that Article 16 should be deleted from the Statute.[98]

Further, even where the Security Council refers a case to the Court, the Council may seek to micro-manage the investigation or prosecution of the case. For instance, Security Council Resolution 1593 which referred the situation in Darfur to the Court requires the Chief Prosecutor of ICC to periodically apprise the Security Council of actions taken.[99] Accordingly, the Prosecutor has addressed the Security Council on the

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95. *See* Security Council Resolution 1422, S.C. Res. 1422, U.N. SCOR, 4572nd mtg., U.N. Doc. S/RES/1422 (2002), July 12, 2002, available at <http://www.un.org/Docs/Scres/2002/sc2002.htm>.

96. Security Council Resolution 1487, S.C. Res. 1487, U.N. SCOR, 4772nd mtg., U.N. Doc. S/RES/1487 (2003), June 12, 2003, available at: <http://www.un.org/Docs/sc/unsc_resolutions03.html>.

97. *See* Coalition for the ICC, Chronology of the Adoption and Withdrawal of Security Council Resolutions 1422/1487, <http://www.iccnow.org/documents/declarationsresolutions/UN1422_2004.html>. The failure to secure the vote to renew Resolution 1487 was related to concerns over allegations of abuse by U.S. soldiers at Abu Ghraib prison in Iraq. *Id. See also*, Amnesty International, *U.S. Threats to the International Criminal Court*, available at: <http://web.amnesty.org/pages/icc-US_threats-eng> (visited Feb. 10, 2006).

98. *See* Amnesty International, *International Criminal Court: The Unlawful Attempt by the Security Council to Give US Citizens Permanent Impunity From International Justice*, AI Index, IOR 40/006/2003 (a legal analysis of Security Council Resolutions 1422 & 1487 by Amnesty International concluding that the resolution is contrary to the Rome Statute, and also to the United Nations Charter). A summary of the legal analysis is available at: <http://web.amnesty.org/library/index/engIOR400082003?Open&of=eng-393> (visited Feb. 10, 2006).

99. Security Council Resolution 1593, U.N. SCOR, 60th Sess., 5158th mtg., U.N. Doc. S/RES/1593, 8 (March 31, 2005) (the Prosecutor is required to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution).

Darfur situation twice.[100] It is not impossible that the Security Council may decide at a later stage to invoke Article 16 to stop the Court from going forward with the case.

The idea that the Security Council should play an oversight role on the operations of the Court should be resisted.[101] The Court is envisioned as an independent entity and should remain as such. The Security Council should not be allowed to politicize the judicial functions of the Court. While the Security Council's cooperation with the Court will enhance its effectiveness, any attempt to subject it to the whims and caprice of the Security Council will greatly undermine the Court's independence and credibility. States, particularly developing and "third" world countries, may view the Court as another vestige of western domination.

### C. FAILURE TO PROVIDE FOR UNIVERSAL JURISDICTION

The jurisdictional reach of the ICC is more limited than the general international jurisdiction currently enjoyed by States or groups of States over *jus cogens* violations.[102] As noted above, State delegates at the Rome Conference agreed on a compromised Article 12 which sets out the preconditions for the Court's jurisdiction when a situation is not referred to the Court by the Security Council. Throughout the Conference, the U.S. sought to limit the Court's jurisdiction by arguing that the Court should exercise jurisdiction only against nationals of States Parties or territorial States on claims of official acts. The United States wanted a situation in which no U.S. national would ever be brought before the ICC without U.S. consent.[103]

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100. Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSR 1593 (2005), June 29, 2005, available at <http://www.icc-cpi.int/pressrelease_details&id=108&l=en.html> and Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSR 1593 (2005), Dec. 13, 2005, available at <http://www.icc-cpi.int/cases/current_situations/Darfur_Sudan.html>.

101. Bruce D. Landrum, *The Globalization of Justice: The Rome Statute of the International Criminal Court*, 2002-Sep ARMY LAW 1, 11 (2002) (noting that one of the main concerns of the United States is the limited role played by the United Nations Security Council in the operation of the ICC).

102. *See also* Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 116 (2001) (observing that "the core crimes within the ICC's jurisdiction - genocide, crimes against humanity, and war crimes - are crimes of universal jurisdiction.").

103. Ruth Wedgwood, Harold K. Jacobson & Monroe Leigh, *The United States and the Statute of Rome*, 95 A.J.I.L. 124, 126 (2001).

Also, the U.S. demanded a guarantee that no U.S. servicemen or women would be investigated or prosecuted by the ICC without U.S. consent.[104] It has been suggested that the justification for the U.S. position was that "more than any other country the United States is expected to intervene to halt humanitarian catastrophes around the world."[105] It was therefore argued that this position renders U.S. personnel "uniquely vulnerable to the potential jurisdiction of an international criminal court."[106] According to Ambassador David Scheffer:

> The illogical consequence imposed by Article 12, particularly for non-parties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions...[107]

Apart from the apparent inequality of this request, its obvious implication is that a guarantee for America would mean a *de jure* and *de facto* exemption of all other States, effectively rendering the purpose of the Court moribund.[108]

Although the U.S. position was not acceptable to most States at the Rome Conference, a proposal by Korea that the Court should exercise jurisdiction where the victim's State or the custodial State has ratified the ICC Statute was also rejected in order to accommodate U.S. concerns regarding supposed over-reach of the Court's jurisdiction.[109] Thus, absent submission of a case to the ICC by the UN Security Council, the Court can only exercise jurisdiction where the case occurs in the territory of a State Party, or where the crime is committed by a national of a State

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104. *Id.* at 126. *See also*, Thomas W. Lippman, *America Avoids the Stand: Why the U.S. Objects to a World Criminal Court*, WASH. POST, July 26, 1998, at C01 (noting that the American Government insisted that the Rome Statute must contain an ironclad guarantee that no American would ever come before the Court).

105. Michael P. Scharf, *Rome Diplomatic Conference for an International Criminal Court*, A.S.I.L. Insights (June 1998), available at <http://asil.org/insights/insigh20.htm> (accessed March 15, 2002).

106. *Id.*

107. David Scheffer, *The United States and the International Criminal Court*, 93 A.J.I.L. 12, 19 (1999).

108. Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom"*, IX ANN. SURV. INT'L & COMP. L. 19, 44-45 (2003).

109. Human Rights Watch, Text Analysis International Criminal Court Treaty, July 17, 1998 available at <http://www.hrw.org/press98/july/icc-anly.htm> (last modified April 4, 2002) [hereinafter ICC Treaty Text Analysis].

Party.[110] It should be noted that in most cases, the State of nationality and the territorial State are likely to be the same, as was the case with Pol Pot of Cambodia, Idi Amin of Uganda, Pinochet of Chile, and as exemplified by the first three State referrals to the Court.

The inclusion of the custodial State would have made it possible to apprehend an accused while traveling outside his or her State, or in the alternative, make it difficult for the accused to travel outside his or her State, thereby denying a safe haven anywhere. But, given the way Article 12 was drafted, a country in whose territory an accused is residing will have no legal basis under the ICC Statute to surrender the accused to the Court. This is because Article 12 only requires a State Party to submit to the Court's jurisdiction if the crime was committed on its territory, or the person accused of the crime is a national.[111] In other words, in a situation in which a national of State A commits a crime in State A and then enters State B ostensibly to evade justice, State B is not obliged to surrender him or her to the Court because the crime was not committed in State B's territory and the accused is not a national of State B. The situation becomes compounded if State B is not a State Party to the ICC Statute.

Article 12 also makes it impossible for the victim's State to submit a case to the ICC if its nationals were victims of international crimes in the territory of another State or by nationals of a non-State Party. It has been suggested that if a victim's State is allowed to submit a case to the Court, the Spanish Government would have been in a position to petition the ICC (if it were then in existence) for the "disappearance" of some Spaniards in Argentina in the 1970s and 80s.[112] This possibility is not available even under the new ICC Statute.

The idea that extending the ICC jurisdiction to include custodial and/or victim's States or that the current jurisdiction of the Court is overreaching and therefore violates fundamental principles of international law because it binds non-State Parties[113] is untenable. The U.S. takes the position that under customary international law, a treaty-based international court cannot exercise jurisdiction over the nationals of a non-Party State when acting under the direction of such a non-Party State.[114]

Also, another commentator has suggested that, by conferring upon the ICC jurisdiction over non-Party nationals, the ICC Statute would abro-

110. ICC Statute, *supra* note 1, art. 12.
111. *Id.* art. 12(2)(a-b).
112. ICC Treaty Text Analysis, *supra* note 109.
113. David Scheffer, *supra* note 107, at 18.
114. *Id.*

gate the pre-existing rights of non-parties which, in turn, would violate the law of treaties.[115] Additionally, this commentator suggested that a State has a right to be free from the exercise of exorbitant jurisdiction over its nationals which cannot be abrogated by a treaty to which it is not a Party.[116] Cited in support were the ILC Official Commentaries on the Vienna Convention to the effect that "international tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither imposes obligations on States which are not parties nor modify in any way their legal rights without their consent."[117] Furthermore, it was argued that because of the gravity of the outcome, member States cannot delegate to the ICC their territorial or universal jurisdiction.[118]

Those who make the argument that the Court cannot exercise jurisdiction over individuals if his or her State has not ratified the ICC Statute confuse and/or equate the position of a non-Party State with that of its nationals. As would be expected, this argument has been rejected by international law commentators on the simple basis that while a non-Party State is not itself obligated under a treaty to which it has not consented, the same cannot be said of its nationals if they commit an offense in the territory of a State that is a Party.[119] Responding to criticism of the Court's jurisdiction over nationals of non-Party States for crimes committed within the territory of State Parties to the ICC Statute, Judge Philippe Kirsch, current President of the Court, noted as follows:

> This does not bind non-parties to the [s]tatute. It simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations.[120]

The above expression is in accordance with Article 34 of the Vienna Convention on the Law of Treaties which provides that "a treaty does not

115. Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 L. & CONTEMP. PROBS. 13, 26 (2001).
116. *Id.* at 27.
117. *Id.*
118. *Id.* at 26.
119. Ruth Wedgwood, et al., *supra* note 103, at 127.
120. Philippe Kirsch, *The Rome Conference on the International Criminal Court: A Comment*, 1998 A.S.I.L. Newsletter 1 (1998). Judge Kirsch was the Chairman of the Rome Diplomatic Conference.

create either obligations or rights for a third state without its consent."[121] Also, Article 35 states that a treaty cannot establish an obligation on a non-Party State unless it "expressly accepts that obligation in writing."[122] The ICC Statute does not violate the above provisions of the Vienna Convention as no provision of the ICC Statute expressly created obligations for non-Party States. Also, allowing the ICC to exercise jurisdiction based on the consent of a custodial or victim's State will not violate the Vienna Convention either.[123]

Suffice it to note that there are plethora of international conventions acceded to by the U.S. and many other States that are globally binding on nationals of Party and non-Party States because they reflect the common interest of humanity.[124] No doubt, the crimes prohibited by the ICC Statute reflect the common interest of humanity. At present, any individual State may try perpetrators of these crimes under universal or territorial jurisdiction principles without consent from the State of his or her nationality.[125] Thus, if individual States can exercise universal jurisdiction over the same crimes contained in the ICC Statute,[126] there has not been any convincing legal argument to deny a group of States from joining

121. Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, U.N. Doc. A/CONF.39/27 (1969), entered into force on Jan. 27, 1980 *reprinted in* 1155 U.N.T.S. 331 (1969); 25 ILM 543 (1969) [hereinafter Vienna Convention on the Law of Treaties].

122. *Id.* art. 35.

123. *Id.* art. 38 ("Nothing ... precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such").

124. *See* Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 220 U.N.T.S. 1969, 20 U.S.T. 2941; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 106 U.N.T.S. 1973, 22 U.S.T. 1641 (Hague Convention); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 178 U.N.T.S. 1975; 24 U.S.T. 565 (Montreal Convention); The International Convention Against the Taking of Hostages, Dec. 17, 1979, 206 U.N.T.S. 1983; 1979 U.S.T. 186; The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted Dec. 14, 1973, 168 U.N.T.S. 1977, 28 U.S.T. 1975 (Protected Persons Convention); The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted Dec. 10, 1984, 1465 U.N.T.S. 85, 1988 U.S.T. LEXIS 202 (Torture Convention); The International Convention on the Suppression and Punishment of the Crime of Apartheid, opened for signature Nov. 30, 1973, 1015 U.N.T.S. 243 (Apartheid Convention); The Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, 1979 U.S.T. LEXIS 187. These treaties provide for and obligate States, both states of nationality and territorial states, to exercise jurisdiction or extradite. Furthermore, the Montreal Convention, the International Convention Against the Taking of Hostages, the Protected Persons Convention, the Torture Convention and the Apartheid Convention allow for the victim's state to either exercise jurisdiction or extradite. The U.S. is a member of all except the Apartheid Convention.

125. Paul Arnell, *International Criminal Law and Universal Jurisdiction*, 11 INT'L LEGAL PERSP. 53, 60-63 (1999). *See also*, Attorney-General of Israel v. Adolf Eichmann, 36 I.L.R. 5, 26 (Israel S.Ct. 1962); Demjanjuk v. Petrovsky, 776 F. 2d 571, 582-583 (6th Cir. 1985).

126. Under the principle of universal jurisdiction, a State is permitted to prosecute non-nationals for certain crimes committed outside that State's territory. *See*, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 520 (1992); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300-04 (4th ed. 1990); Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

together to set up a court that does the same thing. Indeed, the Nuremberg tribunal set the precedent for this situation when it stated: "[the Allied Powers] have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."[127]

In view of the above, it cannot be argued that the Court's exercise of treaty-based jurisdiction over the nationals of non-Party State for international crimes contravenes this rule of international law.[128] Therefore, the argument that the ICC Statute is "overreaching" because it purportedly obligates non-Party States through the exercise of jurisdiction over their nationals is a gross distortion of customary international law.[129] Conferring the ICC with universal jurisdiction helps to realize one of the objectives behind the establishment of the Court, which is, to ensure there is no safe sanctuary for individuals wanted for committing egregious crimes.

Until the Court is invested with universal jurisdiction, we will continue to see cases similar to the case of Charles Taylor, former president of Liberia, who found safe haven in Nigeria despite an international arrest warrant for his surrender to a tribunal in Sierra Lone. Nigeria is under pressure to surrender Mr. Taylor to the Sierra Leonean tribunal but has refused based upon the terms of their asylum agreement with Mr. Taylor.[130] It would be a different situation if Mr. Taylor was wanted by the ICC after he had successfully fled to or was granted amnesty by a non-

127. *See*, Nuremberg Charter, *supra* note 47, at 216-17.

128. Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L.R. 363, 376 (2001).

129. See Human Rights Watch, *The ICC Jurisdictional Regime; Addressing U.S. Arguments*, available at <http://www.hrw.org/hrw/campaigns/icc/docs/icc-regime.htm> (last modified April 4, 2002).

130. Mr. Obasanjo, Nigerian's President takes the position that it granted asylum to Mr. Taylor pursuant to the so called Accra Comprehensive Peace Accord to prevent a bloodbath in Liberia on the understanding that he would not be required to try or surrender Mr. Taylor to an International Tribunal except at the request of the Government of Liberia or if Mr. Taylor violates his undertaking not to interfere in Liberian politics. *See* James Seitua, *Why Obasanjo Has Not Turned Taylor Over?*, THE PERSPECTIVE, Atlanta, Georgia, May 31, 2005, available at: <http://www.theperspective.org/Articles/0531200502.html> (visited Feb. 28, 2006); BBC NEWS, *Taylor meets Obasanjo in Nigeria*, Feb. 27, 2006, available at: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4754982.stm> (visited Feb. 28, 2006); BBC NEWS, *Taylor off Agenda at Abuja Talks*, March 4, 2006, available at:
<http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4775012.stm> (reporting that Mr. Taylor's departure into exile was part of a deal backed by African and Western powers and quoting BBC's Elizabeth Blunt in Abuja as saying that the terms of the deal are believed to have included a comfortable home in Nigeria and a pledge that he would not be handed over for prosecution. BBC News also quoted Remi Oyo, Mr. Obasanjo's spokeswoman that "the prerogative of the return of former President Taylor remains that of the Liberian people and Government."); BBC NEWS, *Taylor Meets Obasanjo in Nigeria*, Feb. 27, 2006, available at: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4754982.stm> (visited Feb. 28, 2006).

Party State. The non-Party State would have no obligation whatsoever to surrender Mr. Taylor to the Court and in that circumstance Mr. Taylor would find a safe haven in that State. Also, even if Mr. Taylor finds himself in the territory of a State Party to the ICC Statute, that State cannot confer jurisdiction on the Court if Mr. Taylor did not commit the crime in the territory of that State and he is not a national of the State Party. In the above scenario, the 'traveling tyrant' is allowed to exploit the limitation in the ICC jurisdiction to evade justice.[131]

## D. WAR CRIMES OPT-OUT PROVISION

With pressure from the U.S., the Rome Conference agreed on Article 124 which allows a State Party to opt out of the Court's jurisdiction for war crimes committed on its territory or by its nationals in internal armed conflict for seven years after becoming a Party to the ICC Statute.[132] The U.S. representatives to the Rome Conference had sought a ten year "opt out" from the Court's jurisdiction over war crimes, but the Conference agreed only to a seven year opt-out period.[133] Article 124 provides a compromise capable of "undermining the status of war crimes as truly universal crimes [that might] result in a court with a fragmented jurisdiction."[134] Such a declaration effectively grants immunity from prosecution for those who commit war crimes in the future while their actions continue to cause immense suffering to humankind for years to come. Therefore, the opt-out provision has been criticized as creating a legally and morally unjustifiable loophole to the evasion of justice.[135]

Currently, only Columbia and France have availed themselves of the provisions of Article 124.[136] Fortunately, the Burundian Government's

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131. Leila Nadya Sadat & S. Richard Cadern, *supra* note 65, at 414, n.194 (attributing the phrase "traveling tyrant" to Jelena Pejic, representative of the Lawyer's Committee at the Rome Conference).

132. ICC Statute, *supra* note 1, art. 124. Article 124 provides that a state Party to the ICC may elect to exempt its nationals from the jurisdiction of the Court for a non-renewable period of seven years from the date of ratification of the statute for war crimes.

133. *See* David Scheffer, *U.N. International Criminal Court, Statement Before the Committee on Foreign Relations of the U.S. Senate* (July 23, 1998) available at 1998 WL 12762512.

134. Jonathan Stanley, *Focus: International Criminal Court: A Court that Knows No Boundaries?: The International Criminal Court Treaty is a Big Achievement but Can it Deliver what it Promises?*, THE LAWYER, Aug. 11, 1998, available at 1998 WL 9167987.

135. Philippe Kirsch, *Q.C., The International Criminal court: Current Issues and Perspectives*, 64 L. & CONTEMP. PROBS. 3, 10 (2001).

136. *See* Rome Statute of the International Criminal Court: Declarations and Reservations, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp#N7> [hereinafter ICC Statute: Declarations and Reservations].
The Columbian Article 124 Declaration states as follows:

> 5. Availing itself of the option provided in Article 124 of the Statute and subject to the conditions established therein, the Government of Colombia declares that it does not ac-

desire to make an Article 124 declaration was rejected by their Senate.[137] The "opt out" clause is an unwarranted restriction on the Court's jurisdiction which will severely hamper its effectiveness for years, if not decades.[138] While it is reassuring that only two States have made the Article 124 declaration, it is necessary however that States demonstrate their willingness to hold war criminals accountable by ensuring that Article 124 is deleted from the ICC Statute when it comes up for review in 2009.[139]

## E. RELIANCE ON STATES' COOPERATION

Generally, in order for the Court to effectively exercise its jurisdiction, the Court must rely on the ability and willingness of State Parties to discharge their obligations under the ICC Statute.[140] In the preamble to the ICC Statute, States Parties affirm 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 international cooperation."[141] With the efforts of like-minded States,[142] delegates at the Rome Conference agreed on the need for effective and speedy cooperation with the Court. As a result, Part 9 of the ICC Statute contains the obligations

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cept 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 Colombian nationals or on Colombian territory.

The French Government Article 124 Declaration states:

III. Declaration under Article 124

Pursuant to Article 124 of the Statute of the International Criminal Court, the French Republic declares that 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.

137. *See* Amnesty International, *Burundi - Urge the President to Ratify the Rome Statute of the ICC*, available at <http://web.amnesty.org/pages/icc-290104-action-eng> (Appeal Letter from Amnesty International urging the Burundian Government to ratify the Rome Statute without such a 'license to kill' declaration. The ICC Statute was ratified by Burundi on Sept. 21, 2004, without such declaration. *See* ICC Statute: Declarations and Reservations, *supra* note 136.

138. James Rodgers, *War Crimes Court Under Fire*, 1998 ABA JOUR. 68 (Sept. 1998) (quoting Jelena Pejic, Senior Program Coordinator, Lawyers Committee for Human Rights, New York).

139. Article 124 is subject to review at the Review Conference which is scheduled to take place seven years after the entry into force of the ICC Statute. Since the ICC Statute came into force in 2002, the Review Conference will be held in 2009. *See* ICC Statute, *supra* note 1, arts. 123, 124.

140. Hans-Peter Kau, *Developments at the International Criminal Court: Construction Site For More Justice: The International Criminal Court After Two Years*, 99 A.J.I.L. 370, 383 (2005)(noting that "the hopes and expectations at the International Criminal Court are that the states parties will support it as responsible joint owners by engaging in unreserved and systematic cooperation in matters of criminal law").

141. ICC Statute, *supra* note 1, preamble, para. 4.

142. *See* Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 A.J.I.L. 2, 4 (1999).

of international cooperation and judicial assistance of States Parties to the Court. [143]

When a State ratifies the ICC Statute, it assumes the obligation to "cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court."[144] Further, the ICC Statute requires that States Parties ensure that there are procedures under their national law for all forms of cooperation specified in the Statute.[145]

A significant aspect of this obligation is arresting and surrendering persons accused of crimes to the Court.[146] This is necessary as the Court cannot try an accused person in absentia.[147] Thus, "a decision by the Prosecutor to bring charges against an accused will prompt the critical, indeed crucial question of arrests and transfer to The Hague."[148] In other words, the Court would be unable to exercise its jurisdiction if States refused, delayed or otherwise failed to carry out their obligation to arrest and/or surrender the accused to the Court. There is no doubt that "the credibility of the Court would suffer if an arrest warrant issued by the judges of the Pre-Trial Chamber at the request of the prosecutor pursuant to Article 58 remained ineffective over a long period because the States Parties were slow, or failed, to execute it."[149]

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143. For a discussion of the cooperation regime in the Rome Statute, see Bruce Broomhall, *The International Criminal Court: Overview, and Cooperation with States*, *in* 1999 ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION 45 (Nouvelles Etudes Penales, 1999); Annalisa Ciampi, *Other Forms of Cooperation*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1705 (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002) [hereinafter THE ROME STATUTE: A COMMENTARY]; Frederik Harhoff & Phakiso Mochochoko, *International Cooperation and Judicial Assistance*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 637 (Roy S. Lee ed., 2001); Hans-Peter Kaul & Claus Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 1999 Y.B. INT'L HUMANITARIAN L. 143 (1999); Claus Kress, et al., *International Cooperation and Judicial Assistance: Preliminary Remarks*, *in* COMMENTARY ON THE ROME STATUTE, *supra* note 46, at 1045; Phakiso Mochochoko, *International Cooperation and Judicial Assistance*, *in* THE MAKING OF THE ROME STATUTE, *supra* note 93, at 305; Valerie Oosterveld, Mike Perry, & John McManus, *The Cooperation of States with the International Criminal Court*, 25 FORDHAM INT'L L.J. 767 (2002); Bert Swart & Goran Sluiter, *The International Criminal Court and International Criminal Co-operation*, *in* REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT 91 (Herman von Hebel et al. eds., 1999).

144. ICC Statute, *supra* note 1, art. 86.

145. *Id.* art. 88.

146. *Id.* art. 89.

147. *Id.* art. 63. Article 63 makes it very clear that "the accused shall be present during the trial" and that there can thus be no trials *in absentia*.

148. Hans-Peter Kaul, *supra* note 23, at 375 (citing the Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court (Sept. 8, 2003).

149. Hans-Peter Kaul, *supra* note 23, at 383.

Apart from other express and implicit obligations contained in the ICC Statute, Article 93 of the Statute details certain specific cooperation obligations on States parties to assist the Court with respect to investigations and prosecutions.[150] These obligations are by no means exhaustive but should at least represent a minimal requirement on States Parties to the ICC Statute. However, a study by Amnesty International in 2004 reveals that States Parties' response to their obligations under the Statute has been disappointing.[151] The study notes that among the few States that have adopted national legislation implementing their obligations under the ICC Statute, almost all the States have taken a minimalist approach to cooperation with the Court and few have included provisions that go beyond the express requirements of the ICC Statute.[152] This author shares the concern of Amnesty International that "if every state Party were to take a minimalist approach to implementing its cooperation obligations, the effectiveness of the Court would be greatly reduced, leading in some cases to impunity."[153]

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150. Article 93 provides:

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.

ICC Statute, *supra* note 1, art. 93(1)(a-l).

151. *See* AI: Failure of States to Enact Effective Implementing Legislation, *supra* note 84.

152. *Id.* at 32.

153. *Id.* Regarding the situation in Darfur, Sudan, see, SUDAN TRIBUNE, *ICC Delegation to Visit Sudan's Darfur*, Feb. 27, 2006, available at: <http://www.sudantribune.com/Article.php3?id_Article=14271> (visited Feb. 28, 2006) (reporting that the ICC Prosecutor, Mr. Moreno Ocampo has told the Security Council that the International Criminal Court and the African Union, which has troops in Darfur, had drawn up a Cooperation Agreement in May 2005, which still was not signed).

## F. ARTICLE 98 IMMUNITY AGREEMENTS

While the ICC Statute requires States Parties to ensure that there are procedures under their national law for all forms of cooperation specified in the Statute,[154] some States Parties have taken steps that make their compliance with Article 88 impossible, such as entering into an "immunity" agreement with the U.S. The bilateral immunity agreement is an undertaking by the States concerned that U.S. persons will not be surrendered to the Court without U.S. consent.[155] The Bush administration has threatened ICC States Parties with withdrawal of military aid, including education, training, and financing the purchases of equipment and weaponry, if they fail to protect Americans serving in their countries from ICC's reach.[156] By May of 2005, about 100 States have signed this immunity agreement which is referred to colloquially as the "Article 98 Agreement."[157]

It has been suggested that "these bilateral agreements... are provided for under Article 98 of the Rome Statute."[158] This argument is inapposite.[159] Article 98, which emerged at the Rome Diplomatic Conference, was drafted to address the question of the relationship between the

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154. ICC Statute, *supra* note 1, art. 88.

155. Christopher Marquis, *U.S. Seeking Pacts in a Bid to Shield its Peacekeepers*, N.Y. TIMES, Aug. 6, 2002.

156. Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers' Immunity*, N.Y. TIMES, Aug. 10, 2002, at A1.

157. *See* U.S. Department of State Press Statement, *U.S. Signs 100th Article 98 Agreement*, May 3, 2005, 2005/463, available at: <http://www.state.gov/r/pa/prs/ps/2005/45573.htm> (the press statement notes that on May 2, 2005, Angola became the 100th country to conclude such an agreement with the United States). As of May 18, 2005, Amnesty International reports that the States that have ratified an immunity agreement with the USA include Afghanistan, Albania, Azerbaijan, Bhutan, Bosnia-Herzegovina, Djibouti, the Dominican Republic, El Salvador, Gambia, Georgia, Ghana, Guyana, Honduras, India, Israel, Kazakhstan, Macedonia, the Marshall Islands, Mauritania, Micronesia, Mozambique, Nepal, Nicaragua, Palau, Panama, Romania, Sierra Leone, Sri Lanka, Tajikistan, Timor-Leste, and Uzbekistan have ratified such agreements. *See* Amnesty International, available at: <http://web.amnesty.org/pages/int_jus_icc_imp_agrees> (last updated May 18, 2005).

158. *Id. See also*, Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93 (1999).

159. For a detailed analysis on this, see generally, Amnesty International, *International Criminal Court: U.S. Efforts to Obtain Immunity For Genocide, Crimes Against Humanity and War Crimes*, AI Index: IOR 40/025/2002, Sept. 2, 2002, [hereinafter *U.S. Efforts to Obtain Immunity Agreement*] available at <http://web.amnesty.org/library/index/engIOR400252002?Open&of=eng-385> (visited Feb. 10, 2006); Amnesty International, *International Criminal Court: The Need for the European Union to Take More Effective Steps to Prevent Members From Signing US Immunity Agreements*, AI Index: IOR 40/030/2002, Oct. 1, 2002, available at: <http://web.amnesty.org/library/index/engior400302002?open&of=eng-385> (visited February 10, 2006); Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Article 98 (2) Agreements*, July 9, 2002, available at <www.hrw.org/campaigns/icc/icc_Article98.pdf> (visited Feb. 10, 2006) (expressing the view "that existing U.S. SOFAs are not the type of agreement that would qualify under Article 98 (2), and cannot trump any obligations under the Rome Statute."); Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, 12 CRIM. L.F. 429 (2001).

obligations of States Parties under the *future* ICC Statute and *existing* obligations of States Parties under international law.[160]

Article 98, paragraph 1, deal exclusively with the limited question of the relationship between the obligations of States Parties to the ICC Statute and their prior obligations under customary or conventional international law concerning diplomatic immunities and State immunities, particularly those incorporated in the Vienna Convention on Diplomatic Relations.[161] On the other hand, Article 98 paragraph 2 was intended to address the question of the effect of the ICC Statute on *existing* Status of Forces Agreements (SOFAs).[162] As explained by Hans-Peter Kaul and Claus Kress, both members of the German delegation, Article 98 (2) was designed to address possible - not certain - conflicts between existing obligations under SOFAs and under the ICC Statute:

> The idea behind the provision [Article 98 (2)] was to solve legal conflicts which might arise because of Status of Forces Agreements which are already in place. On the contrary, Article 98 (2) was not designed to create an incentive for (future) States Parties to conclude Status of Forces Agreements which amount to an obstacle to the execution of requests for cooperation issued by the Court.[163]

Similarly, Kimberly Prost, a member of the Canadian delegation, and Angelika Schlunck, a member of the German delegation, have noted that

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160. *U.S. Efforts to Obtain Immunity Agreement*, *supra* note 159, at 7. Article 98 (cooperation with respect to waiver of immunity and consent to surrender) reads:

> 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.
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> ICC Statute, *supra* note 1, art. 98(1)(2).

161. *U.S. Efforts to Obtain Immunity Agreement*, *supra* note 159, at 7. William A. Schabas, *supra* note 38, at 92; *See also*, BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 145 (2003); John T. Holmes, *Complementarity: National Courts Versus the ICC, in* 1 THE ROME STATUTE: A COMMENTARY, *supra* note 143, at 667.

162. *U.S. EFFORTS TO OBTAIN IMMUNITY AGREEMENT*, *supra* note 159, at 7.

163. Hans-Peter Kaul and Claus Kress, *supra* note 143, at 165. *See also*, Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 A.J.I.L. 773, 786 n.36 (2000) (noting that Article 98 (2) was added to address existing agreements on status of forces).

States were concerned with *existing* international obligations when drafting Article 98.[164] Thus, "it would be very hard indeed to concede by way of an interpretative statement that a State Party acted in conformity with its obligation to 'fully cooperate' with the Court in concluding [a] new Statu[s] of Forces Agreement to this effect."[165]

However, even if Article 98 (2) were to be construed by the Court to apply to renewed SOFAs and new SOFAs entered into by States Parties to the ICC Statute, these agreements would have to be consistent with the object and purpose of the Statute, as well as with other rules of international law.[166] The object and purpose of the ICC Statute is to end immunity by ensuring that no one is above the law and immune from the law of genocide, crimes against humanity or war crimes.[167] Article 98 "immunity" agreements are what their name implies – an immunity of U.S. nationals from the Court's jurisdiction. Therefore, to the extent that the immunity agreement is intended to insulate certain persons from the Court's jurisdiction, the immunity agreement is inconsistent with the object and purpose of the ICC Statute. States Parties to the ICC Statute should therefore not enter into such immunity agreements as they are obligated to refrain from acts which would defeat the object and purpose of the treaty.[168]

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164. Kimberly Prost & Angelika Schlunck, *Article 98, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1131 (Otto Triffterer, ed.,1999) ("All States participating in the negotiations in Rome had concerns about conflicts with existing international obligations. Thus, there are several provisions within Part 9, including those in Articles 90, 93 para. 9 and 98 which address that concern. ... Even States which advocated for a strong Court were concerned about actions taken pursuant to this Statute, which would violate these existing fundamental obligations at international law.").

165. Hans-Peter Kaul and Claus Kress, *supra* note 143, at 174.

166. *U.S. Efforts to Obtain Immunity Agreement*, *supra* note 159, at 9 (citing the Vienna Convention on the Law of Treaties, supra note 121, art. 31(1)). Article 31(1) of the Vienna Convention on the Law of Treaties provides that: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

167. ICC Statute, *supra* note 1, preamble, para. 5, art. 27(1). Article 27(1) provides that:

> 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.

168. Vienna Convention on the Law of Treaties, *supra* note 121, art. 18 ("A state is obliged to refrain from acts which would defeat the object and purpose of a treaty ..."). *See*, Judy Dempsey, *Accords with US 'Will Violate' ICC Treaty*, FINANCIAL TIMES, 27 Aug. 2002, (referring to the text of the legal opinion of European Union's legal experts which concluded that a:

> [C]ontracting Party to the statute concluding such an agreement with the US acts against the object and purpose of the statute and thereby violates its general obligation to perform the obligations of the statutes in good faith. ...[a contracting Party's] legal obligation vis-à-vis its co-contracting parties and the Court to surrender a person to the Court upon request cannot be modified by concluding an agreement of the kind proposed by the US.

Furthermore, the conclusion of immunity agreements between States Parties to the ICC Statute and the United States or any other State is questionable, as it contradicts the customary international law principle of *pacta sunt servanda*, which obligates a State Party to a treaty not to do anything that will undermine its treaty obligations.[169] Besides, the validity of these bilateral immunity agreements are doubtful considering that they were procured under coercion[170] and/or by threat[171] of withdrawal of military aid, including education, training, and financing the purchases of equipment and weaponry if the States failed to sign the immunity agreements.[172]

Also, the immunity agreements are void because they contradict a primary norm of *pacta sunt servanda*[173] which is undoubtedly universally recognized as a peremptory norm of customary international law.[174] States Parties to the ICC agreed in Article 88 to "ensure that there are procedures available under their national law for all forms of cooperation" listed in Part 9 of the Rome Statute. Therefore, any national legislation, procedures or practices which would delay or obstruct full cooperation with the Court would be inconsistent with States Parties' obligations under the ICC Statute. [175]

Thus, since States Parties to the ICC have an affirmative duty to comply immediately with requests by the ICC to arrest and surrender accused persons in their territories,[176] they should be concluding agreements that will expedite this obligation. However, the essence of these bilateral treaties with the United States is to insulate U.S. nationals from the jurisdic-

169. Vienna Convention on the Law of Treaties, *supra* note 121, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith").

170. The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect. Vienna Convention on the Law of Treaties, *supra* note 121, art.51, 52

171. Vienna Convention on the Law of Treaties, *supra* note 121, art. 52 ("A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations").

172. *See* Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers' Immunity*, N.Y. TIMES, Aug. 10, 2002, at A1.

173. Vienna Convention on the Law of Treaties, *supra* note 121, art. 53 provides:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

174. *See* Vienna Convention on the Law of Treaties, *supra* note 121, preamble, para 3, (noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized).

175. Checklist for Effective Implementation, *supra* note 22, at 9.

176. ICC Statute, *supra* note 1, art. 59(1).

tion of the ICC, which will directly affect the ability of the Court to prosecute those accused of committing international crimes. The ICC was created to ensure that anyone, irrespective of his or her position, who commits international crime, is held accountable for his or her actions. Therefore, there is no doubt that State Parties to the ICC are violating their international obligations under the Statute by signing such immunity agreements and that such violations could lead to a finding of non-cooperation pursuant to Article 87, paragraph 7.[177]

## IV. CONCLUSION

The highlighted bottlenecks in the Court's effective exercise of jurisdiction are by no means exhaustive. Due to sovereignty concerns, some of the noted impediments were not mere oversights, but compromises that had to be made in order to gather enough support to establish the Court. After the establishment of the ICC, it is very unlikely that the international community may establish another ad hoc international or hybrid criminal tribunal to prosecute persons accused of international crimes.[178] Thus, the continued application of international individual criminal responsibility rests with the Court. It is therefore imperative that the Court be endowed with sufficient personal jurisdiction in order to ensure that perpetrators of egregious international crimes do not go unpunished.

While there is nothing to suggest that these sovereignty concerns are waning, it is nevertheless imperative that the international community ensure the effective operation of the Court and enable the Court to achieve its stated objective. Fortunately, there is an expectation from States Parties that the ICC Statute requires further elaboration as reflected by the requirement to review the Statute within seven years of entry into force.[179]

A meaningful review of the ICC Statute should consider amending the operation of the complementarity principle at least to grant the Court primary jurisdiction over the crime of genocide[180] and certain categories of offenders who by virtue of their official position are unlikely to be

177. Checklist for Effective Implementation, *supra* note 22, at 9.

178. For instance, instead of establishing another ad hoc tribunal in the Sudan, the Security Council chose to refer the situation in Darfur to the Court.

179. ICC Statute, *supra* note 1, art. 123.

180. *See* Draft Statute for an International Criminal Court, Report of the International Law Commission on the Work of Its Forty-Sixth Session, U.N. Doc. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) art. 21 (prescribing inherent jurisdiction to the ICC only for the crime of genocide); Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT'L L. REV. 1, 20 (2000) (noting that the United States was willing to concede "inherent jurisdiction" of the ICC in regard to the crime of genocide).

genuinely prosecuted domestically.[181] The application of complementarity principle serves as a labyrinth capable of rendering the Court otiose. Thus, the complementarity principle remains a viable threat to the future of the international criminal system and the effectiveness of the Court.

Also, it is worrisome that States may, under the guise of complementarity, shield their nationals from the Court and only selectively refer situations or surrender accused persons to the Court that it does not want to deal with.[182] This kind of selective referral by States may unwittingly expose the Court to accusations of aiding the State to pursue its vendetta against perceived opponents. A perception of the Court as an avenue to pursue victor's justice will not augur well for the image of the Court.

Furthermore, States Parties at the next review conference should delete Article 124 from the Statute because its retention sends a dangerous signal that it is okay to commit war crimes for seven years before accountability can be attributed. Equally, Article 16 should be deleted from the ICC Statute. The idea that the Security Council may block the Court's jurisdiction is troubling as it is an invitation for political meddling in judiciary function. It puts the independence and credibility of the Court at issue. At the same time, it exposes the Court to allegations of western dominance. There is no doubt that an effective and independent judiciary can only be achieved when courts are institutionally shielded from direct political influence. Independence of the judiciary is a *sine qua non* to an effective and credible national court.

There is no reason why the ICC Statute, which exerts its independent status, should not confer unfettered independence on the Court's exercise of jurisdiction.[183] It is an irony that while the ICC is not an organ of the

181. Such amendment would draw from the Statute of the Sierra Leone which restricted the primacy jurisdiction of the tribunals to "those who bear the greatest responsibility" for the atrocities. *See* The Statute for the Special Court for Sierra Leone, art. 1, as amended, annexed to the Secretary-General's Sierra Leone Report, available at: <http://www.un.org/Docs/sc/reports/2000/915e.pdf>, also available at: <http://www.sc-sl.org/scsl-statute.html>.

182. Claus Kress, *'Self-Referrals' and 'Waivers of Complementarity' Some Considerations in Law and Policy*, 2 J. INT'L. CRIM. JUS. 944, 946 (2004) (noting that States may embark on 'selective or asymmetrical self-referral' where the *de jure* Government is itself Party to an internal armed conflict).

183. *See* ICC Statute, *supra* note 4, art. 2; Relationship Agreement Between the United Nations and the International Criminal Court, Oct. 4, 2004, UN Doc. A/58/874, U.N. Doc. PCNICC/2001/1/Add.1, preamble 4, U.N. Doc. A/58/874, annex (2004) (entered into force Oct. 4, 2004). (Preamble 4 to the Relationships Agreement states expressly that "the International Criminal Court is established as an independent permanent institution in relationship with the United Nations."). Thus, the ICC is not a specialized agency of the UN nor does it otherwise belong to the "UN Family." For a discussion on the earlier draft of the Relationship Agreement, see Daryl A. Mundis, *The Assembly of States Parties and the Institutional Framework of the International Criminal Court*, 97 A.J.I.L. 132 (2003).

United Nations, it nevertheless submits itself to the direction of the UN Security Council. Should the Security Council be allowed to prevent ICC investigations or prosecutions *willy nilly*, this will violate the principle of prosecutorial independence.[184]

This study argues unequivocally that the conclusion of bilateral immunity agreements between States Parties and the U.S. which serves to insulate U.S. nationals from the Court's jurisdiction is indubitably a violation of the obligations of States Parties under the ICC Statute. Such immunity agreements fly in opposition to the States Parties' obligations under the ICC Statute. Therefore, there is the need to discourage States Parties from concluding the so called "Article 98" immunity agreement. Without States Parties' assistance and cooperation to surrender accused persons to the Court, the Prosecutor and the Court will face a formidable challenge in discharging the objective of the ICC Statute. The Office of the Prosecutor and the Court will constantly be confronted with a special problem and will need to make special efforts to ensure the ready and voluntary support and cooperation of States Parties.

Thus, while it is the position of this author that the provisions of Article 98 clearly reflect an intent to protect existing SOFAs agreements, it now appears necessary to redraft Article 98 at the next review conference to remove any perceived ambiguity that supports the contention that it extends beyond existing SOFAs.

The obstacles highlighted above do not detract from the efforts of the delegates at the Rome Conference that made the establishment of the ICC possible nor do they ignore the political dynamics associated with negotiating international treaties. Rather, this paper invites the international community to demonstrate its support for the Court by mustering the political will to cooperate fully with the Court and free the Court from the inherent bottlenecks in the Statute that lessen the effectiveness of the Court.

184. Bartram S. Brown, *supra* note 51, 389.