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Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council *

MORTEN BERGSMO**
Legal Advisor in the Legal Advisory Section of the Office of the Prosecutor of the ICTY

1. Of the Background to State Concerns That International Justice Mandates Can Obstruct the Dictates of Peace

We have come a long way in rationalising the co-existence between international peace and justice mandates since the Commission of Experts and the International Criminal Tribunal for the former Yugoslavia[1] were established in 1992–1993. At that time, uncertainty and discomfort were experienced among the ranks of those entrusted with the tasks of keeping and policing fragile cease-fire agreements and with negotiating a lasting peace settlement in the former Yugoslavia. The concerns were multiple, as were, it must be conceded, the degrees of sincerity. Many thought that the stigma associated with likely international indictments of leaders from the former Yugoslavia

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** The author has been a Legal Adviser in the Legal Advisory Section of the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) since May 1994. He was seconded by the Norwegian Government as Legal Adviser to the Commission of Experts in 1993–1994. Since 1996 he has been the official representative of the ICTY to the Preparatory Committee and Rome Conference on the establishment of an International Criminal Court, as well as to the Preparatory Commission for an International Criminal Court. The views expressed in the note are those of the author and not necessarily those of the United Nations.

[1] Hereinafter referred to as "ICTY".

would complicate the peace negotiations, insofar as the will to peace of the accused leaders could be substantially undermined. Questions asked in the media and by human rights organisations attached an uncomfortable moral ambivalence to having dealings with leaders subsequent to their indictment by the Tribunal. Representatives of the International Conference for the Former Yugoslavia (ICFY), the prime forum for relevant peace efforts from late August 1992 until Dayton, repeatedly referred to the inappropriateness of "taking the moral high ground". The anonymous article which appeared in *Human Rights Quarterly* in 1996 under the title "Human Rights in Peace Negotiations" was indicative of the difficulties felt by those who had accepted to try to execute the joint United Nations and European Union mandate for a peaceful settlement of the conflicts in the former Yugoslavia.[2] There were similar fears among those implementing the international efforts to keep and police the peace on the ground. They did not know whether the enforcement of Tribunal orders on search and seizure, on-site investigations, arrests, and for individuals to appear before the Tribunal, would undo the painstaking efforts of international peace-keepers and police in the field. What would the reaction of the parties be to such international judicial enforcement action?

The Security Council had decided to employ an instrument that has gradually become known as international judicial intervention. Was this going to be at the expense of the established Council instruments of mediation, peacekeeping and peace-enforcement, and policing? How could the Council's peace and justice mandates co-exist in a mutually reinforcing way? Was the new Tribunal going to be sufficiently independent and impartial or would it unfairly target one of the sides to the conflicts in the former Yugoslavia? How would future criminal justice interventions by the Council impact on unilateral international military interventions? These were questions discussed in Geneva, New York and some capitals after the Security Council had decided in principle to establish an international criminal tribunal for the former Yugoslavia on 22 February 1993.[3] Not even the members of the Commission of Experts had expected the Council to act so swiftly, just 12 days after the Commission cautiously recommended that a tribunal be established in its first interim report to the Council.[4]

The contrast between the resources made available to the ICFY and the Commission of Experts was stark and a subject of stoic bemusement among the members of the Commission. The fact that the International Conference occupied the pre-eminent central floor of Palais des Nations in Geneva, whilst

[2] See *Human Rights Quarterly* 18 (1996) 249–258, in particular the emotive concluding observations on p. 258 (uncharacteristic of its author).

[3] UNSC Resolution 808 (1993), 22 February 1993.

[4] UN Doc. S/25274, 10 February 1993, para. 74 *in fine*.

the Commission had its offices scattered in far off corners of the building, was not material. The Commission was understaffed and inadequately funded. That is a practical and political fact. The initial Commission members were five distinguished international law experts who were assisted by a mere five lawyers seconded from the UN Office of Legal Affairs and two Governments. The financial resources available to the Commission were inadequate for it to appropriately fulfil the mandate given to it by the Security Council. The contrast to the situation of the ICFY was paradigmatic. This predicament was naturally a matter of considerable concern to the Commission members and contributed to the changes in its membership.[5]

The Commission was never in a position to make demanding requests to the international security presence in Bosnia and Herzegovina and Croatia, with the exception of the attempted exhumation of the mass grave at Ovčara outside Vukovar in Croatia. It was materially and legally not equipped to issue compulsory measures. But the initial fact-finding missions it undertook in those two republics represent the beginning of field co-operation between the Security Council's war crimes and peace-keeping mandates. Ever since the ICTY Office of the Prosecutor started its investigations during the summer of 1994, this co-operation has expanded to include new forms of concerted action in the field, steadily and ever-increasing. It has gradually reached a level of professional routine and familiarity that has brought us beyond the initial difficulties in the political and practical balancing of Security Council peace and justice mandates.

One of the members of the Commission of Experts, Professor Torkel Opsahl, found himself particularly well-placed to realistically assess the degree of political support for the Commission and for the efforts to establish the ICTY, the forerunner to the permanent International Criminal Court (ICC). He had daily, informal contact with his long-standing friend Ambassador Thorvald Stoltenberg who during the spring of 1993 was appointed Special Representative of the UN Secretary General for the former Yugoslavia and Co-Chairman of the ICFY Steering Committee. This personal contact with Ambassador Stoltenberg and his ICFY Legal Adviser proved important in building and cementing political support in several Western capitals for both the international war crimes process in the former Yugoslavia and for the need to renew and strengthen efforts to establish a permanent international criminal mechanism with general jurisdiction not restricted to any particular

[5] There were two casualties of the deplorable resource situation. Professor Frits Kalshoven's sick leave as Commission Chairman was indefinite and ultimately led to his resignation. Professor Torkel Opsahl acted as Chairman until he died on Commission premises in the Palais des Nations, tirelessly endeavouring to bring the Commission's work forward despite its limited resources and his fragile health. Professor M. Chèrif Bassiouni then chaired the Commission through its final stages.

conflict. The ICFY interacted closely and daily with the relevant foreign affairs and inter-governmental leaderships at the highest levels. One should not underestimate the contributions of Ambassador Stoltenberg, through ICFY, and more indirectly and discretely, Professor Opsahl, to the emergence of political acceptance in Europe of international criminal justice, especially in 1993.

In retrospect the relationship between the ICFY, on the one hand, and the Commission of Experts and the ICTY, on the other, seems like the seed of balancing between peace and justice mandates through which the tree and its shadow, or lack thereof, can best be envisaged. The international interest in the armed conflicts in the former Yugoslavia, their strategic function, and their possible resolution was virtually complete in the early and mid-1990s. The full spectrum of international peace-making instrumentalities, short of proper peace-enforcement, was being considered in inter-governmental organisations and capitals. For a long time nothing seemed to work. There was a genuinely perceived fear of spill-over in the Balkan region, and the conflict of interests between the permanent members of the Security Council as well as within the Western group of States could not be concealed. In the midst of these deeply troubling realities, the international community, led by the Security Council, first decided to establish an international fact-finding mechanism, the Commission of Experts, as an enforcement measure under Chapter VII of the UN Charter.[6] Some seven months later, the Council established the ICTY on the same legal basis.[7] And then, a mere 6–7 months further down the road, the General Assembly requested the International Law Commission to complete as a matter of priority its work on a draft statute for a treaty-based international criminal court.[8] Upon its completion in mid-1994, the text formed the basis for the ICC-negotiations which commenced in 1995, first in the Ad Hoc Committee, then the Preparatory Committee, and which were finally concluded at the end of the Rome Conference on the establishment of an ICC in June–July 1998.[9] In other words, the idea of an international criminal justice response to the wars in the former Yugoslavia was accepted and implemented at the same time as the ICFY and associated initiatives were trying to make peace.

In September 1994, a closed, informal meeting on the relationship between the international peace and justice processes in the former

[6] UNSC Resolution 780 (1992), 6 October 1992.

[7] UNSC Resolution 827 (1993), 25 May 1993.

[8] UNGA Resolution 48/31, 4 December 1993.

[9] The Final Act of the Rome Conference identified the instruments of the more detailed legal infrastructure of the ICC to be developed by a Preparatory Commission for the International Criminal Court for the benefit of the Assembly of States Parties of the future Court.

Yugoslavia took place at Harvard Law School.[10] This was not only the first meeting of its kind, it was also indicative of the need for thorough analysis of and discourse on some of the issues of concern. Senior representatives of the ICFY and ICTY, together with leading academics from the United States and Europe and former members of the Commission of Experts, engaged in free and full consultation on tensions, problems and possibilities inherent in the relationship between the two institutionalised international mandates. The meeting illustrated that the dilemmas were (and are) real, but that they are not limited to the situation arising out of the conflicts in the former Yugoslavia. There was a sense that the very nature of the international criminal justice process necessarily presents the implementers of international peace mandates, be they inter-governmental or unilateral, with combinations of requirements which cannot be compromised and are long-term. The needs include respect for the fundamental independence and impartiality of the justice process, access to and control over the gathering of evidence and case preparation in general, willingness to arrest indicted persons, non-application of immunity regimes, and general preparedness among States to comply with requests for assistance and judicial orders. The importance of mutual understanding and respect for the integrity of the different mandates was stressed. The participants also recognised the shared values of respect for individual life, physical integrity and personal liberty which ultimately underpin both the protection regimes of international criminal law and the efforts to restore and maintain international peace and security.

It is in the context of this broader balancing of interests between international peace[11] and justice mandates that this note is written. It is realistic to expect that the tensions inherent in this balancing will continue also after the ICC has been established. It is a matter of considerable importance that one aspires to address such future tensions on the basis of the fundamental premises and in the proper forum recognised by the ICC Statute. The Security Council's pre-eminent role in the maintenance of international peace and security is fully recognised by the ICC Statute. The Council is the forum in which the essential dictates of the making, enforcement and keeping of international peace and security must be measured against the requirements of international criminal justice. The UN Charter and the ICC Statute both point in the same direction. It would serve the objects and purposes of neither the Charter nor the Statute to prevent a natural and dynamic relationship between the Security Council and the ICC from evolving, on the grounds

[10] The meeting was organised by Professor Henry Steiner, Director of the Law School Human Rights Program, Harvard University, in co-operation with Payam Akhavan and the present author.

[11] Inter-governmental or other.

that the jurisdictional regime of the Court is not entirely as one had wished. This is all the more pressing if the concerned States are among those that have demonstrated the strongest support for international criminal justice, from the time of the Commission of Experts, to the *ad hoc* Tribunals and the negotiation of substantial parts of the ICC Statute. These are the main questions considered in this note.

2. State Concerns about the International Criminal Court's Jurisdictional Reach That Could (But Should Not) Affect the Security Council's Use of the Court

It was against the background described in section I above that the provisions in the ICC Statute on the Court's relationship with the Security Council were negotiated. Of all the Court's relationships, the one with the Security Council is likely to be the most important for its practical success.[12] The concern here is not to describe the different manifestations of the relationship between the Court and the Council, nor their legal anatomy.[13] Rather, the purpose of this note is to discuss some of the criticisms by concerned States of the Court's jurisdictional reach, with a view to assessing the possible impact of such criticisms on the Council's willingness to use the Court through future referrals of situations. The mixed political-legal nature of the State concerns in question make it an exercise in futility to try to exhaustively identify and analyse the full reality behind the criticism of the ICC Statute.

By the time the Preparatory Committee on the establishment of the Court started its work in 1996, the Security Council's power to undertake international judicial intervention through *ad hoc* tribunals was generally recognised as a Council faculty firmly rooted in Chapter VII of the UN Charter. Some States did not recognise the legal basis of the Security Council to establish the ICTY and ICTR, but few, if any, could doubt that the permanent members

[12] Sir Franklin Berman has remarked: "In my view far and away the most important of [the Court's relationships] will prove to be the developing relationship with the Security Council", see "The Relationship between the International Criminal Court and the Security Council", in H.A.M. von Hebel, J.G. Lammers and J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, T.M.C. Asser Press, The Hague, 1999, p. 173.

[13] For such discussions, see Sir Franklin Berman, op. cit., pp. 173–180; Lionel Yee, "The International Criminal Court and The Security Council: Articles 13(b) and 16", in Roy Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, pp. 149–152; and Gabriël H. Oosthuizen, "Some Preliminary Remarks on the Relationship between the Envisaged International Criminal Court and the UN Security Council", *Netherlands International Law Review*, XLVI, 1999, 313–342.

of the Council did *not* intend to give up the newly asserted power and instrument of judicial intervention in any foreseeable future. Why should they? The emerging success of the two *ad hoc* Tribunals, subsidiary organs of the UN created by the Council, was gradually being recognised by States at the same time as the process to establish the ICC progressed. It has been remarkable to observe the steady increase in the frequency with which ICC-delegates from across the globe have referred to the jurisprudence of the *ad hoc* Tribunals, and the weight they have been prepared to give both the jurisprudence and the contributions made by Tribunal representatives during the ICC-negotiations.

The continued interest of the Security Council in ensuring that its international judicial interventions succeed has sent a clear signal to delegations negotiating the provisions on the relationship between the Council and the Court in the ICC Statute. Despite controversy there was in reality little doubt what the final outcome of the negotiations on Council referrals to the Court would be, provided there was going to be a Statute at all.[14] The opposition to the proposition that the Statute should recognise that the Council can refer situations to the Court under Chapter VII of the UN Charter was consistent but relatively contained. Some States, India pre-eminent among them, objected firmly to the accommodation of any role at all for the Security Council in the Statute of the permanent Court. The Council has no legal basis for such involvement in the Charter, it was argued, and any concession to the Council would damage the non-political nature of the Court. India remained an eloquent and committed proponent of this position until the very end of the last plenary session of the Rome Conference in the early hours of 18 July 1998:

> The power to refer is now unnecessary. The Security Council set up *ad hoc* tribunals because no judicial mechanism then existed to try the extraordinary crimes committed in the former Yugoslavia and in Rwanda. Now, however, the ICC would exist and States Parties would have the right to refer cases to it. The Security Council does not need to refer cases, unless the right given to it is predicated on two assumptions. First, that the Council's referral would be more binding on the Court than other referrals; this would clearly be an attempt to influence justice. Second, it would imply that some members of the Council do not plan to accede to the ICC, will not accept the obligations imposed by the Statute, but want the privilege to refer cases to it. This too is unacceptable.[15]

[14] See Hans-Peter Kaul, *Der internationale Strafgerichtshof: Das Ringen um seine Zuständigkeit und Reichweite, Humanitäres Völkerrecht*, Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht (IFHV), Bochum, 1998, p. 142.

[15] This is cited from the unofficial "Explanation of vote by India on the adoption of the Statute of the International Criminal Court, Rome, July 17, 1998" which the author obtained

This explanation of vote was made after the Statute had been adopted with its Article 13(b), which provides that if a situation is referred "to the Prosecutor by the Security Council acting under Chapter VII of the Charter to the United Nations", the Court may exercise its jurisdiction. Article 13 establishes the jurisdictional triggering or activation regime of the Statute. It empowers the Court, not the Council. The principle recognised by Article 13(b) was accepted by the overwhelming majority of the negotiating States. Article 13(b) does not take or give any power to the Council, it merely echoes a power which the Council enjoys under the UN Charter, regardless of the express provisions of the ICC Statute. For our purposes it only has academic interest to consider whether the Council could refer situations to the Court even without Article 13(b), an interest we shall not pursue here.

The reasons why the Security Council might wish to refer a situation to the ICC under Chapter VII are largely self-explanatory and require no detailed analysis. Situations which involve atrocities that amount to "the most serious crimes of concern to the international community as a whole"[16] will frequently challenge international peace and security in a manner which triggers the responsibility of the Council to serve as the primary guardian of the maintenance of international peace and security.[17] It is reasonable to expect that the combined factors of media and NGO pressure, governmental intelligence activity and public indignation will not be weaker in the future than they ended up being in the cases of the former Yugoslavia and Rwanda. But it is not enough that a strong group of non-permanent members of the Security Council would like to see the Council take action and refer a situation to the ICC. As long as current Article 27 of the UN Charter provides the parameters of the decision-making regime within the Council, the role of the permanent five members remains essential. A decision to refer a situation to the ICC would require an affirmative vote of nine Council members including the non-use of veto by the permanent five. This makes support by the permanent members indispensable for referrals to take place. In theory they could all abstain if there was strong unity and leadership among nine of the non-permanent members. Experience since the ICTY was established, however, suggests that in practice the leading engagement of at least one permanent Council member is required for the Council to undertake international judicial intervention.

from the Indian Delegation after its presentation, and it should thus be checked against the official United Nations transcript of the relevant session. For an assessment of the Indian position, see Morten Bergsmo, "The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11–19)", *European Journal of Crime, Criminal Law and Criminal Justice*, 1998-4, p. 353.

16 Preambular paragraph 9 of the ICC Statute, see also Article 1.

17 See Article 24(1) of the UN Charter.

This does not mean that all the permanent members of the Security Council must become States Parties to the ICC Statute for the Council to be positively disposed towards referrals to the Court. But it could be an unfortunate obstacle if one or more permanent Council members find it necessary to consider themselves opposed to the Court or critical to its use by the Council. It is difficult to identify any *legal* merit underpinning such a position, and even the underlying political considerations do not seem to stand the test of enlightened *Realpolitik*. The case for the absence of so-called jurisdictional overreach in the ICC Statute has been preliminarily argued elsewhere,[18] where it was suggested that the concerns of permanent members of the Security Council or other States which remain non-States Parties seem to be appropriately accommodated by the ICC Statute.

The scenario that has been presented as an acute political dilemma during the negotiations of the Statute and after its adoption centres on the ability of non-States Parties to participate in international peace-keeping and peace-enforcement operations, whether authorised by the Security Council or not. It has been suggested that the usual clause on exclusive criminal jurisdiction for the sending State in the standard status-of-forces agreements cannot prevent servicemen from non-States Parties from being investigated and prosecuted by the ICC. It is correct that under Article 90(6) of the ICC Statute (which concerns competing requests for the surrender of a person from the ICC and a non-State Party towards which the requested State has an international obligation to extradite the person), the requested State has the discretion to decide where to transfer the person to. But among the factors which the requested State shall take into consideration are the interests of the requesting State and the possibility of subsequent surrender between the Court and the requesting State (for example, due to successful invocation of complementarity by the requesting State).[19] More importantly, this provision only regulates the discretion of the *requested State*, not that of the *ICC* to make a request for surrender in the first place. Article 98(2) addresses the absence of the latter power in situations where the requested State is under an obligation under international agreements to obtain the consent of a sending State to surrender a person of that State to the Court. Article 98(2) provides that the Court may only proceed with a request for surrender if it "can first obtain the cooperation of the sending State for the giving of consent for the surrender".

[18] See Louise Arbour and Morten Bergsmo, "Conspicuous Absence of Jurisdictional Overreach", *International Law Forum du Droit International* 1, 1999, 13–19; also published in H.A.M. von Hebel, J.G. Lammers and J. Schukking (eds.), op. cit., pp. 129–140. See also Bartram S. Brown, "U.S. Objections to the Statute of the International Criminal Court: A Brief Response", *Journal of International Law and Politics*, 31, 1999, 855–891 [at 873 to 877].

[19] See Articles 90(6)(b) and (c).

This is an article whose implications many delegations unfortunately did not fully realise until *after* the Rome Conference,[20] insofar as it was introduced at the end of the Conference and in the context of technical negotiations on State co-operation. Concerned States will undoubtedly ensure that status-of-forces agreements relevant to their involvement in international peace-keeping and peace-enforcement operations are adapted to facilitate unhindered application of Article 98(2), so that the agreements expressly provide that the consent of the concerned sending non-State Party is required for exceptions to be made to the provision on exclusive criminal jurisdiction for that sending State.[21]

In any event, the complementarity principle in Article 17 provides concerned States with an additional and more fundamental safeguard. The ICC is only meant to supplement national criminal justice systems; it is of a complementary nature. A case is only admissible if as a bare minimum there is no State with jurisdiction over it that is willing and able genuinely to investigate and prosecute it. The burden to prove that a State lacks will or ability rests on the ICC Prosecutor. Proving the unwillingness of a rule of law State to genuinely investigate and prosecute could possibly be as difficult for the Prosecutor as proving the guilt of the accused in the case.[22] To prove such unwillingness is not something prosecutors normally do, much less challenging the very ability of a criminal justice system to genuinely investigate and prosecute. Any State that intends to investigate and prosecute can pre-empt the ICC from becoming fully seized of the case by translating its intention into *bona fide* action. States that intend to respect their international legal obligations to prosecute serious violations of international humanitarian law need not fear that their citizens will be prosecuted by the ICC, whether or not they are States Parties to the ICC Statute.

The complementarity regime is indeed very strong and permeates the ICC Statute.[23] This was one of the "major objectives" of several delegations, including that of the United Sates.[24] Justice Louise Arbour had suggested

[20] Some key delegates have advised me that they did not know of the existence of the provision until after the adoption of the Statute.

[21] Ruth Wedgwood made an unusual reference to this in her article "Fiddling in Rome: America and the International Criminal Court", *Foreign Affairs*, 77(6), 1998, p. 22: "In another effort to allay U.S. fears, the Rome treaty protects all bilateral agreements exempting U.S. troops stationed abroad from local criminal justice systems. Terms can now be added to these 'status of forces' agreements to protect U.S. troops from international turnovers as well". And she continues, confidently: "The odds are good that U.S. partners will agree to such codicils *if the matter is handled quietly*" (emphasis added).

[22] This is not a statement about the standard of proof required.

[23] See preambular paragraphs 9 and 10, and Articles 1, 8(1), 17, 18, 19 and 20.

[24] David Scheffer, "The United States and the International Criminal Court", *The American Journal of International Law*, 93(1), 1999, p. 15.

before the Rome Conference that the activation of the complementarity principle should depend at least on the issuing of an indictment in a State with jurisdiction in the case. Delegates turned a blind eye to her call. Instead the United States delegation introduced a proposal on preliminary rulings regarding admissibility during the last session of the Preparatory Committee,[25] in order to "preserve [...] the fundamental principle of complementarity from the outset of an investigation by the court".[26] The proposal seemed not to meet with any substantial support from other delegations during the Committee session, but it still found its way into the Statute as Article 18 a few weeks later.

The problems with the complementarity regime relate not to any weakness or lacunae in its scope or application. Rather, it is from the unlikely corner of execution of requests for assistance that one must look to generate a critical perspective. Article 99 of the Statute leaves the execution of ICC requests for assistance to the requested State in accordance with its statutory procedures. Naturally, the requested State determines the relevant procedures under its law. It is obliged to ensure that there "are procedures available under [its] national law for all the forms of cooperation which are specified" (emphasis added) in the State co-operation Part of the Statute (Article 88), but the Statute does not say exactly what these procedures must be. There is a general obligation for States Parties to co-operate fully with the ICC in its investigation and prosecution (Article 86) and to comply with requests by the Court to provide certain forms of assistance in relation to investigations and prosecutions (Article 93). However, the practice of the *ad hoc* Tribunals has shown that the way in which Tribunal requests or orders are executed is essential to the efficacy of the requested steps. The Prosecutor's ability to control the collection of information and potential evidence pursuant to requests for assistance is of significant importance to the quality and amount of material that will be generated. And what about territorial States that have not seen a change in political regime since the alleged crimes were committed? The most important evidence tends to be located on the territory of the States that have suffered the crimes. Do we expect tainted governments to effectively assist the ICC in its investigations and prosecutions? The exceptions to the main rule on execution of requests for assistance in Articles 99(4) and 57(3)(d) fall far short of accommodating the requirements of international investigation and prosecution of "the most serious crimes of international concern".[27] It might be said that the main rule on execution in Article 99 is "pragmatic and

[25] UN Doc. A/AC.249/1998/WG.3/DP.2 ("Article 11*bis* – Preliminary Rulings Regarding Admissibility"), 3 April 1998.

[26] David Scheffer, op. cit., p. 15.

[27] Article 1.

legally essential for the successful operation of the court",[28] but successful at which level? Did it trouble delegates that the very same criminal justice system which is expected to execute the Court's requests for assistance must have been declared unwilling or unable to genuinely investigate and prosecute the case in question by Judges of the Court under Article 17 as a condition for admissibility? How will well-organised victim groups respond to this anomaly in cases where the requests for assistance are repeatedly addressed to the regime whose police and military created the victimisation? More importantly, could the very legitimacy of the ICC trial process be challenged by likely revision applications flowing from the opening of archives and other sources of evidence following changes in regime in territorial States after judgement at The Hague?

These problems associated with the thoroughly codified complementarity principle sharply contrast the unwillingness of States that are concerned with so-called jurisdictional overreach to appropriately acknowledge that the same complementarity principle protects their servicemen from being investigated and prosecuted by the ICC, whether or not the State in question is a Party to the Statute. Not only are some concerned States silent on the relevancy of the complementarity principle. The restrictive reality of the Court's power to request transfer of citizens from non-States Parties (Article 98(2)) seems to evade the reasoning as well, sometimes in between sweeping assertions made against the ominous backdrop of vital concerns of international peace and security.

It is a non-controversial proposition that "complementarity is not a complete answer",[29] but does it involve "*compelling* states (particularly those not yet party to the treaty) to investigate the legality of humanitarian *interventions* or peacekeeping *operations* that they already regard as valid official actions to enforce international law" (emphasis added)?[30] Does the Court have subject-matter jurisdiction to investigate the legality of "humanitarian interventions and peacekeeping operations"? It will probably have competence to investigate aggression sometime in the future, provided agreement is reached on the definition of the crime and the conditions under which the Court may exercise jurisdiction over this crime. Judging from the history of attempts to define aggression and the preliminary work of the Working Group on the Crime of Aggression in the Preparatory Commission, this process is going to be very difficult and time-consuming. In any event, Article 5(2) provides that both the substantial and jurisdictional definition of aggression must be consistent with the relevant provisions of the UN Charter, including Article 24

[28] David Scheffer, op. cit., p. 15.

[29] Ibid., p. 19.

[30] Ibid.

on the primary responsibility of the Security Council for the maintenance of international peace and security and other provisions that flow from this article. International enforcement or keeping of the peace is a very serious instrument of foreign policy to any State, and it depends on political and legal legitimacy for its success whether or not it is undertaken pursuant to Security Council exercise of its primary, but not exclusive, responsibility in the area. It is universally recognised that unilateral or other operations without express Security Council authorisation require for the purpose of their sustainability legal scrutiny before, during and after their activation. Such are the longer-term demands of appropriate legal legitimacy.

Moreover, the complementarity principle does not strictly speaking "compel" States to do anything. On the contrary, the principle is there as a means to accommodate the broadest possible group of States, many of whom objected to jurisdictional primacy for the Court along the lines of the *ad hoc* Tribunals. By giving primacy to national criminal justice systems, the complementarity principle simply reflects well-established international obligations of States to investigate and prosecute serious violations of international humanitarian law, the norms of which protect the most fundamental interests recognised by legal orders. The ICC Statute itself expressly confirms "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[31] Complementarity adds no new element of compulsion; rather, it was a necessary concession to the prevailing doctrine of State sovereignty.

We cannot assume that ICC Judges will be irresponsible in the application of the complementarity test of unwillingness or inability to "genuinely" investigate or prosecute, or any other judicial standard or criterion for that matter. That would challenge the very legitimacy of the process that the Judges administer. Neither can we conclude from this conspicuous unwillingness to give due credit to a battle fought and won by the concerned States with the adoption of the complementarity regime (Articles 17–19), that their *bona fide* intention to fulfil their international legal obligations to investigate and prosecute all serious violations of international humanitarian law is lacking. The limited transparency of values and interests dictating international legal reasoning by States could be misleading[32] and generate questions about the quality of the good faith of these concerned Governments. However, the political realities of the efforts to make predictable and containable the emerging system of international criminal justice (which we have witnessed during the latter half of the 1990s) point us in a different, but not necessarily

[31] Preambular paragraph 6.

[32] Not only to a bearer of utopian critique, whether or not he or she suffers from what Brian Urquhart referred to as "Nordic romanticism".

more rational, direction in our effort to better understand the concerns of jurisdictional overreach in the following paragraphs.

Article 12 on the acceptance of jurisdiction has been systematically targeted by some of the concerned States as the source of the jurisdictional problems they see afflicting the ICC Statute. Let us consider this article more closely. Article 12 in itself does not provide a veto to any State, but not because there was a shortage of attempts to have it do so. Article 12(2) preconditions the exercise of the Court's jurisdiction on its acceptance by the territorial State or State of nationality. Either State must have become a Party to the Statute or accepted the Court's jurisdiction unilaterally (Article 12(3)).[33] This is not a precondition when the Security Council has referred a situation under Chapter VII of the UN Charter to the Court. A group of States with Germany at the helm argued that since there is well-established universal jurisdiction for the core crimes of genocide, crimes against humanity and war crimes, the ICC's jurisdiction over these crimes should not depend on State acceptance of the Court's jurisdiction.[34] Why should an inter-governmental court be jurisdictionally disadvantaged *vis-à-vis* its States Parties? As soon as it became clear that other States vehemently objected to any reflection of the doctrine of universality in the Statute,[35] the

[33] States which make such declarations are obliged to co-operate with the Court without any delay or exception in accordance with Part 9 on State co-operation, see Article 12(3) *in fine*.

[34] See A/AC.249/1998/DP.2, 23 March 1998. In this discussion paper submitted to the Preparatory Committee, Germany stated: "Under current international law, *all States may exercise universal criminal jurisdiction* concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every State can exercise its own national criminal jurisdiction, regardless of whether the custodial State, the territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice. ... [T]here is no reason why the ICC – established on the basis of a Treaty concluded by the largest possible number of States – should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves. By ratifying the Statute of the ICC, the States Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes".

[35] As stated by the United States delegation to the Diplomatic Conference: "There are too many Governments which would never join this treaty and which, at least in the case of the United States, would have to actively oppose this court if the principle of universal jurisdiction or some variant of it were embodied in the jurisdiction of the court", quoted from the statement of the United States on 9 July 1998 in the Committee of the Whole (on file with the author) in connection with the deliberation on discussion paper A/CONF.183/C.1/L.53, 6 July 1998, put forward by the Bureau of the Committee of the Whole. The statement continued: "As theoretically attractive as the principle of universal jurisdiction may be for the cause of international justice, it is not a principle accepted in the practice of most governments of the

battle for what became Article 12 essentially centred on whether it should accommodate the States for whom a veto mechanism was the articulated panacea. The quest for a veto drove the process. The possible anatomy and usefulness of a veto was fully explored by the negotiating States through the diligent and persistent efforts by a minority which cannot be criticised for having left stones unturned.[36]

The United States delegation took the position that both the territorial State and the State of nationality of the alleged perpetrator must have accepted the Court's jurisdiction as a precondition to its exercise.[37] If the State is not a Party to the Statute, this proposal required the prior consent of the State.[38] The United States delegation maintained this position throughout the Rome Conference, and requested a vote in the last meeting of the Committee of the Whole on a proposal to amend the final draft of the Committee's Bureau to this effect.[39] This initiative was uprooted through a procedural no-action motion that secured a decisive majority of the votes. The cumulative requirement of jurisdictional acceptance by both the territorial State and the State of nationality would give both an effective veto over the Court's jurisdiction. States that intend to remain non-States Parties would have a formal guarantee that their citizens would not be investigated and prosecuted by the Court under this regime. It has been argued that this would have "remedied the dangerous drift of Article 12 toward universal jurisdiction over nonparty states".[40]

Others will more accurately claim that the notion of universal jurisdiction was successfully rejected for the purposes of the Statute even before the Rome Conference, in the Preparatory Committee, and that there in reality is no trace of the doctrine in the Statute seen as a whole, in particular, in Article 12 seen through Articles 17 and 98. In any event, to suggest that there is a "drift" in a multilateral instrument towards a principle which many consider well-established customary international law[41] shows the degree of apparent

world and, if adopted in this statute, would erode fundamental principles of treaty law that every government in this room supports".

[36] For a very useful account of the negotiating history of the jurisdictional regime, see Hans-Peter Kaul, "Special Note: The Struggle for the International Criminal Court's Jurisdiction", *European Journal of Crime, Criminal Law and Criminal Justice*, 1998-4, pp. 364–376.

[37] See A/CONF.183/C.1/L.70, 14 July 1998.

[38] United States statement of 9 July 1998, op. cit. The passage appears in the context of prior consent of the State of nationality of the suspect.

[39] The amendment proposal rested on the written submissions in A/CONF.183/C.1/L.70, 14 July 1998, and A/CONF.183/C.1/L.90, 16 July 1998.

[40] David Scheffer, op. cit., p. 20.

[41] *Supra* note 34. A considerable number of States supported the views expressed by Germany in the Preparatory Committee and during the Rome Conference. See also Commission of Experts for the Former Yugoslavia, First Interim Report, UN Doc. S/25274, op. cit., paras. 72–73.

difference in perception and interests. Presumably those who were concerned that the Statute recognise customary international law would be more inclined to describe Article 12 as having drifted *away* from custom. Seen in this light, propositions that nationals of non-States Parties are in reality subject to potential ICC prosecution which their State would not like to see, and that this is an "indefensible overreach of jurisdiction", sound more like statements of particular political concerns of the States offering them, than legal concerns. Contemporary methodology for international legal reasoning facilitates lack of transparency in argument, so there is nothing unusual about this. What seem to be the fundamental concerns here are indeed very real and weighty.

The United States' view of the political reality as it bears on the Court's jurisdictional reach should resonate well in some P-5 capitals, and its underlying factual component probably does so much more widely. As Ambassador Scheffer puts it:

> It is *simply and logically untenable* to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize (emphasis added).[42]

In other words, to "expose" servicemen of the United States armed forces to any aspect of ICC jurisdiction is both logically untenable and untenable in and of itself. For all those States that do not have any problems with the logic of the jurisdictional system of the Statute, presumably a large portion of the States in the world, we must assume that the theoretical exposure referred to is logically tenable. The proposition that such exposure would be untenable in and of itself seems to capture the reality of the position better. The fact that we stand face to face with a position based both in objective facts of military and associated force and in one powerful Government's view of its international role, commands the utmost attention to the position and its basis, which essentially seems to be one of power. This is a field of argument with which all players are familiar. Ambassador Scheffer takes one further step in transparency:

> Equally troubling are the implications of Article 12 for the future *willingness* of the United States and other governments to take significant risks to intervene in foreign lands in order to save human lives or to restore international or regional peace and security. The illogical consequence *imposed* by Article 12, particularly for nonparties to the treaty,

[42] David Scheffer, op. cit., p. 18.

> 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, which up to this point have been mostly shielded from *politically motivated charges* (emphasis added).[43]

The political need for a veto is so strong that without its express recognition in Article 12, elsewhere in the Statute, or in another suitable instrument, we are advised that the willingness of the United States Government to participate in international military interventions will be affected, and that such interventions themselves will be severely limited. These propositions are very serious indeed, given the universal recognition of the cardinal importance of the legally recognised interests underlying international peace and security, human rights and the humanitarian concerns which motivate such international interventions. It is also a stark reminder of how strongly the need for a veto is felt, in that the most serious interests and values recognised by the international legal order are found to be too light in the balance. The competing and favoured interest is the avoidance of the "significant new legal and political risks" to participating States in international military interventions, which, it is suggested, could face charges in the context of the ICC that are "politically motivated". Is this interest, and the assumptions on which it is based, so clear, indisputable and rational that reasonable persons world-wide can understand and appreciate its positive discrimination at the expense of core values of our international legal order? Does the reasoning display an understanding of international law in human and international security that can instil goodwill among men and women and confidence that the asserted global leadership is sustainable? Or does the reasoning indicate a certain deficit in longer term realism, as to what would actually best serve the interests of these States participating in international military interventions and their military establishments some years down the road?

In terms of *legal* risks to non-States Parties in future international military interventions, it is difficult to identify any that are real, much less significant. In operations that involve a status-of-forces agreement or any other international agreement between the sending non-State Party and the territorial State where the intervention occurs, the non-State Party can prevent the ICC from even requesting surrender by having inserted a clause in the agreement that requires the consent of the sending non-State Party to surrender a person of that State to the Court (Article 98(2)). Many will argue that such a clause would flow naturally from the traditional provision on exclusive criminal jurisdic-

[43] Ibid., p. 19.

tion for the sending State in status-of-forces agreements. Additionally, the non-State Party can always invoke jurisdiction over the case and commence *bona fide* investigation and prosecution of the case in question, and the ICC will have to defer under the complementarity principle. Suggestions that non-States Parties will suffer unfair admissibility rulings fail to take some basic realities into consideration. A decision by a three-judge Pre-Trial or Trial Chamber can be appealed to the five-judge Appeals Chamber.[44] Consistent ruling against a non-State Party would require the support of at least a total of five Judges.[45] The ICC will be even more dependent on States than the *ad hoc* Tribunals given in particular the weak State co-operation regime in Part 9 of the Statute. How likely is it that ICC Judges will feel inclined to make erroneous decisions on whether States are willing or able to genuinely investigate and prosecute? How realistic is it that Judges would want to take on non-States Parties in this way, especially if they are permanent members of the Security Council, potentially one of the main providers of work and resources to the Court? These sobering questions and considerations apply equally when there is no international agreement between the non-State Party and a requested State, and we are outside the scope of Article 98(2). These situations will in practical terms normally involve unilateral international military intervention, an area of State practice which, regardless of the establishment of the ICC, is confronted with a steadily growing demand for justification of the legal and political legitimacy of the action. In any event, the reference to significant new legal risks does not seem to correspond well to the reality of the ICC Statute as perceived by the majority of States who normally support international military intervention "to save human lives or to restore international or regional peace and security".[46]

Assessing the proposition that there will be significant new *political* risks in such interventions is probably more important for a proper understanding of the objections to the ICC jurisdiction, but also more difficult. The very notion of "political" risk in this context necessarily refers to interests of State, although the risk of actual investigation and prosecution by the ICC is a risk facing the suspected perpetrator and his or her personal liberty. It is the risk of the law catching up with the alleged doer of the "most serious crimes of international concern"[47] when other criminal justice systems are unable or unwilling to conduct their elementary functions. Some would question whether this can fairly be referred to as a "risk" to the interests of the State of nationality in question. How can the legitimate interests of a State suffer from

[44] See Articles 19(6) *in fine* and 39(1) and (2)(b).

[45] See Article 74(3).

[46] David Scheffer, op. cit., p. 19.

[47] Article 1.

the investigation and prosecution by a foreign or international jurisdiction of the most serious crimes known in the international community allegedly committed by one of its subjects, when it is not able or willing to do so itself? It would be interesting to see an exact formulation of such interests. We have already considered the purely theoretical likelihood that the national of a non-State Party be surrendered to the ICC, and the Court's limited competence to request such surrender. This can hardly be described as a significant risk.

What about exposure to a proprio motu prosecutorial initiative pursuant to Article 15 of the Statute?[48] There were frequent references during the negotiations of the Statute to the prospect of a "rogue" ICC Prosecutor susceptible to "frivolous" complaints. The passage quoted above refers to "politically motivated charges". Article 13(c) must be approached in sobriety. It provides that one of the ways the jurisdiction of the Court can be triggered, when the preconditions under Article 12 exist, is through the Prosecutor's initiation of an investigation pursuant to Article 15. Article 15 does not give the Prosecutor the power to start an investigation, only to initiate, that is, to conduct a clearly limited "preliminary examination" in response to information received on crimes within the jurisdiction of the Court. The Prosecutor is obliged to analyse the seriousness of information received, and to that end he or she may seek additional information from various sources and receive testimony at the seat of the Court. It is only if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation that he or she must turn to the Pre-Trial Chamber with a request for judicial authorisation of a full investigation. The autonomous scope of operation of the Prosecutor under Article 15 is in other words very narrow. Are legitimate State interests at significant risk through the Prosecutor's exercise of the discretion to receive and seek information and to receive testimony, the obligation to assess the seriousness of the information, and the discretion to request judicial authorisation of an investigation? The negotiations during the Rome Conference contained ample speculation in the painting of possible scenarios, most of them lacking in accurate reflection of the realities of international investigation and prosecution.

It is fair to acknowledge the risk of political embarrassment to a State of nationality that a public announcement by an international prosecutor of a preliminary examination of one or more of its citizens would entail. Although such an examination is not an investigation or a formal inquiry, and should not be described as such, such an announcement would bring public attention

[48] For a commentary on the negotiation history and content of Article 15, see Morten Bergsmo and Jelena Pejić, "Article 15: Prosecutor", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos, Baden-Baden, 1999, pp. 359–372.

to the allegations contained in the information received by the prosecutor in question. But in assessing the weight of such potential political embarrassment one should strive to maintain appropriate reason. The same holds true for fear of consequences on morale in the armed forces of a State whose citizen is under preliminary examination by an international prosecutor. The examination which the ICTY Office of the Prosecutor has preliminarily conducted of alleged conduct by NATO forces in the armed conflict with the Federal Republic of Yugoslavia in 1999 deserves careful and balanced observation and consideration by concerned Governments. Fair-minded observers must concede that the ICTY Prosecutor's examination and dealings with relevant parties have been entirely legal, reasonable, professional and therefore not unpredictable. As a matter of fact, there has generally speaking emerged an appropriately open and constructive process of co-operation between the Prosecutor's Office and the governmental and inter-governmental agencies involved, in a way which has brought about the implosion of myths created about the unpredictability and dangers inherent in an international criminal jurisdiction with an independent prosecutor. It remains to be seen how this fact will gradually penetrate and be allowed to undermine misconceptions that seem to be held by some concerned government officials. Seen in a broader perspective, this process of demystification of international preliminary examination and the generation of considerable comfort in the ranks of those who are entrusted with the application of force to keep and enforce international peace and security, represents a continuation of the consolidation process of the co-existence of international peace and justice mandates which goes back to 1992–1993 (see Section 1 above).

We witnessed the same struggle for a veto power through the negotiations on what became Article 16 on the postponement of ICC investigation and prosecution pursuant to a request by the Security Council.[49] In order to give the Council's request binding force, it must be adopted by a resolution under Chapter VII of the UN Charter. Whether its binding force should depend on a separate Council decision subject to the voting rules in Article 27 of the Charter was contentious. The present wording of the article only emerged in the last stages of the Diplomatic Conference. The International Law Commission had surprisingly chosen a more pragmatic approach by providing in its 1994 draft Statute that "[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council

[49] For a commentary on the negotiation history and content of Article 16, see Morten Bergsmo and Jelena Pejić, "Article 16: Deferral of Investigation or Prosecution", in O. Triffterer (ed.), op. cit., pp. 373–382. See also Sir Franklin Berman, op. cit., pp. 176–178; and Lionel Yee, "The International Criminal Court and The Security Council: Articles 13(b) and 16", in Roy Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, pp. 149–152.

as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides".[50] This provision turns the tables, insofar as the burden would rest on the Court to monitor the Council's agenda to determine whether it could commence prosecution. The Council members would not be required to make any decision specifically with regard to deferral; it would flow automatically from the mere fact that the Council becomes seized of a situation under Chapter VII. It is noteworthy that the ILC would have endorsed such a position when it is exactly in these Chapter VII situations that most crimes within the Court's jurisdiction are likely to be committed. In effect, the Council would have had the power to approve prosecutions, and one permanent Council member alone could have prevented the Court from working. The permanent five members of the Council would have had an effective veto power over the Court, also as non-States Parties. It was Singapore that reversed the Court-Council relationship by requiring specific Council action,[51] and the tide turned in favour of this principle when the United Kingdom lent its support through a proposal which served as the basis for the final wording of Article 16.[52] Article 16, in other words, does grant that the Security Council itself can, through the normal qualified majority, veto both investigation and prosecution by the Court, but no single Council member has such a formal power, to the continued distress of some.

The proposed United States text to a supplemental document to the Rome Statute which was informally circulated during the March 2000 session of the Preparatory Commission for the ICC brings the quest for a formal guarantee for non-States Parties against Court exposure one final step further.[53] It is suggested that there be a clause in the agreement between the ICC and the

[50] Report of the International Law Commission on the Work of its Forty-Sixth Session, UN Doc. A/49/10 (1994), II, B, I ("Draft Statute for an international criminal court"), Article 23, para. 3, p. 85.

[51] Non-paper/WG.3/No. 16, 8 August 1997: "No investigation or prosecution may be commenced or proceeded with under this Statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect".

[52] Proposal by the United Kingdom of Great Britain and Northern Ireland: Trigger Mechanism, UN Doc. A/AC.249/1998/WG.3/DP.1, 25 March 1998.

[53] The text which circulated informally reads: "The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a UN Member State, and such directing State has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the UN Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply" (on file with the author).

UN which further restricts the discretion of the Court to seek surrender or accept custody of a suspect who acts within the overall direction of a UN Member State which has so acknowledged. The Court may not seek surrender or accept custody if the suspect is a national of a non-State Party unless the Court obtains the consent of the State. Alternatively, the Court may seek surrender or accept custody if "measures have been authorized pursuant to Chapter VII of the UN Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply".

This provision would give a non-State Party who is a UN Member a formal guarantee that its nationals, when acting within its overall direction and it has so acknowledged, will not be sought surrendered or accepted into custody by the Court without its consent, unless the Security Council has adopted Chapter VII measures against that State in relation to the same situation and has, as a second step, decided that the consent-requirement shall not apply. If the non-State Party is a permanent member of the Security Council it has a double guarantee, insofar as it can also veto any unlikely proposal that the Council adopt Chapter VII measures against itself or its close allies. Moreover, it could also support measures under Chapter VII against a State, but veto a decision on the applicability of the subsection in this connection (and thus maintain the requirement of the directing State's consent). In order to give effect to such a clause in relation to Article 98, the United States' proposal contains a suggested rule further to Article 98 which requires consistency with the clause in the supplemental document.[54] A rule with similar content was adopted by the ICC Preparatory Commission during its June 2000 session.[55]

On a general note, the need for a veto power experienced by a few States that probably anticipate that they will remain non-States Parties in the foreseeable future is so strong that the formulation of the concern transcends the realm of pure legal argument to political or ideological considerations. The

[54] The draft rule reads: "The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with its obligations under the relevant international agreement".

[55] Rule 9.19 provides that "the Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under Article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court". The report on the Commission's proceedings contains the following understanding: "It is generally understood that Rule 9.19 should not be interpreted as requiring or in any way calling for the negotation of provisions in any particular international agreement by the Court or by any other international organization or State".

fact that the foundation of the quest for a veto contains significant ideological elements makes the concerns no less real than those supporting the positions taken by other Governments. Absent any new significant legal and political risks to international military intervention following the establishment of the ICC, this is one possible explanation to the extraordinary balancing of interests that appears to undermine the exigencies of international peace and security, human rights and humanitarian concerns which underpin international military intervention, as a most unusual response to the Court's jurisdictional regime. This response probably attests more accurately to its emotive character than the presumed intent of Governments supporting the reasoning.[56] But the intensity of the perceived role of the military and political capacity of one State begs the question whether the State interests said to be at risk are such that even the principle of sovereign equality of States is suspended, beyond the established Charter-based veto power for the permanent five members of the Security Council. Regrettably, the felt seriousness of these perceived State interests is such that the concerns could negatively affect the willingness of the Security Council to refer situations to the ICC.

3. The Court's Dependency on Partnership with the Security Council

The ICC will depend on the support of the Security Council in order to function effectively for reasons other than the weaknesses of the Statute's State co-operation regime referred to above. First, the Court's territorial jurisdiction is limited to the States that have accepted its jurisdiction. In the initial phases of the Court's existence how many of the States that will potentially witness atrocities of international concern on their territory are likely to become States Parties or unilaterally accept the Court's jurisdiction? Armed conflicts between or within the States that normally ratify international human rights instruments early occur rather infrequently. Security Council referrals to the Court pursuant to Chapter VII of the UN Charter may concern any situation that threatens international peace and security in UN Member States. This widens the scope of the territorial jurisdiction of the ICC significantly. As noted by Sir Franklin Berman "[i]ndeed it is very likely that the early activity of the Court once it is formally in being may be entirely in consequence of references by the Security Council".[57]

Furthermore, one obvious lesson from the operation of the *ad hoc* Tribunals is that international criminal justice requires material resources.

[56] It is noteworthy that NATO States decided to undertake the international military intervention against the Federal Republic of Yugoslavia despite the fact that the armed conflict occurred within the jurisdiction of the ICTY.

[57] Sir Franklin Berman, op. cit., p. 180.

The ICC will be funded by the States Parties and "[f]unds provided by the United Nations, subject to the approval of the General Assembly, *in particular in relation to the expenses incurred due to referrals by the Security Council*" (emphasis added).[58] It is unlikely that the Security Council would want to see its international judicial intervention action through referral of a situation to the Court become ineffective due to lack of material resources. Such inefficacy would be synonymous with Council inefficacy.

The weak State co-operation regime of the ICC Statute remains the strongest argument for a constructive partnership between the Court and the Security Council. The serious problems that the deficit of effective prosecutorial and judicial powers are likely to cause for case preparation before the ICC have already been described elsewhere.[59] The problem goes much beyond concerns that the standard for confirmation of charges might not be met,[60] pointing to the danger of erroneous judgements and an unreasonable number of successful revision applications on the grounds that important new evidence has been discovered after the trial.[61] This could ultimately affect the legitimacy of the justice process before the ICC.

Needless to state, the Security Council retains its power to establish new *ad hoc* Tribunals pursuant to Chapter VII of the UN Charter after the adoption and entry into force of the ICC Statute. The powers of the Council under the Charter are not affected by a new multilateral treaty such as the ICC Statute. Legally speaking, the Council could decide to establish new *ad hoc* Tribunals after the ICC has been set up. That would cause significant political problems, but that is a different matter. International judicial intervention is a newly-asserted power of the Security Council, and we have two successful precedents of its application in 1993 and 1994. It is unrealistic to expect that the Security Council would give up this instrument, especially if its referral of situations to the ICC would not amount to equally effective international judicial intervention.

The Security Council has the power under Chapter VII and Article 103 of the UN Charter to empower the ICC Prosecutor and Judges to prepare and conduct trials as effectively as in the *ad hoc* Tribunals. If the Council adopts such empowerment measures in its referral resolution under Chapter VII, they would prevail over conflicting provisions in the ICC Statute according to Article 103 of the UN Charter. State obligations generated under the UN

[58] Article 115.

[59] See Louise Arbour and Morten Bergsmo, op. cit., pp. 137–138 ("4. Authority: the obvious elusive").

[60] See Article 61(7): "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged".

[61] See Article 84(1)(a).

Charter prevail over conflicting obligations of UN Members under any other international agreement. The legal basis of such Council action and the exact scope of its effects will necessarily be challenged in cases before the ICC. The question will arise whether Article 103 applies to judges in an intergovernmental jurisdiction in the same way as to UN Member States. This is one of several questions which were left open during the negotiation of the Statute in the fear that the Security Council's involvement in the work of the Court is politically contentious in a way which could affect the universality of the Court.

Even if international law can provide for a constructive partnership between the ICC and the Security Council, which the Court needs to be effective, Council referrals and empowerment of the Court will raise serious concerns of double standards and independence. The Council is a political body *par excellence*. The Court is meant to be a purely judicial institution. The Council will most probably want to refer situations to the Court in some cases, but clearly not in others, and not necessarily because there was less victimisation in the situations where it wishes not to act. How likely is it that the Council will refer situations occurring on the territory of one of its permanent members or their close allies? The discrimination is not likely to follow lines based on the ethnicity or religion of the main victim groups, but will it be based on how far the atrocities are occurring from the centre of P-5 spheres of interest? The protection regimes of customary international criminal law protect equally, without regard to how well sheltered one is by one or more P-5 umbrellas. There is also reason to be concerned by the fact that a strengthening of the powers of the Prosecutor and Court through Security Council referrals essentially represents a political framing of the jurisdictional mode of the Court. But which other options does the contemporary international constitutional order provide? It would not seem that these problems will affect the requisite independence, impartiality and fairness of the actual criminal justice process before the Court. The integrity of the operation of the two *ad hoc* Tribunals confirms this position. Rather, the concerns serve as reminders of the obvious limitations of consent-based international criminal justice regimes grounded in treaty, and of the intimate relationship between the enforcement of international criminal law and the maintenance of international peace and security.

This is an area of international relations that has seen dramatic developments since 1993. It is only natural that the policies and practice of States towards existing and emerging international institutions of criminal justice go through different stages, as the fortunes of the Commission of Experts for the former Yugoslavia and the ICTY vividly illustrate. Whilst the general trend towards broader and stronger State support for the *ad hoc* Tribunals is crystal

clear, some States are still very reluctant to express support for either the *ad hoc* Tribunals or the process to establish the ICC. Other States, including permanent members of the Security Council, have seen significant shifts in policy and practice both with regard to the ICTY and the ICC-process. Some States, such as the Nordic countries and the Netherlands, have supported both the *ad hoc* Tribunals and the ICC-process in a sterling manner in relative terms. Few if any States have done more for the Commission of Experts, the two *ad hoc* Tribunals and the negotiation of several parts of the ICC Statute than the United States; this is a well-documented fact. Some of the strong supporters of international criminal justice are, at the same time, among the States most concerned with the jurisdictional reach of the ICC Statute.

This will continue to be a real issue, despite shortcomings in the legal argumentation offered in support of essentially political concerns. However, the future balancing between international peace and justice mandates should not be played out through the question of whether or not Article 13(b) should be utilised by the Security Council. That is not the appropriate arena. To use Sir Franklin Berman's term, the "positive pillar" of Article 13(b)[62] must not become a negative one. The ICC needs the Security Council. Ideally the Council should use the Court whenever the facts justify a referral pursuant to Chapter VII of the Charter, and such referrals should not end up as bargaining chips in efforts to revise the broad jurisdictional compromise reached in Rome. The permanent members of the Council play a decisive role in this respect. They find themselves challenged by the aspirations of the overwhelming majority of the States of the world as expressed through the Rome Statute. The permanent members of the Council are the leading members of the organ in the international community that has been entrusted with primary responsibility for maintaining international peace and security. Sustaining this leadership role in the longer term requires policies and practice that are based on underlying values and interests which do not conflict with the broader aspirations of the States and peoples who the permanent five aspire to lead and provide security for.

Article 16 of the ICC Statute, on the other hand, *does* provide the appropriate vehicle for the future balancing of interests of international peace and justice mandates, and recognises that the Security Council is the proper forum. The article can be used by the Council to postpone ICC investigations and prosecutions when the Council "assesses that the peace efforts need to be given priority over international criminal justice",[63] in the interest of international peace and security. It recognises a Council power to "request the Court

[62] Sir Franklin Berman, op. cit., p. 174.

[63] See Morten Bergsmo and Jelena Pejić, "Article 16: Deferral of Investigation or Prosecution", op. cit., p. 378.

not to investigate or prosecute when the requisite majority of its members conclude that judicial action – or the threat of it – might harm the Council's efforts to maintain international peace and security pursuant to the Charter".[64] The ICC Statute does not, and could not, weaken the Council's ability to fulfil its obligations under the UN Charter as the leading protector of international peace and security. On the contrary, the Statute makes the Court "available to the Security Council as an instrument in the maintenance of international peace and security under the UN Charter".[65] Through Article 16, any member of the Security Council with concerns about the jurisdictional reach of the ICC and its possible implications, in particular the permanent five, may raise its specific concerns in a concrete case, in an appropriately empowered body, with a view to trying to give effect to its grievances in a real situation of genuine international peace and justice interests. This would be the right time and place for the airing and consideration of such concerns, as opposed to doing so in fragmented fora that lack the clarity of the Security Council's mandate and are susceptible to fears that one or more permanent members may actually try to prevent the Council from properly recognising the Court. Even the staunchest defenders of unilateralism must concede this.

When the States concerned with jurisdictional overreach in the ICC Statute finally overcome their fears, and Article 16 becomes the vehicle for the balancing of interests of international peace and justice mandates, we may see that "the Court itself will lean more and more on the strong arm of the Council to make its jurisdiction effective", and that, again in the words of Sir Franklin Berman, the relationship between the ICC and the Security Council "will be a profound symbiosis",[66] through which the seed of early co-existence of peace and justice mandates may grow into a tree providing ample shade and fair fruits.

64 Ibid.

65 Sir Franklin Berman, op. cit., p. 174.

66 Ibid., p. 180.