Decisions of International legal institutions: compliance and enforcement at Stanford Law School
A New World Court for Globalized Justice

Cornell Talk, April 3 (Thurs.) luncheon
EALS Talk, April 10(Thurs.), 15:30
Tampa Talk, May 19, 19:30

History

Welcome to the ICC, a new world court for globalized justice!
The Road to Rome to the Hague was a long and contentious one. While an idea of the International Criminal Court has roots in early 19th century, the story best began in 1872, when Gustav Moynier, one of the founders of the International Committee of the Red Cross, proposed a permanent court in response to the crimes of the Franco-Prussian War.
The next serious call came after WWI, with the Peace Treaty of Versailles in 1919. German Kaiser Wilhelm II could have been tried for the supreme offense against peace. The League of Nations also adopted a convention creating an ICC in 1937, but it was not ratified. After WWII, the Allies set up the Nuernberg and Tokyo Tribunals to try Axis war criminals. The international community, reflecting on the Holocaust, began to think once again that the establishment of an international criminal court was desirable and possible. Many thought the founding of the UN would bring the world closer to a permanent court. Yet more than 50 years had to go by and a lot of ground work by the UN General Assembly (UNGA) and International Legal Commission (ILC) was required before the ICC was born.
From the end of the Cold War in1989 the idea of creating an ICC was resurrected on the agenda of the UNGA. The atmosphere was ripe because of a dramatic increase in the number of UN peace-keeping operations as well as drug-trafficking cases. At the request of the UNGA, the ILC submitted a final draft statute. The UNGA established a Preparatory Committee (PrepCom) in 1995 to discuss further the major issues. Korea joined like-minded group and actively participated in the PrepCom from this time on. Finally the UNGA convened a diplomatic conference in Rome and adopted the text of the Rome Statute of the ICC on July 17, 1998. It entered into force on July 1, 2002 after being ratified by 66 states. The Rome Statute is comprised of 13 sections and 128 articles.
The evolution of international law was for a long time characterized by the exclusive development of substantive norms establishing rights and obligations of States. The criminal law, both substantive and procedural, was exclusively national. Therefore, the problem of the individual criminal responsibility for violation of international law came up much later, when some moral values were gradually accepted as being of general interest for all states and the need to protect them was universally recognized. Just think about how to deal with

piracy, slavery, drug trafficking, trading of women and children, dissemination of pornography, counterfeit of currency, terrorism, taking of hostages, war, genocide, apartheid, ethnic cleansing.

There was a separate development. Faced with widespread violations of international humanitarian law, which resulted in mass killings, detention, ethnic cleansing and rape in former Yugoslavia and in Rwanda, the Security Council created two ad-hoc tribunals: ICTY in 1993 and ICTR in 1994. Both of them will exist until 2008, regardless of whether all the cases will be completed or not. One of my former students was elected a judge of the ICTY and is now busy trying Milosevic. Another ad hoc tribunal is in operation in Sierra Leone. Another similar ad-hoc tribunal for atrocities committed in Cambodia might soon be born, according to Hans Corell.

Now 92 states have ratified the Rome Statute. At the time of the first election in February 4-7, 2003, 45 states put forward their candidates. The election rules were very complex. In electing 18 judges each state had to vote for 18 candidates, meeting the following three requirements: 1) vote for at least six women; 2) vote for minimum two from Asia, three from Africa, three from Central and South America, two from Eastern Europe and three from Western Europe and other states; and 3) vote for at least nine from the list A, which is the criminal law expert group, and at least five from the list B, which is the international law expert group. Two thirds majority was required. On February 4, seven candidates were elected on the first ballot. I was the only male among the seven judges-elect, and remained a kind of endangered species until the second male was elected many rounds later. The entire election process was over at the midnight of February 7th by electing the 18th judge on the 33rd ballot.

The Nature of the ICC; Its relationship with National Courts (principle of complementarity)

The ICC is a permanent international institution established by treaty for the purpose of investigating and prosecuting individuals who commit the most serious crimes of international concern. The exercise of its jurisdiction is complementary to that of the national legal system of States parties. National criminal jurisdiction has as a rule priority over the ICC jurisdiction. Actually all requests for cooperation, including the arrest and surrender of an accused, and securing evidence, are directed to and executed by national legal systems. It is only in two situations where the ICC jurisdiction comes into place: 1) when a national legal system is not able to investigate and prosecute persons alleged to have committed the crimes under its jurisdiction; 2) when a national legal system refuses or fails to investigate and prosecute such persons. It is an expression of collective action by States parties to a treaty that established an institution to carry out collective justice for certain international crimes. It does not infringe upon national sovereignty, as it is not overriding national legal systems that

are capable of and willing to carry out the investigation and prosecution of certain international crimes. This is a central tenet of the Statute and arguably the principle on which the success of the ICC will hinge. The complementarity regime has been defended as an effective and fair balance between national sovereignty concerns and the imperatives for the ICC action in the face of non-genuine state action.
The ICC is different from ad-hoc tribunals for Yugoslavia and Rwanda, which have concurrent jurisdiction with national courts, but have primacy over them.

Admissibility of a case

The ICC has first to decide about the admissibility of the case. A case is inadmissible, 1) if it is investigated or prosecuted by a State that has jurisdiction over it, unless the State is unwilling or unable to genuinely prosecute; 2) if a State with jurisdiction has investigated the case and has decided not to prosecute unless such a decision is the result of the unwillingness or the inability of the State to prosecute; 3) if the person has already been tried for the respective conduct; and 4) if the case is not of sufficient gravity to justify action by the ICC.
A State is considered to be unwilling to undertake the proceedings for the purpose of shielding the person from the court's jurisdiction; 2) if there is an unjustified delay in the proceedings, inconsistent with the intent to bring the person to justice; and 3) if the proceedings are not conducted independently or impartially.
A State is considered to be unable to prosecute when its national judicial system is in a total or substantial collapse that prevents it from acquiring necessary evidence or obtaining the accused, or otherwise unable to carry out the proceedings.
Challenges to the admissibility of a case may be brought only once by either side.
Would a domestic amnesty be a bar for prosecution? The Statute is silent. But it is argued that domestic amnesty would be effective for domestic law offenses, and that more serious war crimes should not be subject to such an amnesty. The indictment of Pinochet by the Spanish court and then by the UK H.L. ignored the self-amnesty decree passed by Pinochet in 1977 as contrary to international aw.
In countries going through transitions from dictatorship to democracy in Latin America, Eastern Europe and Africa in the 80s and 90s, struggles for truth and justice have resulted in a variety of policy instruments such as criminal prosecutions, truth commissions, reparation schemes and disqualification of persons. This shift towards holding leaders and public officials accountable raised a dilemma as to how to balance it against the need for national reconciliation in a society recently torn by conflict. What South Africa did is different from blanket amnesty of the type generally passed in some Latin American countries. In any case reconciliation should not be reached at the expense of the victims' right to see justice done.
The movie, entitled Amandla shows the reconciliation process in South Africa very well.
The ICC will have to be the judge of its own competence, including when this may be

contested.

Jurisdiction

The ICC is competent for crimes committed on the territory of a State party or by one of its nationals. The Court is also competent when a State that is not a party consents to the court's jurisdiction and the crime has been committed on that state's territory or the accused is its national. Its jurisdiction may also result from the extradition by a State that is not a party of a person who is not its national, but has committed a crime on its territory. Although the ICC jurisdiction may become universal or close to universal by the ratification of the Rome Statute by more and more States, it is still territorial criminal jurisdiction. The concept of universality is reflected only in the referrals from the Security Council that are not linked to the territoriality or to the citizenship of any State. The Security Council is arguably the most important entity for the ICC, in terms of being the source of referrals of the most dangerous situations globally and in terms of affording real authority to obligations to cooperate with the ICC. But it is hard to imagine the Council agreeing to refer a situation to the ICC, no matter how heinous it may be, given the US attitude.

I developed an argument to persuade my own government to ratify the Rome Statute. South Korea's ratification would constitute a strong legal defense against a possible aggression from ever unpredictable North Korea on top of the military defense that South Korea has been spending billions of dollars to build up in the last 50 years. If, for example, North Korea attacks South and the ICC crimes are committed in South Korea that is a territory of a member State, the ICC would, in principle, be able to exercise its jurisdiction over North Korea.

Certain media referred to Tony Blair as a possible client of the ICC who might have a prospect of being defended by his wife Cherie's human rights law firm, because the UK is a member state. The same reference was made to PM John Howard of Australia. But it is not so simple as the media suggest it is.

The ICC has no jurisdiction over States or other legal entities. The defense advanced at the Nuernberg and Tokyo tribunals was state responsibility that excludes individual responsibility, invoking the act of State. It was rejected there and also by ICTY and ICTR. What about diplomatic privileges and immunities? They are procedural one. It means that there is no immunity of the legal responsibility, but immunity in respect of the local jurisdiction. The objective of the immunity is to enable the beneficiary to carry out his or her functions unhindered. It is not granted to facilitate or guarantee immunity for the most serious violations of international human rights and humanitarian law.

Core Crimes in the Rome Statute (RS)

The ICC exercises its jurisdiction over 1) crimes of genocide (RS 6), 2) crimes against humanity (RS 7), 3) war crimes (RS 8) and 4) the crime of aggression (RS 5.1). The definitions of crimes in the RS were not intended to develop new standards in the areas of the laws of armed conflict or international humanitarian law.
The statutory definition of genocide is based on the 1948 Genocide Convention. Biafra in 1967, Bangladesh in 1971, and Tutsi in 1994, etc. are examples. If the objective pursued is the elimination of a group as such, it would be an act of genocide. If the act is directed against persons, it would be a crime against humanity. Crimes against humanity are defined in the Rome Statute in conformity with the UN Charter and Judgment of the Nuernberg Tribunal and the provisions of the Security Council resolutions concerning the ICTY and ICTR.
It is any act committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack, such as murder, extermination, enslavement, deportation or forcible transfer, 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 from of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds in connection with any crime under the jurisdiction of the Court, enforced disappearance of persons, crime of apartheid, other inhuman acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

War crimes are defined in the Statute for more than four pages, based on the four Geneva Conventions of 1949 and the Protocols of 1977.

The crime of aggression is not defined in the Statute. The ICC will exercise jurisdiction once the definition is adopted and conditions are set out. The UNGA once adopted a long definition of aggression in 1974. An act of aggression is a crime against international peace. The first use of armed force by a State in contravention of the UN Charter shall constitute prima facie evidence of an act of aggression, although the Security Council may conclude that such a determination would not be justified in the light of other relevant circumstances.

The definitions given to these categories of crimes contain a number of legal overlaps. Thus, murder and extermination, which are crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population, may also be crimes of genocide if committed against a qualified group, or war crimes if committed as part of a plan or policy or as part of a large scale commission.

The Assembly of States parties adopted the Elements of Crimes (EOC) prepared by the

Prep.Com, among other key instruments, in order to assist the ICC in its interpretation and application of the relevant articles concerning crimes under the jurisdiction of the ICC. While EOC add nothing substantive on genocide, on war crimes EOC introduce concepts like military necessity, reasonableness and unlawful conduct. In any case EOC do not mean to change the Rome Statute.

The first category of war crimes: includes the grave breaches of the Geneva Convention, as acts against persons or property protected under those conventions; namely willful killing, torture or inhuman treatment, including biological experiments.

The second category of war crimes are those grave breaches of humanitarian law, listed mainly in Protocol I concerning international armed conflicts, but also in the Regulations annexed to the Hague Convention IV, such as acts directed against the civilian population or civilian objects. The Statute includes outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, raped, enforced prostitution and any form of indecent assault, which constitute grave violations of the four Geneva Conventions of 1949.

The third category of crimes of war includes acts committed in armed conflicts not of an international character, representing serious violations of article 3 common to the four Geneva Conventions, namely acts of violence to life, outrages upon personal dignity, taking of hostages or passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court.

The fourth category of crimes of war enumerates other serious violations of the laws and customs applicable in armed conflicts not of an international character. These provisions are based mainly on the Protocol II of 1977.

Serious violations of laws and customs, applicable in both international and internal armed conflicts, include also intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter.

The material element of the criminal responsibility Crimes against humanity are defined to be widespread or systematic attack directed against any civilian population, some against groups or collectivities

Genocide is a crime directed against a national, ethnical, racial or religious group, group victim. For crimes of war the definition refers to persons or property protected under the Geneva Conventions of 1949, and more precisely to prisoners of war and any other protected persons, civilian population, civilian objects, personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission, natural environment, towns, villages, buildings, cultural goods, medical facilities and others.

While the intent and knowledge are needed, mental disease, duress, self defense, mistake of fact or law will constitute a defense excluding criminal responsibility. What about superior

orders? If a crime under the jurisdiction of the ICC is committed by a person pursuant to an order of a government of a superior, whether military or civilian, such an order shall not relieve that person of criminal responsibility, unless that person was under a legal obligation to obey such orders, did not know that the orders were unlawful and the orders were not manifestly unlawful. The Rome Statute says that orders to commit genocide or crimes against humanity are manifestly unlawful.

General principles of criminal law

The Rome Statute recognizes the principle of individual criminal responsibility for serious violations of international law. It also addresses the responsibility of leaders for actions of subordinates, the age of responsibility (18), the statute of limitation, an individual's responsibility for both an act and an omission, and defenses that would exclude criminal responsibility. There is no retroactivity, and only crimes committed after July 1, 2002, when the Statute took effect, are covered. The definition of crime shall be strictly construed and not be extended by analogy.

Procedural due process – investigation, appeal, criminal responsibility, evidence

The ICC proceedings follow the sequence of investigation, confirmation hearing (RS61), trial, appeals and revision proceedings. But these stages are preceded by the mechanisms triggering the exercise of the ICC's jurisdiction and admissibility proceedings, and they are followed by the enforcement of the international sentence. The investigation relates to the interplay between the prosecutor and the pre-trial chamber, and to the respective roles of prosecution and defense.

The prosecutor shall submit his or her request for authorization of the investigation to the Pre-trial chamber (RS 15.3). The prosecutor shall inform the chamber of his or her decision not to proceed (RS 53) under certain circumstances. Pre-trial chamber, the referring state or the Security Council may request the prosecutor to reconsider a decision not to proceed. The prosecutor may collect and examine evidence, request the presence of and question persons (accused, witnesses, victims), obtain the cooperation of a State, organization or person by agreements to that effect, agree not to disclose information received as confidential, take necessary measures to ensure confidentiality of information, the protection of persons and preservation of evidence. It is highly desirable to specify the general criteria guiding the selection of cases at the outset of the ICC operation. A clear pronunciation of prosecution policy, given in the abstract, could prevent the public from harboring unrealistic expectations as well as avoid any appearance of political bias in particular cases. The prosecutor may also request the pre-trial chamber to authorize "a unique investigative opportunity" under Article 56 of the RS, that is to take measures to collect evidence that may not be available

subsequently for the trial (for instance, a witness unwilling to come to the Hague to testify). A broad interpretation of Art.56 of the RS may diminish the role of the trial as the climax of the proceedings. It is obvious that the potential to reduce the length of the trial constitutes a powerful incentive to make broad use of Art.56 powers to take evidence in advance of trial.

An arrest warrant may be issued by the pre-trial chamber at the request of the prosecutor.

Instead of an ex parte review of the indictment as it exists in the ICTY and ICTR, the hearing to confirm the charges shall be held in the presence of the person charged who has the right to object to the charges, challenge the evidence presented by the prosecutor and to present evidence. The idea was to concentrate all the disclosure at the pre-trial stage and to place it under the supervision of the pre-trial chamber, in order not to repeat the delay experienced at the ICTY and ICTR.

The prosecutor was elected on April 21, 2003 and the deputy prosecutor on September 4, 2003 respectively at the Assembly of State parties.

Member states have agreed on a lawyer from Argentine, who is a visiting professor to Harvard Law School like me. The ICC judges expressed hope that the prosecutor would be able to come to The Hague by June 1, 2003.

Decisions of the trial chamber of acquittal or conviction may be appealed on grounds like procedural error, error of fact or of law, or any other ground affecting the fairness of the proceedings. A sentence may be appealed on the ground of disproportion. The Appeals Chamber has broad power to reverse or amend the appealed decision or to order a new trial before a different Trial Chamber.

Since I am sitting at the Appeals Division, it would take quite some time to have any case.

What is the role of the defense? While the RS devised the prosecutor as an officer of justice rather than a partisan advocate, the defense could still insist on conducting investigations on its own. The ICC's normative framework allows for a degree of coordination between Prosecution and Defense in their investigative activities.

Arrested or convicted persons are entitled to compensation if they are victims of unlawful arrest or detention, or if their conviction has been reversed on the basis of newly discovered facts.

The ICC has also the power to order the payment of appropriate reparation (compensation, restitution and rehabilitation) to the victims of the acts committed by the convicted person only against the convicted person. The Statute foresees the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the ICC. A Trust Fund has already started small.

Interests of the victims are also defended by a Victims and Witnesses Unit, to be set up by the Registrar, for protective measures and security arrangement, counseling and assistance. It is a kind of legal aid scheme.

The above-mentioned judicial guarantee for procedural fairness is in conformity with the International Covenant of Civil and Political Rights, with the 1950 European Convention for

the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights of 1969, the 1981 African Convention on Human Rights and Peoples Rights as well as the 1949 Geneva Convention and Additional Protocols I and II of 1977. They are minimum guarantees, meaning that internal laws and other international instruments may offer more judicial guarantees to persons allegedly responsible for such crimes. The provisions of the Statute dealing with general principles of criminal law and rules of procedure (RS 22-33) are a combination of the common law and the civil law. For instance, while the adversarial character of trials is maintained, judges are assigned a broad competence in matters dealing with investigation and the examination of witnesses. Therefore, how the overall architecture of the ICC's proceedings will be shaped depends upon the judges.

The RS provides for many articles (86-102) with respect to international cooperation and judicial assistance between States and the ICC. They have to do with surrender of persons to the ICC, the ICC's ability to make provisional arrests, and State responsibility to cover costs associated with requests from the ICC. With an arguable exception of the failed State scenario under Art. 57.3 (d) of the RS, the ICC has no power to take forcible measures on the territory of a State. Thus intrusive measures such as searches and seizures will have to be executed by the State upon request by the ICC. States parties are under no duty to compel witness to appear in The Hague to testify at trial, but duty to facilitate the voluntary appearance of a person as witness. Video-link would be OK.
To enforce the judgment the ICC relies on the States who volunteer to do so or the host state. Part 10 of the RS includes the recognition of judgment, the role of States in enforcement of sentences, the transfer of the person upon completion of a sentence, and parole and commutation of sentences. In order for the ICC to be fully effective it relies on its States Parties to adopt national legislation enabling cooperation with the ICC. The purpose of ICC implementing legislation is two-fold: to place States Parties to cooperate with the ICC; and to place them in position to exercise national jurisdiction in lieu of the ICC.

US Opposition to the ICC – From "unsigning" to immunity agreements

Out of its fear that the ICC will be used as a forum for politically motivated prosecutions, the US formally renunciated its support for the ICC and unsigned the RS in May, 2002. In addition, the US amended the American Servicemembers' Protection Act in July 2002. It reads: "Nothing in this title shall prohibit the US from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Quaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity." Because of the strong pressure from the US Government 74 countries, including some that ratified the RS, have so far signed a US-proposed non-surrender agreement, US so-called Article 98 agreement, or bilateral impunity

agreement. These bilateral agreements, if signed, would provide that neither party to the accord would bring the other's current or former government officials, military or other personnel (regardless of whether or not they are nationals of the state concerned) before the jurisdiction of the ICC. Many legal experts argue that the US is misinterpreting and misusing Art. 98 of the RS, for Article 98 was designed to address any potential discrepancies that may arise as a result of the existing agreements and to permit cooperation with the ICC, and thus means to simply cover anything like Status of Forces Agreements (SOFA), not a bilateral agreement that the US is seeking. Experts further contend that if countries that have ratified the RS enter into such an agreement (32 countries), they would breach their obligations under international law. In response to the US attacks against the ICC, the EU came up with a series of guiding principles:

1) Any possible solution must not lead to impunity and would have to include appropriate provisions to ensure that persons who have allegedly committed ICC crimes will be prosecuted by national courts; 2) Any solution could not be reciprocal and could only cover the surrender of persons who are not nationals of a State Party to the RS; and 3) Any solution would limit the scope of persons from a sending State present on the territory of a requesting State, i.e., American military personnel and officials.

Until now we have witnessed countless victims around the globe, including children and women, suffer from the heinous crimes. The perpetrators of these crimes have gone largely unpunished. I believe that the creation of the ICC is the collective call of the international community for correcting this wrong and establishing a new precedent in international justice. Creation of the ICC is thus a biggest step for globalized justice since the international military tribunals in Nuernburg and Tokyo, and the ICC is the most important human rights institution that the world has seen in half a century. The ICC is part of the mankind's journey, that is our generation's opportunity to answer a call on behalf of future generations with combined sense of urgency and relief. I am acutely aware that my participation in the court's first vital cases will define a new era in the global rule of law.

If I may quote Martin Luther King's speech as my plea to you, you should remain awake through a revolution in the international law. We now stand on the border of the promised land for globalized justice. The older order of international law is passing away and a new one is coming in. We should all accept this order and learn to live together as brothers and sisters in a world society.

Nobody will envy us for the horrible case with which we may have to deal, but every comparative proceduralist must envy us for the opportunity to bring the procedural law of the ICC from the books into action.

However, the pace of ratification of the Rome Statute needs to be stepped up in some regions.

Challenges ahead

Definitions of crimes in the RS may be major efforts to consolidate, expand and develop substantive international criminal law, but do not always correspond to provisions of national legislation. This would pose a big problem for national implementing legislation. What about 9-11 terrorism?

Peer-to-peer roundtable conversations on the theme of compliance and enforcement

14 January 2004

The International Criminal Court is an important development which takes international law a long way forward. It has established for the first time an agreed international mechanism by which people who commit war crimes, genocide and crimes against humanity can be taken to court and tried. It moves the criminal prosecution out of national jurisdictions and establishes a single standard of justice across the world.
It is important that all the members of the world community should complete their obligations under the treaty and to put the law into effect. The ICC is an essential part of the fight to build greater concern for human rights around the world. The ICC is all part of the wider developments around the world to raise the standards of justice and humanity, and to improve the social and economic environment for as much of the human race as possible.

Deliberating on Saddam

The United States and the rest of the world should put as much time and thought into where and how to put Saddam Hussein on trial as in the prosecution itself.
The options are numerous: Among potential mechanisms for a trial is the newly formed Iraqi tribunal set up in December, 2003, an international military tribunal, the relatively new International Criminal Court or a special United Nations court. Some have suggested a hybrid of some or all of the above options would work best.
One factor is the issue of just how much of Saddam's activity the prosecution would address. Would it be for actions that go back many years? If so, that could work against the International Criminal Court, which could address crimes only back to July 1, 2002. Would the prosecution focus primarily on Saddam Hussein or give substantial attention to other leaders in his regime? Another matter is whether the death penalty would be pursued. If so, European nations might rightfully object. Would the new Iraqi tribunal or the International Criminal Court be equipped to handle such a case? Any prosecution is expected to take months to pursue.

Rule of law and human rights are vital for democracy

In recent decades, our world has witnessed a growing and welcome commitment to democracy. We have seen a steady trend towards the establishment of democratic forms of government. Today, from Latin America to Africa, and from Europe to Asia, democracy is more widely accepted and practiced than ever before.

Democracy means more than the functioning of effective representative institutions. It means upholding fundamental principles - particularly the rule of law and respect for human rights. The rule of law - and its pre-eminent condition, equality before the law - is the platform upon which the edifice of democracy rests. Respect for human rights is vital for the democratic edifice to stand. In fact, a symbiotic relation exists between the two: human rights are necessary for the functioning of democracy, and a functioning democracy is essential to ensure the full enjoyment of human rights.

Effective democratic systems allow for the peaceful articulation of demands and resolution of competing claims, thereby promoting a sense of justice and social unity. They are thus vital antidotes to extremism and terrorism. Violent extremists find fewer recruits in societies where government is by the consent of the people, the rule of law is respected, and human rights are guaranteed and promoted.

Democracy belongs to the people. It cannot be imposed from the outside. Different national characters and cultures produce different sorts of democratic systems. However, effective international cooperation is important in encouraging the building of true democracy.

Justice and accountability are essential for the rule of law to be upheld in democratic societies. At the international level, the creation of the International Criminal Court was an historic advance in efforts to support justice and prevent impunity. Strengthening democracy, human rights and the rule of law is critical to achieving social progress and modernization, and to meeting the challenges of development.

Peter Singer: One World: The Ethics of Globalization Yale University Press 2002)

A changing world for one atmosphere, one economy, one law and one community. A better world?

Advocate for national interest (nation state) and argument against humanitarian intervention in 19c and 20c power politics. We have lived with the idea of sovereign states for so long that they have come to be part of the background not only of diplomacy and public policy but also of law. Implicit in the term “globalization” is the idea that we are moving beyond the era of growing ties between nations and are beginning to contemplate something beyond the existing concept of nation-state. But this change needs to be reflected in all levels of our thought, and especially in our thinking about law.

The world cannot stand aside when gross and systematic violations of human rights are taking place. What we need are legitimate and universal principles on which we can base intervention. This means redefinition of state sovereignty that prevailed in Europe since the Treaty of Westphalia in 1648.

Since September 11, 2001, it seems that world leaders now accept that every nation has an obligation to every other nation of the world to suppress activities within its borders that might lead to terrorist attacks carried out in other countries, and that it is reasonable to go to war with a nation that does not do so.

In the global village someone else’s poverty very soon becomes one’s own problem: of lack of markets for one’s products, illegal immigration, pollution, contagious disease, insecurity, fanaticism, terrorism. Terrorism has made our world an integrated community in a new and frightening way. Not merely the activities of our neighbors, but those of the inhabitants of the most remote mountain valleys of the farthest-flung countries of our planet, have become our business. We need to extend the reach of the criminal law there and to have the means to bring terrorists to justice without declaring war on an entire country in order to do it. For this we need a sound global system of criminal justice, so justice does not become the victim of national differences of opinion. We also need, though it will be far more difficult to achieve, a sense that we really are one community, that we are people who recognize not only the force of prohibitions against killing each other but also the pull of obligations to assist one another.

Our newly interdependent global society and economy, with its remarkable possibilities for linking people around the planet, gives us the material basis for a new law or new legal order.

One Economy - WTO

<u>Sydney Cone III – The Development of the WTO and the ICC</u>

In the context of the early stages of the ICC as a supranational institution it may be instructive to look at an established multilateral juridical institution, such as WTO that developed substantial body of history and jurisprudence. While the types of crimes specified in the RS of ICC are only infrequently related to issues that come before WTO, both institutions shar a common need to develop political and diplomatic skills that will help them to establish and maintain global credibility. WTO deals with disputes in the realm of international economic law as distinguished from criminal law. Also WTO deals with

disputes between its member countries as distinguished from prosecutions of individual criminal defendants. WTO may merit attention because it seems to have been successful in developing broad-based transnational acceptance manifesting, or at least not inconsistent with the consensus that it needs in order successfully to handle difficult and seriously contested controversies in which substantial economic interests are at stake.

WTO was painfully slow in coming into existence. The negotiation of the Agreement Establishing the WTO was every bit as tortuous as plagued by crises, set-backs and deadlocks as the negotiation of the RS.

In the beginning there was the GATT that was a mere provisional agreement that was never ratified. It began modestly and it grew as a fragile enterprise beset with risk. GATT was not a juridical entity. It was a staff based in Geneva for a purpose of administering the contractual GATT, a staff of unelected international civil servants engaged by the countries called the contracting parties that had signed this agreement. The contracting parties developed "diplomats' jurisprudence." At an early stage disputes between contracting parties were referred to "working parties" for resolution, and they issued "reports' that made "recommendations." Thus even when the proceedings had the effect of binding the disputing parties to a decision by a tribunal, crisp judicial terminology was avoided in favor of purposefully precatory diplomatic phraseology. In time the working parties came to be called "panels," which is still the term for courts of first instance in the WTO dispute settlement system.

The analogy may be apposite, as a matter of general institutional culture as a matter of appreciating the relationship to be developed between a supranational criminal court, on the one hand, and, on the other, the states that created it and on which it is altogether dependent. This dependency exists not only in operational areas such as obtaining evidence and carrying out sentences imposed on persons whom the court has found guilty, but also as regards the fundamental necessity of building and retaining the confidence of the international community that the court is acting wisely and constructively in its administration of criminal justice.

After the institutional GATT had to add lawyers to its staff, the step turned GATT dispute settlement system into a process based on legal skills as well as diplomacy, adjudicating legal claims until they were eventually decided by resort to precedent, legal analysis and diplomacy. The ups and downs of the GATT in the years preceding the WTO put to the test the development of a multilateral institution capable of resolving disputes. No master plan in advance. The results were not always tidy, but they produced a substantial body of case by case experience and a functioning a valuable process for the settlement of disputes.

DSU= Understanding on Dispute Settlement, annexed to the Agreement Establishing the WTO.

Under it courts of first instance – panels; appeals courts – Appellate Body (the most powerful multilateral tribunal ever established). The Appellate Body and the panels are subordinate to

the Dispute Settlement Body (DSB). Under the DSU the DSB must act no later than a fixed time on a report submitted to it, and the report is approved unless the members of the DSB unanimously disapprove it.

The national security exception issue- The national security exception in the GATT is quite broad according to its Article XXI. The national security exception in the Rome Statute is much narrower under its Arts. 72 and 93. A state party is entitled to invoke its national security as a ground for denying a request by the ICC for the production of documents or the disclosure of evidence. It could in theory be used to inhibit the ICC work rather seriously. In order to gather documents and other evidence, the agents of ICC are singularly dependent upon obtaining the cooperation of the national criminal and law-enforcement authorities of the respective member state. In the event of non cooperation the agents of ICC through diplomacy or otherwise, may find practical solutions that would yield documents or evidence from sources that are helpful or at least not subject to crippling interference. An oblique answer to this question may be found by ascertaining what us nations have made of the broad national security exception in the GATT over the long life of that agreement. Member states invoked it rarely.

Does one look for useful lessens from the WTO applicable to the rather different sphere of law under the jurisdiction of the ICC?

1) An international consensus may be within reach on the proposition that all legitimate spheres of human endeavor would greatly benefit to the extent that the multilateral rule of law, in the form of agreed, enforceable and enforced multilateral standards, were to be strengthened in a manner that would diminish recourse to criminal behavior. 2) Ipse dixit is unlikely to produce significant useful results; that much energy, resourcefulness and patience will have to go into the development of standards that will advance the cause of criminal justice and, at the same time, not run afoul of a multiplicity of political, social and economic agendas. The ICC faces the daunting task of building a credible jurisprudence out of individual cases and, simultaneously, playing a major role in the never-ending task of transforming the Rome Statute into a relevant, living document.

Peter Singer

1) The WTO does, through its use of the product/process rule and its very narrow interpretation of Article XX, place economic considerations ahead of concerns for other issues, such as environmental protection and animal welfare, that arise from how the product is made.
2) While the WTO does not violate national sovereignty in any formal sense, the operations of the WTO do in practice reduce the scope of national sovereignty.
3) The WTO is undemocratic both in theory and practice, firstly because a procedure requiring unanimous consent to any change is not a form of democracy, secondly because the dispute panels and the Appellate Body are not responsible to either the

majority of members or the majority of the planet's adult population, and thirdly because the organization is disproportionately influenced by the major trading powers.

4) A charge that the WTO makes the rich richer and the poor poorer has yet to be proven.

If the WTO does give precedence to commercial interests, is it reasonable to say that it does so only at the behest of its member states, which have the final decision on whether or not to go along with the WTO's rules? The standard response by the WTO supporters to the claim that the organization overrides national sovereignty is that it is no more than the administrative framework for a set of agreements or treaties freely entered into by sovereign governments. Every member-nation of the WTO is a member because its government has decided to join, and has subsequently decided to leave. Moreover decisions on matters other than the resolution of disputes are generally reached by consensus. Since the WTO is an expression of the decisions of sovereign governments, it is not something that can interfere with national sovereignty. This account of the WTO as merely the administrator of a set of multilateral agreements may be true in formal terms, but it leaves out some important practical details. When nations remain members they can have their sovereignty significantly curtailed.

The loss of national sovereignty might be a price worth paying for the benefits the WTO brings. Is there any alternative means by which nations and their citizens could gain the same benefits?

One law

There is another area in which the traditional ideas of state sovereignty has been more directly confronted and overridden. Support for an effective universal prohibition on genocide and crimes against humanity shows more clearly than any other issue how our conception of the sovereign rights of states has changed over the past 50 years. Why has it happened? How has it been defended? Why is it justified?

In the end we need to be able to do something that will make potential perpetrators of genocide fear the consequences of their actions. Just as, at the domestic level, the last line of defense against individual crimes of murder, rape, and assault is law enforcement, so too the last line of defense against genocide and similar crimes must be law enforcement, at a global level, and where other methods of achieving that fail, the method of last resort will be military intervention.

The International Military Tribunal at Nuerenberg gave jurisdiction over crimes against peace, war crimes and crimes against humanity.

The 1984 Convention against Torture accepted the principle that there should be international criminal responsibility for crimes against humanity committed at the instigation or with the

toleration of state authorities. The Convention was central to the House of Lords decision on whether the UK Government could extradite Senator Auguste Pinochet to Spain, to be tried there for crimes he was alleged to have committed in Chile. Chile had ratified the Convention, and this was sufficient for the law lords to find that Pinochet could be extradited to Spain. But that case also raised the question of what is called "universal jurisdiction," that is, the right of any country to try a person who has committed crimes against humanity, irrespective of whether the country in which the crime was committed is a signatory to a convention that provides for international criminal responsibility in respect of that crime.

At the time of the Pinochet hearing, Amnesty International made a strong case that international law recognizes universal jurisdiction for crimes of humanity. The prosecution of Adolf Eichmann in Israel is often cited as a precedent for this view.

Eichmann was kidnapped in Argentine, brought to Israel, tried and executed there. Israel's right to assert jurisdiction over offenses committed in Germany was recognized. The Supreme Court of Israel claimed universal jurisdiction not on the ground that that Israel was the legal representative of Eichmann's victims, but on the ground of universal jurisdiction over crimes against humanity.

In the Pinochet case Lord Philips discussed the question of universal jurisdiction: "I believe that it is still an open question whether international law recognizes universal jurisdiction in respect of international crimes – that is the right, under international law, of the courts of any state to prosecute for such crimes wherever they occur. In relation to war crimes, such a jurisdiction has been asserted by Israel, in the prosecution of Adolf Eichmann, but this assertion of jurisdiction does not reflect any general state practice in relation to international crimes. Rather, states have tended to agree, or attempt to agree, on the creation of international tribunals to try international crimes. They have however, on occasion, agreed by conventions, that their national courts should enjoy jurisdiction to prosecute for a particular category of international crime wherever occurring."

Belgium has legislation recognizing the principle of universal jurisdiction, and that legislation was invoked in the trial of our citizens of Rwanda on charges relating to their involvement in the 1994 genocide in that country. In June 2001, a Belgian jury found them guilty.

Princeton Principles on Universal Jurisdiction in Jan.2001 at the initiative of the International Commission of Jurists. The principles endorse the idea of criminal jurisdiction exercised by any state based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of victim, or any other connection to the state exercising such jurisdiction. The crimes specified include piracy, slavery, war crimes, crimes against humanity, crimes against peace, genocide and torture. Subsequent principles require adherence to international norms of due process, reject

the idea of immunity for those in official positions such as head of state, and deny the efficacy of a grant of amnesty by a state to the accused. A lone dissenter, Lord Browne-Wilkinson warns that universal jurisdiction could lead to states hostile to other states seizing their officials and staging show trials for alleged international crimes. The result would be more likely to damage than to advance chances of international peace. A legal case brought against Ariel Sharon to Belgian court by Palestinian victims. ICJ ruled in February, 2002 that a Belgian arrest warrant for the acting Foreign Minister of DRC on charges of human rights violations was itself a violation of international law, because a foreign minister has immunity from such prosecutions.

To reduce the risk of a proliferation of charges brought by individual nations invoking universal jurisdiction, Lords prefer the use of international courts, unless the country whose national has been charged has signed a treaty accepting universal jurisdiction for the relevant offenses, as in the case of Chile, which had signed the Convention against Torture. If it worked well enough, it might make universal jurisdiction unnecessary.

International courts are pushing us toward a global system of criminal justice for such crimes. Unlike the Nueremberg Tribunal, the trial of Milosevic at the ICTY is not justice exacted by the occupying powers against the leaders of a nation that has been forced into unconditional surrender. It is a sign of the recognition that national sovereignty is no defense against a charge of crimes against humanity.

International tribunals have been one-time arrangements, and the ICJ deals only with disputes between states. To make the prosecution of crimes against humanity a permanent feature of international law, 160 countries met in Rome, 139 signed, and 92 ratified.

The ICC has a prosecutor who can bring charges of genocide, crimes against humanity, and war crimes against individuals as long as they are a national of a state that has ratified the treaty, or the crime was committed on the territory of such a state, or the Security Council refers a specific case to the court. Thus the world has for the first time, a permanent international body enforcing international criminal law.

The US has played a less than distinguished role in this process.

Punishing the criminals after an atrocity has occurred is something that most people would support because of their belief that this is what justice requires. From a utilitarian perspective punishing those guilty of past crimes will put others who might do something similar on notice that they will have no refuge from justice, and so deter them from committing new crimes. Since the fear of punishment will not always be sufficient to prevent the crimes taking place, however, the question of intervention will still arise. If punishment can be justified, so can intervention to stop a crime that is about to occur, or already in progress.

Kant’s Perpetual Peace: no state intervention by force with another state.

John Stuart Mill: definite and rational test for intervention.

Lassa Oppenheim: There is general agreement that, by virtue of its personal and territorial

supremacy, a State can treat its own nationals according to discretion. But there is a substantial body of opinion and practice in support of the view that there are limits to that discretion; when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind, intervention in the interests of humanity is legally permissible.

Michael Walzer's Just and Unjust Wars (shock and conscience criterion):

Humanitarian intervention is justified when it is a response (with reasonable expectations of success) to acts that shock the moral conscience of mankind. The old-fashioned language seems to me exactly right….The reference is to the moral convictions of ordinary men and women, acquired in the course of their everyday activities. And given that one can make a persuasive argument in terms of those convictions, I don't think that there is any moral reason to adopt that posture of passivity that might be called waiting for the UN (waiting for the universal state, waiting for the messiah….).

Kofi Annan:

Intervention is justified when death and suffering are being inflicted on large numbers of people, and when the state nominally in charge is unable or unwilling to stop it.

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

The 1998 Rome Statute of the ICC:

Art.2: genocide

Art. Crimes against humanity

We can draw on the definitions of genocide and crimes against humanity, as well as Walzer's and Annan's criteria, to say:

Humanitarian intervention is justified when it is a response (with reasonable expectations of success) to acts that kill or inflict serious bodily or mental harm on large numbers of people, or deliberately inflict on them conditions of life calculated to bring about their physical destruction, and when the state nominally in charge is unable or unwilling to stop it.

The International Commission on Intervention and State Sovereignty (set up by Canadian Government; co-chaired by Gareth Evans) report:

Criteria for justifiable military action: 1) large scale loss of life;

2) large scale ethnic cleansing.

Not only right to intervene, but international responsibility to protect victims.

Who should decide when the criteria have been satisfied? UN

Annan says: state sovereignty is being redefined by the forces of globalization and international cooperation. The state is now widely understood to be the servant of its people. Intervention is authorized to protect individual human beings whose rights are being violated within a sovereign state.

The UN Charter places two sets of obligations on its members, to respect human rights and not to interfere in the internal matters of another state. How can these two conflicting principles be reconciled?

We could reconcile the Charter with humanitarian intervention if we could defend at least one of the following claims:

1. That the violation of human rights, even in one country, is itself a threat to international peace; Annan's position
2. That the existence of tyranny itself constitutes a threat to international peace(Democracies are the best guardians of peace); Can you prove the link between democracy and peace?
3. That the rights of domestic jurisdiction retained by the states in Article 2(7) of the UN Charter do not extend to committing crimes against humanity, nor to allowing them to be committed within one's domestic jurisdiction (there is universal jurisdiction over those who commit genocide or other crimes against humanity). The state has a responsibility for the protection of its people. When a state is unwilling or unable to fulfill that responsibility, the responsibility falls upon the international community, and more specifically on the Security Council.

To support intervention, the following should be considered:

1) Does intervention do more good than harm? Even if intervention against a tyrannical regime that commits crimes against humanity violates neither international law nor the UN Charter, it might still be wrong to intervene. It makes no moral sense to rescue a village and start WW III, or destroy a village in order to save it. We need to have rules and procedures making intervention difficult to justify, for some nations are capable of deceiving themselves into believing that their desire to expand their influence in the world is really an altruistic concern to defend democracy and human rights. But even when those rules and procedures have been satisfied the key question must always be: Will intervention do more good than harm?

There is an important ethical point at issue here, one that often leads to misguided objections to arguments about when it is right to intervene in the domestic affairs of another state. The objection runs: if it was justifiable to intervene against Serbia in Kosovo, then it must also be justifiable to intervene against Russia in Chechnya, etc. What this objection overlooks is that it is one thing for there to be a legal basis, and even a just cause, for intervening, and a totally different thing for intervention to be justified, all things considered. (Think of predictable human costs of the resulting war that would make it wrong to intervene.

2) Avoiding cultural imperialism

Moral relativism never crosses the boundary of your own culture, and should thus be rejected. A much better case against cultural imperialism can be made from the standpoint of a view of ethics that allows for the possibility of moral argument beyond the boundaries of one's own culture. We can argue that distinctive cultures embody ways of living that have been

developed over countless generations, that when they are destroyed the accumulated wisdom that they represent is lost, and that we are all enriched by being able to observe and appreciate a diversity of cultures.

3) Reforming the UN

Summing up

A global ethic should not stop at, or give great significance to, national boundaries. National sovereignty has no intrinsic moral weight. What weight national sovereignty does have comes from the role that an international principle requiring respect for national sovereignty plays, in normal circumstances, in promoting peaceful relationships between states. It is a secondary principle, a rule of thumb that sums up the hard-won experience of many generations in avoiding war. Respect for international law is vital, but the international law regarding the limits of sovereignty is itself evolving in the direction of a stronger global community. As we have seen, the International Commission on Intervention and State Sovereignty has sought to reframe the debate in terms of "responsibility to protect" rather than "the right to intervene." In doing so, the commission is suggesting that sovereignty no longer simply a matter of the power of the state to control what happens within its borders. The limits of the state's ability and willingness to protect its people are also the limits of its sovereignty. The world has seen the horrific consequences of the failures of states like Cambodia, the former Yugoslavia, Somalia, Rwanda, and Indonesia to protect their citizens. There is now a broad consensus that, if it is at all possible to prevent such atrocities, they should be prevented. Only the UN should attempt to take on this responsibility to protect. Otherwise, national interests will again conflict and plunge the world into international conflict. If, however, the world's most powerful nations can accept the authority of the UN to be the "protector of the last resort" of people whose states are flagrantly failing to protect them, and if those nations will laso provide the UN with the means to fulfill this responsibility, the world will have taken a crucial step toward becoming a global ethical community.

One Community

Human equality: Theory and practice

Though claiming human rights, we put the interests of our fellow citizens far above those citizens of other nations. We have to consider to what extent we really can, or should make "one world" a moral standard that transcends the nation-state.

A Preference For Our Own

We need another test of whether we have special obligations to those closer to us, such as our

compatriots.

Ethics and Impartiality

Can accepting the idea of having these special obligations itself be justified from an impartial perspective?

Is our obligation to help a stranger in another country as great as the obligation to help one of our own neighbors or compatriots?

Assessing Partial Preferences

The first set of preferences – family, friends and those have rendered services to us, "neighbors" and "fellow-countrymen": the relationships require partiality, but they are stringer where there are shared values, or at least respect for the values that each holds. Where the values shared include concern for the welfare of others, irrespective of whether they are friends or strangers, then the partiality demanded by friendship or love will not be so great as to interfere in a serious way with the capacity for helping those in great need.

The Ethical Significance of the Nation-State

Compatriots as extended kin

What impartial reasons can there be for favoring one's compatriots over foreigners? Nationality. Immigration law of racial or ethnic preference.

A Community of Reciprocity

To be a citizen in a state is to be engaged in a community of reciprocity.

The Imagined Community not of nation-state, but of the world (Benedict Anderson)

Citizens sharing an allegiance to common institutions and values, such as a constitution, democratic procedures, principles of toleration, the separation of church and state, and the rule of law. If the modern idea of the nation rests on a community we imagine ourselves to be part of, rather than one that we really are part of, then it is also possible for us to imagine ourselves to be part of a different community. That fits well with the suggestion that the complex set of developments we refer to as globalization should lead us to reconsider the moral significance we currently place on national boundaries. We need to ask whether it will, in the long run, be better if we continue to live in the imagined communities we know as nation-states, or if we begin to consider ourselves as members of an imagined community of the world.

The Efficiency of Nations

Justice Within States and Between States

Today it is a mistake to think that people compare themselves only with their own fellow citizens in terms of justice.

Rawls and The Law of Peoples

Rawls's A Theory of Justice does not address the issue of justice between societies. With the

more recent publication of *The Law of Peoples (*A Theory of Global Justice?), however, Rawls has at last addressed himself to the issue of justice beyond the borders of our own society. Rawls believes that well-off societies have significant obligations toward struggling societies, but there is a lack of focus on obligations toward individuals who are currently destitute in other countries.

The issue of how the rich nations and their citizens are to respond to the needs of the more than one billion desperately poor people has an urgency that overrides the longer-term goal of changing the culture of societies that are not effectively regulated by a public conception of justice. But that issue is not one to which Rawls has ever given serious attention.

The Reality

The UN set a target for development aid of 0.7 percent of GNP. Most of the developed economies fail to reach it.

An Ethical Challenge

6. A Better World?

The ancient Greek iconoclast Diogenes, when asked what country he came from, is said to have replied: “I am a citizen of the world.” Until recently such thoughts have been the dreams of idealists, devoid of practical impact on the hard realities of a world of nation-states. But now we are beginning to live in a global community. Almost all the nations of the world have reached a binding agreement about their greenhouse gas emissions. The global economy has given rise to the World Trade Organization, the World Bank, and the International Monetary Fund, institutions that take on some functions of global economic governance. An international criminal court is beginning its work. Changing idea about military intervention for humanitarian purposes show we are in the proves of developing a global community prepared to accept its responsibility to protect the citizens of states that cannot or will not protect them from massacre or genocide. At the UN Millennium Summit the world’s leaders have recognized that relieving the plight of the world’s poorest nations is a global responsibility, although their deeds are yet to match their words.

When different nations led more separate lives, it was more understandable for those in one country to think of themselves as owing no obligations, beyond that of non-interference, to people in another state. But those times are long gone. Today our greenhouse gas emissions alter the climate under which everyone in the world lives. Instant communications and modern transport make national boundaries permeable.

We should be developing the ethical foundations of the coming era of a single world community. Recently the international effort to build a global community has been hampered

by the repeated failure of the US to play its part: refusal to sign the Kyoto Protocol, vote against the ICC.
If the US wants the cooperation of other nations in matters that are largely its own concern such as the struggle to eliminate terrorism, it cannot afford to be so regarded.
As more and more issues increasingly demand global solutions, the extent to which any state can independently determine its future diminishes. We therefore need to strengthen institutions for global decision-making and make them more responsible to the people they affect. How to prevent global bodies becoming either dangerous tyrannies or self-aggrandizing bureaucracies, and instead make them effective and responsive to the people whose lives they affect, is something that we still need to learn.

A. Principle of Complementarity

The principle of complementarity is set out in various provisions of the Rome Statute and regulates the relationships between the ICC and the national jurisdictions. In particular it intends to reconcile the States' duty to exercise criminal jurisdiction over international crimes with the establishment of a permanent ICC having jurisdiction over the same crimes. The overall objective is "to put an end to impunity" for crimes of concern to the international community as a whole and thus to contribute to their prevention. In substance the system envisaged in the Statute is that of "successive" jurisdiction, first of national authorities and then of the ICC, which implies primacy recognized to the exercise of domestic jurisdiction.
One of the foundations of the Court's work is the development of the principle of complementarity, which is of seminal importance within the Rome Statute and central to the Court's success. The Court is only empowered to act when national jurisdictions demonstrate an inability or unwillingness to prosecute. These terms are new under international law, and it has therefore been left to the Court to articulate clear and foreseeable criteria to define these central principles to the Court's jurisdiction. In developing these notions, the Court must make it clear that trials at the national level must be genuine so as to remain in conformity with the Statute. In ensuring that national procedures meet these requirements, the Court reduces the need for its intervention and yet ensures the primary goal that should be foremost in all our minds: that justice be done. It is all the better if this can be achieved through national institutions. Some of the fundamental challenges that the Court will face will be (i) the interpretation and application of the concept of "inability" or "unwillingness", and (ii) the question concerning pardons, amnesties and immunities.
(i) Challenges to admissibility will come from subjective elements provided by the Statute, rather than from the objective ones.
- In the "unwillingness" test, the intention of the State has to be determined. This subjective element will have to be considered as the State must be shielding the person from criminal responsibility (Article 17 (2)(a)) or the proceedings must be inconsistent with an intent to bring the person to justice (Article 17 (2)(b) and (c)). *Before Big, p.75

- In the “inability” test, the Court will have to be satisfied that the damage to a national system is significant enough for the State to be “unable to carry out its proceedings.”
- In the “genuine” test … key element to determine admissibility with its criteria of “unwillingness” and “inability”(see Big, p.674)
- Examples of “unwillingness” or “inability” to prosecute can be found behind the reasons that lead to the creation of the ICTY and ICTR. Although the courts were functioning in former Yugoslavia, serious concerns existed about shielding individuals from the ICTY (Big, p.668) where in Rwanda the judicial system had collapsed through the genocide (Rwanda was cited by many during the negotiations, Big p.677).
- Ultimately, it will fall to the ICC itself to try to cast light on the interpretation and application of complementarity and give legal precision to the new legal concept of “inability” and “unwillingness”. Thus, the advantage of having subjective elements is that it will eventually provide some latitude for the Court to develop these new notions and their elements.

(ii) The “pardon gap theory” is one challenge that the Court might have to deal with and is often brought up in the doctrine about the ICC (see Big p.678,). As explained by John T. Holmes, since the Statue does not provide for the Court to assume complementary jurisdiction over crimes that were later pardoned, a State might “investigate, prosecute, convict and sentence a person, and then pardon or parole the person soon after”(Before Big, p.76). Therefore, allowing that person to fall within a gap of international justice. Nevertheless, flexibility provided by the Statute might prove to be a cure to such potential gaps, such as Article 20(3). (Check also with Article 27).

→ Immunities as instances of inability: a national court might be unable to try a person due to immunities. Immunities granted by official pardon or as part of a truth or reconciliation commission process are not given any special status under the Rome Statute. The qualification of such immunities is ultimately a matter that the Court shall decide.

Issues relating international cooperation

It may be argued that the repression of serious violations of humanitarian law is the responsibility of all States and relevant international organizations, who are called to establish and carry out the closest cooperation aimed at prosecuting those responsible for the crimes involved, wherever these crimes are perpetrated. This, in addition to other State duties that are also set out in the four Geneva Conventions and Additional Protocol I of 1977 thereto, such as the duties to criminalize certain conducts in national legislations, to search and apprehend the individuals responsible for international crimes, and to comply with the principle “aut dedere aut iudicare.”

When a “self-contained” system of international cooperation is set up in a treaty such as the

Rome Statute, it is clearly the relevant treaty-framework that dictates the State obligations in this area, unless the related provisions were to be regarded as contrary to international norms of "jus cogens." In this connection (unlike in the case of the ad hoc Tribunals established by the Security Council) the distinction between States Parties and States non-Parties is a crucial element within the cooperation regime envisaged by the Statute, in line with the principle of application inter partes of international treaties; and it may be submitted that the existence of principles of customary law does not necessarily imply an obligation to comply with requests by the ICC for cooperation outside the Statute framework, for States which do not become a party to it.

Under the Rome Statute cooperation would be between

1) the ICC and international organizations, particularly the UN (RS 87(6), 54(3)c.d.) (RS 2, 15-20). Request for relevant information, arrest and surrender, preservation and collection of evidence, service of judicial documents, etc. ICC may set up a network of agreements w/ other organizations.

ISSUES

i) What should be the attitude of ICC in case of refusal to cooperate by the international organization? In case of failure by international organization to comply with a request for cooperation, is ICC entitled to take steps similar to those provided for by RS 87.5.b. and 7?

Contrary to RS 87(5)b – non compliance by States non-Parties – and RS 87(7)-non compliance by States Parties-RS 87(6) does not set out a procedure for a case of non-compliance by intergovernmental organizations. On the other hand failure by an intergovernmental organization to cooperate may derive from a breach of an agreement with ICC, or of an obligation under a Security Council resolution. In these cases one may argue that the procedures envisaged in RS 87 may apply also to intergovernmental organizations; and that ICC has an implicit power to least inform the ASP/SC of the non-cooperation issue. Conversely it does not seem appropriate to allow ICC to 'making a finding" in this respect, since this consequence appears to be reserved, within the RS, to instances of non compliance by States Parties.

ii) Art. 15 of the ICC-UN agreement refers to the duty to cooperate with the ICC on the part of the UN, its programmes, funds and offices concerned. Is the same obligation placed on UN forces (or multinational forces authorized by the UN) which are engaged in peacekeeping?

iii) Is there a room for conclusion of formal/informal agreement between ICC and international organizations granting cooperation w/ ICC?

2) the ICC and the States Parties – general obligation

Part.9 Art.86 States Parties general obligation to cooperate covers not only the forms of cooperation and assistance specified in Part 9, but all the obligations provided for in the Statute. To act promptly and with all due diligence in accordance with the general principle of good faith governing performance of international obligations. Art.87 sets modalities to be followed by Staes in complying with requests for cooperation made by ICC. Arrest and

surrender, other forms of assistance, offences against the administration of justice, enforcement of fines and forfeiture measures. Arts. 88, 89-92.
Consultation between ICC and State Party; remedies for non-compliance; availability of procedures under national law.

3) the ICC and the States non-Parties

Art.87.5.a.

ISSUES

i) What would be an appropriate procedure for negotiations and conclusions by the ICC of arrangement and agreements under Art.87.5?

ii) What could be an "other appropriate basis" for requesting cooperation from State non-Party? Could it be the general principles on respecting and ensuring respect for international humanitarian law?

4) cooperation in case of competing requests for surrender of a person or for other forms of cooperation

An ICC decision does not prevail over a State's duty under treaty or customary law towards States non-Parties. Art.90.

Arts. 93(9), 97.c., 98.1. &2.

RS Enforcement provisions: arts. 103-110

103: role of states in enforcement of sentences of imprisonment
104: change in designation of State of enforcement
105: enforcement of sentence
106: supervision of enforcement of sentences and conditions of imprisonment
107: transfer of the person upon completion of the sentence
108: limitation on the prosecution or punishment of other offences
109: enforcement of fines and forfeiture measures
110: review by the Court concerning reduction of sentence

Kress: The crucial Importance of the law on cooperation under Part.9 of the RS and the relationship between the internal and the external part of the procedural law

Stahn

Enforcement of Collective Will: the Reversion of a Concept

The Security Council should bear the responsibility of determining both the existence of a threat to the peace and the measures necessary to remove that threat (Art.39 Charter). But the great hope placed by the framers in the role of the Council as "enforcer of the collective will" has never fully materialized. The UN has not been equipped with military forces through stand-by agreements under Art.43, which has required the Council to rely on the member states' voluntary contributions to military enforcement actions throughout its existence. This

changing pattern did not cripple the system, but it actually transformed the centralized model of collective security, upon which Chapter VII is built, into a decentralized enforcement system with far less control by the Council over the execution of its decisions. The other tragic irony of the development of the Charter system since 1945 is the decline in the Council's multilateral monopoly over the use of force. This erosion is reflected on the levels of both unilateral and multilateral action. Unilateral actions have mostly been defended by reinterpreting Charter law. States have invoked various exceptions to Art.2(4) and even broader interpretations of Art.51 in order to defend interventions for the protection of nationals abroad or forcible responses to alleged terrorist acts without Council authorization. This practice has not nullified existing Charter rules, but has weakened their prescriptive effect.

Regional enforcement action has unquestionably deviated from the letter of the Charter. The Charter's wording is clear in this regard. It expressly states that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state. But state practice tended to disregard the authorization requirement in cases where the UN did not or could not act and a regional collective body found it appropriate to act. (E.G., Liberia, and Sierra Leone by Economic Community of West African States (ECOWAS), Kosovo intervention by NATO in 1999, etc. for these regional actions the UN Security Council retroactively endorsed or acquiescenced). Operation Enduring Freedom received quasi-unanimous support in the international arena, yet the intervention arguably exceeded the accepted parameters of Art.51 and interfered with the Council's responsibilities under Chapter VII, at least insofar as the toppling of the Taliban regime was concerned.

These developments teach two lessons. First, they demonstrate that the departure from the framework of the Charter has not caused a complete breakdown of the system but has encouraged the development of alternative mechanisms to deal with uses of forces lacking Council authorization. Second, they lend considerable support to the idea that lawfulness in the international legal system is not merely a matter of textual interpretation but results from cumulative and interactive processes of discourse and collective decision making.

Challenges to the Council's monopoly over the use of force

The challenges to the centralized enforcement system established in 1945 evolved, in part, in response to opposition to the nature of the Council's powers and functions in the international legal system. Ideologically the Council's loss of authority can be ascribed to the traditional weaknesses of the collective security system; namely the lack of representativeness of the Council and the veto power of the five permanent members. Both sets of criticism have been used to challenge the dogma that states may under no circumstances disregard the council's monopoly power over the use of power. The challenges to the Council's authority are founded on idealistic theories about majoritarian decision-making power and the

democratization of international law. Democratic school argues that decisions taken by regional organizations such as by NATO in Kosovo, may under certain circumstances offer enough collectiveness to outweigh the absence of authorization by the Council, because a group of states using force without a Council mandate may be more representative of the international community than a group of Council members blocking military action. Others argue that the Council may be an inappropriate body for judging military actions like humanitarian interventions because not all of its members adhere to the values of liberal democracy and human rights domestically. They contend that the international community should place more emphasis on the objectivity of the actors involved in a decision-making process than on purely quantitative or majoritarian considerations. A third (institutionalist) school may claim that uses of force that are not based on Chapter VII may still be legitimate alternatives to Council decision making, if they are employed by collective regional bodies that involve all the parties affected by the decision.

Although there are strong policy objections to recognizing a right of states to enforce the collective will without a corresponding decision of the Council, recent practice indicates that not all forms of forcible intervention without authorization can be treated alike. Two basic distinctions may be made. First, interventions undertaken to enforce common interests or legal obligations defined by the Council may and should be regarded differently from interventions conducted in pursuit of interests shared by a group of states individually because they are normatively in accordance with the Charter and based on universally defined principles, which gives them more acceptability in terms of public policy. Second, interventions by regional organizations or coalitions of states enjoy more legitimacy than unilateral enforcement actions, not only because they involve a greater number of actors, but because they follow a collective decision-making procedure, which introduces checks and balances and limits the risk of abuse.