

# The International Criminal Court: An Overview

Franklin M. Ebdalin\*

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## INTRODUCTION

July 17, 1998 marked an unprecedented event in diplomatic history and international law, as representatives of one hundred twenty (120) States who had gathered in Rome voted to overwhelmingly adopt the *Statute for the*

\* LL.B. '67 (Class Salutatorian), Ateneo de Manila University School of Law. The author is currently the Undersecretary for Administration, Department of Foreign Affairs. Among the many positions he has held in the Department were: Assistant Secretary for Legal Affairs (1996-2000); Philippine Ambassador to Hungary, the Czech Republic, Poland, and Slovakia (1993-96); Deputy Chief of Mission, Philippine Embassy in Washington, D.C. (1989-93). The author was the Alternate Head of the Philippine Delegation to the Diplomatic Conference on the International Criminal Court held in Rome, Italy, on June 15-17, 1998, which adopted the Statute of the International Criminal Court.

*Establishment of the International Criminal Court.*<sup>1</sup> The Statute provides for a Court like no other. Unlike the International Court of Justice,<sup>2</sup> the International Criminal Court (ICC) has jurisdiction to try individuals for the most serious crimes of international concern. And unlike the Yugoslavian and Rwandan War Crimes Tribunals, the Court is permanent in character and is not limited by geographical boundaries.<sup>3</sup> It is, after all, a court that was intended to punish and deter the perpetrators of the most heinous and egregious crimes.

This essay will present a short historical background on the establishment of the ICC and an overview of the provisions of the Statute itself. It will then proceed to discuss the major issues that confronted the Rome Diplomatic Conference, and the Philippine positions and interventions on these issues.

## I. THE HISTORICAL IMPETUS

What came to be known as the Rome Diplomatic Conference officially took only five (5) weeks of deliberations and negotiations to conclude, but it was the culmination of a long process that had begun in 1989. To a large extent, its origins extended even as far back as 1946.

The long road towards the genesis of the ICC began in 1946 with the realization that the important principles and precedents created by the Nuremberg Charter and Judgment of the International Military Tribunal at Nuremberg should serve as the basis for further codification of international law.<sup>4</sup> Thus, when the United Nations General Assembly (UNGA) passed Resolution 260<sup>5</sup> on December 9, 1948 adopting the Convention on the Prevention and Punishment of Genocide, it invited the International Law Commission (ILC) "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide..."

For this purpose, the General Assembly established a Committee to draft proposals relating to the establishment of such a court. The Committee came

1. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter ICC Statute].
2. Only states may be a party to proceedings before the International Court of Justice. See Statute of the International Court of Justice, art. 34 (1).
3. Compare Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. VIII, U.N. Doc. S/25704, at 36 (1993) [hereinafter Yugoslavian Statute] and Statute of the International Tribunal of Rwanda, art. VIII, U.N. Doc. S/RES/955, (1994) [hereinafter Rwandan Statute], with ICC Statute.
4. G.A. Res. 95, U.N. Doc. A/236, at 2-3 (1946).
5. 78 U.N.T.S. 277 (1951) cited in U.N. Resolution 260, 1948 - On Genocide, available at [http://www.us-israel.org/jsource/UN/genocide\\_convention.html](http://www.us-israel.org/jsource/UN/genocide_convention.html) (last visited Oct. 29, 2001).

out with a draft statute in 1951 and a revised draft statute in 1953, but consideration of the draft statute was postponed due to the failure of States to agree on the definition of "aggression." States argued that it was useless to consider establishing an International Criminal Court and an International Criminal Code if the principal international crime, aggression, could not be defined.<sup>6</sup> With the advent of the Cold War, discussions on the matter came to a standstill and the idea was conveniently shelved.

The proposal to codify rules on international criminal law and responsibility, and to establish an international judicial organ to deal with such cases, was periodically considered by the General Assembly, but was met with half-hearted enthusiasm. Aside from the contentious issue of aggression, States were nervous about a mechanism that would investigate and indict top leaders. Others worried that their soldiers on peacekeeping missions could be arrested for violations of international humanitarian law. Finally, in December 1989, H.E. Arthur N. Robinson, now President of Trinidad and Tobago, proposed the possibility of establishing an International Criminal Court to prosecute drug traffickers. The proposal did not immediately gain any support, but it contributed to the growing acceptance of the idea of an International Criminal Court, and that of a universal instrument and institution that would prevent impunity and bring to justice violators of international humanitarian law.

With the rising incidence of crimes that undermined international peace and stability, the idea began to receive strong support from the global community. Thus, in 1992, the UN General Assembly directed the ILC to prepare a draft statute for an ICC. A year later, the conflict in the former Yugoslavia erupted, and war crimes in the guise of "ethnic cleansing" once again commanded international attention. This led to the establishment by the UN Security Council of the *ad hoc* tribunal for the former Yugoslavia,<sup>7</sup> followed in 1994 by the establishment of a similar tribunal for Rwanda.<sup>8</sup> The constitution of these *ad hoc* tribunals was brought about by the realization that there was no mechanism to punish perpetrators of heinous crimes when national systems failed or were unwilling to take action against them.

By 1996, the ILC was able to come out with a final text of the Draft Code. A Preparatory Committee was constituted, which produced a consolidated text for the consideration of the Rome Diplomatic Conference. History was then about to take place.

6. Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 377 (1992).

7. U.N.S.C. Resolution 827, 3217th mtg., U.N. Doc. S/RES/827 (1993).

8. U.N.S.C. Resolution 955, 3453rd mtg., U.N. Doc. S/RES/955 (1994).

## II. THE STATUTE IN BRIEF

More than a historical document, the Statute represents a monument to the treaty-making process. It is comprised of thirteen (13) Parts and one hundred twenty-nine (129) Articles, covering, *inter alia*, jurisdiction; general principles of criminal law; the composition and administration of the court; investigation and prosecution; international cooperation and judicial assistance; and enforcement.

### A. Establishment of the Court

The Court is established as a permanent institution that has the power to exercise jurisdiction over persons for the most serious crimes of international concern. It is emphasized that the Court shall be complementary to national criminal jurisdictions.<sup>9</sup> The relationship of the Court with the United Nations is to be determined through an Agreement to be concluded by the Assembly of State Parties to the Statute and thereafter to be concluded by the President of the Court on its behalf.<sup>10</sup>

The seat of the Court is to be established at The Hague in Netherlands.<sup>11</sup>

### B. Jurisdiction, Admissibility, and Applicable Law

Article 5 of the Statute lays down the pivotal rule that the jurisdiction of the Court shall be limited "to the most serious crimes of concern to the international community as a whole," these crimes being genocide, crimes against humanity, war crimes and the crime of aggression. Although the Statute elaborates on the first three crimes, it stipulates that the Court shall exercise jurisdiction over the crime of aggression once a provision defining it and setting out the conditions under which the Court shall exercise jurisdiction over such crime is adopted by the State Parties to the Statute.<sup>12</sup>

The Court acquires jurisdiction only over crimes committed after the entry into force of the Statute.<sup>13</sup> The Court's exercise of its jurisdiction is triggered by a referral to the Prosecutor by a State Party, a referral to the Prosecutor by the Security Council acting under Chapter VII (Action With Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression) of the UN Charter, or an investigation initiated *motu proprio* by the Prosecutor.<sup>14</sup>

The Statute also adopts the principle of *ne bis in idem*, which holds that a

9. ICC Statute, *supra* note 1, art. 1.

10. *Id.* art. 2.

11. *Id.* art. 3.

12. *Id.* art. 5.

13. *Id.* art. 11.

14. *Id.* art. 13.

person may not be tried and punished for the same crime twice.<sup>15</sup>

In the exercise of its jurisdiction, the Statute mandates the Court to apply:

- a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime<sup>16</sup>

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

#### C. General Principles of Criminal Law

The Statute adheres to the principles of: *nullum crimen sine lege*<sup>17</sup> (an action may be punished only if it had been made punishable prior to its commission); *nullum poena sine lege*<sup>18</sup> (the crimes within the jurisdiction of the Court should be defined with clarity and precision); and non-retroactivity.<sup>19</sup>

Accordingly, under Article 23 of the Statute, a person convicted by the Court may be punished only in accordance with the Statute. More importantly, the Statute emphasizes that the Court shall have jurisdiction over natural persons, and holds that a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for such crime.<sup>20</sup> In relation to this, it may be noted that the Statute applies to all persons, without distinctions based on official capacity, *i.e.*, the Head of State or Government, a member of Government or Parliament, or an elected representative or a government official.<sup>21</sup> Likewise, emphasis is placed on the responsibility of military commanders and other superiors.<sup>22</sup> Finally, the Statute adopts the principle of *mens rea* in determining liability for a crime, *i.e.*, the person shall be criminally liable only if the material elements of the crime are committed with intent and knowledge.

15. *Id.* art. 20.

16. *Id.* art. 21.

17. *Id.* art. 22.

18. *Id.* art. 23.

19. *Id.* art. 24.

20. *Id.* arts. 25 (1) & (2)

21. *Id.* art. 27 (1)

22. *See id.* art. 28 (On the Responsibility of Commanders and other Superiors).

#### D. Composition and Administration of the Court

The Court is to be composed of the Presidency; an Appeals Division, a Trial Division and a Pre-Trial Division; the Office of the Prosecutor; and the Registry.<sup>23</sup> The Presidency is to be responsible for the proper administration of the Court,<sup>24</sup> while the Registry is to be responsible for the non-judicial aspects of the administration and servicing of the Court.<sup>25</sup>

The members of the Court who are nominated and elected by the State Parties shall have established competence in criminal law and procedure as well as in relevant areas of international law such as international humanitarian law and the law of human rights.<sup>26</sup>

The Office of the Prosecutor, on the other hand, is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court for purposes of examination, and for conducting investigations and prosecutions before the Court. The Office of the Prosecutor is to act independently as a separate organ of the Court.<sup>27</sup>

#### E. Investigation and Prosecution

An investigation is initiated by the Prosecutor after prior evaluation of the information made available to him or her.<sup>28</sup> The Pre-Trial Chamber is to oversee prosecutorial investigations and ensure that the defendant's rights are protected.<sup>29</sup>

After the investigation, the Pre-Trial Chamber issues a warrant of arrest of a person if there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.<sup>30</sup>

#### F. Trial

The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.<sup>31</sup> The onus is on the prosecutor to prove the guilt of the accused.

23. *Id.* art. 34.

24. *Id.* art. 38 (3).

25. *Id.* art. 43 (1).

26. *Id.* art. 36 (3)(b).

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

28. *Id.* art. 53 (1).

29. For the functions and powers of the Pre-Trial Chamber, *see id.* art. 57.

30. *Id.* art. 58 (1).

31. *Id.* art. 64 (2).

Trial *in absentia* is not allowed. It shall be in the presence of the accused.<sup>32</sup> Victims may participate in or be represented at trials.<sup>33</sup> Reparation to victims, including restitution, compensation, and rehabilitation, is provided for.<sup>34</sup>

#### G. Penalties

The applicable penalties include imprisonment (which may not exceed a maximum of thirty years), life imprisonment, and fines and forfeiture of the proceeds, property, and assets derived from a crime.<sup>35</sup> The death penalty is excluded.

This does not affect the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties so prescribed by the Statute.<sup>36</sup>

#### H. Appeal and Revision

Both the Prosecutor and the convicted person may appeal a final decision on the grounds of procedural error, error of fact, or error of law.<sup>37</sup>

#### I. International Cooperation and Judicial Assistance

The Court's viability depends largely on the cooperation of national jurisdictions. Accordingly, all State Parties have the general obligation to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.<sup>38</sup> In accordance with the rule of specialty, a person surrendered to the Court under the Statute may be tried or punished only for the conduct or course of conduct that forms the basis of the crimes for which that person has been surrendered.<sup>39</sup> Other forms of cooperation provided for include ensuring the availability of procedures under national law,<sup>40</sup> provisional arrests<sup>41</sup> and surrender of persons to the Court.<sup>42</sup> Pursuant to this, the Court may request for the arrest and surrender of the accused by the State where he may be found.

32. *Id.* art. 67 (1).

33. *Id.* art. 75 (3).

34. *Id.* art. 75 (2).

35. *Id.* art. 77.

36. *Id.* art. 80.

37. *Id.* art. 81 (1).

38. *Id.* art. 86.

39. *Id.* art. 101 (1).

40. *Id.* art. 88.

41. *Id.* art. 92.

42. *Id.* art. 89.

#### J. Enforcement

Sentences of imprisonment shall be served in States which have indicated their willingness to accept sentenced persons.<sup>43</sup> If no State is designated by the Court, then the sentence shall be served in a prison facility made available by the Host State (*i.e.*, Netherlands).<sup>44</sup>

#### K. Assembly of States Parties

The Assembly of State Parties shall consider and adopt, as appropriate, recommendations of the Preparatory Commission, provide management oversight, consider and decide the budget of the court and consider any question relating to non-cooperation by State Parties.<sup>45</sup>

Each State is to have one representative in the Assembly,<sup>46</sup> and shall be entitled to one vote.<sup>47</sup>

#### L. Financial Regulations

The funds of the Court and of the Assembly of State Parties are to be obtained from contributions made by State Parties and funds provided by the United Nations. The latter, in particular, shall be used in relation to the expenses incurred due to referrals by the Security Council.<sup>48</sup> Another source of funds are the voluntary contributions of Governments, international organizations, individuals, corporations and other entities.<sup>49</sup>

#### M. Final Clauses

The Statute enters into force after ratification by sixty (60) States.<sup>50</sup> Seven years thereafter, a Review Conference shall be convened to consider amendments to the Statute. Such review may include the list of crimes as specified in Article 5.<sup>51</sup>

Amendments to the Statute may be proposed only after the expiry of seven (7) years from its entry into force.<sup>52</sup> Notably, a State may declare that for a

43. *Id.* art. 103 (1).

44. *Id.* art. 103 (4).

45. *Id.* art. 112 (2).

46. *Id.* art. 112 (1).

47. *Id.* art. 112 (7).

48. *Id.* art. 115.

49. *Id.* art. 116.

50. *Id.* art. 126 (1).

51. *Id.* art. 123 (1).

52. *Id.* art. 121 (1).

period of seven years after the entry into force of the Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to war crimes when a crime is alleged to have been committed by its national or on its own territory.<sup>53</sup>

Reservations to the Statute are not permitted.<sup>54</sup>

### III. THE PHILIPPINE POSITION

The Philippine position during the Rome Conference was for the establishment of an effective and efficient International Criminal Court, one that was not to be established simply for the sake of being established:

[i]f it were set-up on the basis of the least common denominator which renders it ineffective in addressing the problem of impunity of the perpetrators of atrocious violations of the laws of humanity, then perhaps the world would be better off without it. For such a flawed institution will not serve justice and consequently, cannot help maintain international peace and security...<sup>55</sup>

In order for the Court to be effective and efficient, the Philippines submitted that the ICC should be constituted as an independent judicial organ by means of a multilateral treaty (not through an amendment of the UN Charter), with its own international legal personality, and as a permanent institution that could act when required to consider a case submitted to it.

### IV. SALIENT ISSUES

During its nascent stages, the drafting of the Statute was faced with several critical issues, which included the crimes covered by the Court, universal jurisdiction, the principle of complementarity, access, and the role of the Security Council *vis-a-vis* the Court.

#### A. Crimes Covered

In the initial discussions of the Preparatory Committee, there was no agreement as to which crimes should be brought within the jurisdiction of the Court. However, there was a broad consensus that the court's jurisdiction should at the very least include the "core" crimes that are of concern to the international community as a whole: genocide, crimes against humanity, and war crimes.<sup>56</sup>

53. *Id.* art. 124.

54. *Id.* art. 120.

55. Lauro L. Borja Jr., *Towards an Effective International Criminal Court*, Address Before the ICC Diplomatic Conference in Italy (June 16, 1998).

56. See Agreement for the Establishment of An International Military Tribunal, art. 6, 5 U.N.T.S. 251, reprinted in 39 AM. J. INT'L L. 257 (1945).

The Philippine delegation, while supporting this view, strongly advocated the inclusion of such crimes as drug trafficking, terrorism, and crimes committed against UN personnel. The debates over the inclusion of these crimes lasted until the last day of the Conference. In the end, the jurisdiction of the Court was limited to the "core" crimes and to aggression. Notably, the crime of aggression remains undefined and will not come within the jurisdiction of the Court until a definition is adopted. It may also be noted that Article 121 on amendments, and Article 123 on the provision for a Review Conference, opens the door to the possibility of eventually including these crimes within the jurisdiction of the Court.

Of the core crimes, the least contentious item was the crime of genocide. The States were virtually unanimous in agreement that this crime should be included within the Court's jurisdiction. The only issue in relation to this was whether the definition of "genocide" as provided for in the 1948 Genocide Convention<sup>57</sup> formulation should be adopted, or whether the concept should be broadened. In the end, the Statute adopted the 1948 formulation.

In relation to crimes against humanity, the Statute adopted a definition with a high threshold, one more restrictive than the prevailing international law standards. The definition under Article 7 states that crimes against humanity are acts<sup>58</sup> committed: first, as part of a widespread or systematic attack; second, against any civilian population; and third, with knowledge of the attack. The second and third elements are not required under prevailing international law standards.

The Court has jurisdiction over war crimes when they are committed "as part of a plan or policy or as part of a large-scale commission of such crimes."<sup>59</sup>

57. Convention on the Prevention and the Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277. Article 2 of the Convention defines genocide as "any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group." *Cf.* ICC Statute, art. 6.

58. These acts are: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. ICC Statute, art. 7.

59. *Id.* art. 8.

War crimes include grave breaches of the 1949 Geneva Conventions,<sup>60</sup> other serious violations of the laws and customs applicable in international armed conflict and armed conflicts not of an international character. It is generally accepted in international law that breaches of the laws of war may be punished by any State which acquires custody of persons suspected of responsibility.<sup>61</sup>

What is notable about the definition is the inclusion of crimes committed in non-international armed conflict. However, "non-international armed conflict" does not cover situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.<sup>62</sup> In addition, only acts which take place in a State where a protracted armed conflict between governmental authorities and organized armed groups exists, or between such groups, are considered war crimes. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities, has also been included as a war crime.

Aggression, long considered as the main obstacle to the creation of an international criminal court because of the inability to define it with specificity, still remains undefined under the Statute.<sup>63</sup> As a writer once said, "[t]he most important thing about defining aggression is to define it."<sup>64</sup> Attempts have been made over the years to do exactly that.

The Twenty-Ninth UNGA approved Resolution 3314 on December 14, 1974,<sup>65</sup> which sought to define aggression. Aggression was defined as "the use of force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations..."<sup>66</sup> This definition, however, did not receive broad support in view of its lack of clarity. It did not categorically ascertain the need for the use of armed force. Neither did it address acts of indirect

60. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

61. IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 305 (4d ed. 1990).

62. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(2), 16 I.L.M. 1442 (1977).

63. See *Preparatory Commission for International Criminal Court Is Told Definition of "Crime of Aggression" Still Under Review*, U.N. Press Release, L/2967 (2000).

64. Ferenz, *supra* note 6, at 375.

65. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 21, reprinted in 69 AM. J. INT'L L. 480 (1975).

66. *Id.* art. 1.

aggression, such as the fomenting of civil unrest in another country.

For its part, the Philippines pushed for the inclusion of aggression under the jurisdiction of the Court. The Philippines submitted that aggression exists as a crime under customary international law which must necessarily be addressed because it is in fact the root cause for the commission of other serious crimes, as it clearly triggers wars and conflicts. Accordingly, those who wrongfully waged war should be held personally responsible for the aggression.

Considering the lack of material time and the divergent views of the State Parties,<sup>67</sup> it was decided that aggression be included under the jurisdiction of the Court, but only after the Parties define the crime.

### B. The Principle of Complementarity

The concept of "complementarity" underpins the entire structure of the ICC.<sup>68</sup> Complementarity essentially means that the Court will "complement," not replace, national courts.<sup>69</sup> This principle is encapsulated in the tenth preambulatory paragraph of the Statute ("Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions"<sup>70</sup>) and is reiterated in Article 1, on the establishment of the Court, and in Article 17 on the admissibility of a case.

Accordingly, the ICC is not intended to operate as a supranational body that will supplant national judicial systems. Rather, it is aimed at strengthening such systems, and it can only step in when national authorities are unwilling or unable to act. It is thus, a default Court that will act only in the absence of any action by national judicial systems.

The Statute provides for standards to determine whether a State is unwilling or unable to genuinely carry out the investigation or prosecution of a case. Under Article 17:

2. In order to determine unwillingness in a particular case, the Court shall consider... whether one or more of the following exists, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal

67. See *Delegates Differ on Whether Statute of Proposed International Criminal Court Should Cover Crime of Aggression*, U.N. Press Release, GA/L/3047 (1997).

68. Lawyers Committee for Human Rights, *Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute*, 1 International Criminal Court Briefing Series 13 (No. 1, 1998).

69. This is contrary to the identical provision of the Rwandan and Yugoslavian International Tribunal Statutes, which state that "The International Tribunal [for the former Yugoslavia/Rwanda] shall have primacy over national courts." Yugoslavian Statute, art. IX (2); Rwandan Statute, art. IX (2).

70. ICC Statute, *supra* note 1, at pmbl.

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, under the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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

It is precisely this principle of complementarity which ensures that the Court will not be in derogation of the sovereignty of States. Although it is traditionally accepted that sovereignty is absolute in the domestic level, it is also agreed that this sovereignty is subject to limitations voluntarily agreed upon by States as members of the family of nations. In the leading case of *Tañada vs. Angara*,<sup>71</sup> the Supreme Court had the occasion to expound on this theory of "auto-limitation:"

By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by, or derived from a convention or pact. After all, states, like individuals, live with co-equals, and in pursuit of mutually covenanted objectives and benefits, thus they also commonly agree to limit the exercise of their otherwise absolute rights.<sup>72</sup>

### C. The Role of the Security Council

The role of the UN Security Council as against the jurisdiction of the ICC was another contentious issue that the Rome Conference had to face. Too great a role for the Council could result in the Court being seen as dominated by the major powers, thus lacking the attributes of independence, universality and fairness. On the other hand, it was feared that the ICC may usurp the Council's role in matters relating to international peace and security, and the exercise of its Chapter VII powers under the UN Charter. This view was espoused by the United States, which lobbied for a provision stating that the Prosecutor would not be able to initiate investigations without the prior approval of the Council.<sup>73</sup> Other States however opined that such a provision would politicize the Court and protect the Council's Member States from the reaches of the Court.

71. 272 SCRA 18 (1997).

72. *Id.* at 66.

73. See *United States Declares At Conference That United Nations Security Council Must Play Important Role in the Proposed International Criminal Court*, UN Press Release, L/2879 (1998).

The Statute, as finalized, incorporated the attempt of the State Parties to reconcile and maintain a balance between these views. As such, the Security Council is afforded a special role within the ICC. On one hand, it is given the power to refer situations to the Prosecutor for investigation.<sup>74</sup> This power, however, is not reserved exclusively for the Council — as was preferred by the States who were also members of the Council — but is shared by States. In addition, the Prosecutor may, on his own, investigate a situation. The Council is also given the power to delay an investigation or prosecution by the Court.<sup>75</sup> It can do so by requesting the ICC, through a resolution adopted under its Chapter VII powers, that an investigation be deferred. The deferment is for a maximum period of twelve months, which may be extended.

Although the Statute was overwhelmingly passed, with only seven states voting against it and twenty-one countries abstaining, those who voted against its adoption were countries such as the United States,<sup>76</sup> China, India, and Israel whose non-participation cast serious doubts on the viability of the ICC. To date, the United States and Israel have signed the Statute, but it is uncertain that they will ratify the same. As of October 12, 2001, 139 countries have signed the Statute, and forty-three countries have ratified it.<sup>77</sup> The international community is still anticipating the Court's final birth, which will come only after sixty States ratify the Treaty.

In the meantime, the Preparatory Commission continues to thresh out still unresolved issues such as the definition of aggression and the relationship of the Court with the UN. What the final outcome will be, and when the Court will finally come into being, remains an uncertainty. What is certain is that the advent of the ICC has already profoundly shaped international humanitarian and criminal law.

74. ICC Statute, *supra* note 1, art. 13.

75. *Id.* art. 16.

76. See David Schiffer, Ambassador-At-Large for War Crimes Issues, *United States Department of State Statement on Creating an International Criminal Court* (Washington, Aug. 31, 1998), at <http://www.mtholyoke.edu/acad/intrel/scheffer.htm> (last visited Oct. 27, 2001).

77. NGO Coalition for an International Criminal Court, *Rome Statute Signature and Ratification Chart*, at <http://www.igc.apc/icc/rome/html/ratify.html> (last visited Oct. 27, 2001).