

VERTICAL INTEGRATION, THE RECONSTITUTED STATE AND THE ICC

**VERTICAL INTEGRATION, THE RECONSTITUTED STATE AND
THE INTERNATIONAL CRIMINAL COURT:
EXPANDING THE HORIZONS OF INTERNATIONAL LAW AND GOVERNANCE**

By

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ABSTRACT

Established in 1998, the permanent International Criminal Court (ICC) presents fundamental complexities for the concept of state sovereignty, while raising prospects for progressively developing international law and global governance in human security-related areas. The Court's distinct history, negotiation and governance properties have significance well beyond international criminal justice. The ICC has broader implications for emerging forms of multilateral and transnational cooperation, the heightened standing and visibility of the individual person within the regulatory and protective precincts of international law, and the evolving role, capacity and disposition of the state in brokering, implementing and enforcing innovative governance arrangements. These analyses cross a number of sub-fields within international relations and global governance scholarship. A transcending dimension of my theoretical approach and intended contributions is the idea of state sovereignty as a meta-constitutive institution that fundamentally structures international law and politics, but is itself subject to subtle normative changes in its qualitative meanings and implications

As an institutional fulfilment of the post-Second World War proceedings at Nuremberg, the ICC strikingly departs from the conventional inter-national law of states. The Court seeks to uphold individual-focused human rights and humanitarian law safeguards, as reflected by the three crimes within its jurisdiction: genocide, war crimes, and crimes against humanity. Its jurisdiction over individual offenders is equally novel. The ICC is 'complementary' to national justice systems, and thus will directly administer justice only when states are demonstrably 'unwilling or unable' to conduct genuine proceedings. This distinct supranational governance format aims to facilitate national legislative and capacity-building measures to enhance the vigilance and effective functioning of domestic legal systems. The Court is the permanent organizational and normative focal point of an emerging program of enforcement and supporting efforts. More broadly, it contributes to the normative ideal and practical realization of a comprehensive and integrated global human security agenda.

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PRINCIPAL ABBREVIATIONS

ASP	Assembly of States Parties to the International Criminal Court
CICC	Coalition for the International Criminal Court
ICC	International Criminal Court
ICJ	International Court of Justice (United Nations)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission (United Nations)
IMT	International Military Tribunal at Nuremberg
LMG	Like-minded Group of States
OTP	Office of the Prosecutor of the International Criminal Court
PrepCom	Preparatory Committee on the Establishment of an International Criminal Court
UN	United Nations

Chapter 1

INTRODUCTION TO THE ICC AND OUTLINE OF THIS STUDY

Contents

- I. Introduction
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I. Introduction

In June and July, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court finalized and adopted the Rome Statute of the International Criminal Court (the Rome Statute). The Rome Statute was decisively approved on the last day of the conference: 120 states voted in favour; 7 were opposed; and 21 abstained (UNDCP-Final Act, 1998). Once the number of ratifying countries exceeded 60 in April, 2002, the permanent International Criminal Court (ICC) was established, and entered into force on 1 July, 2002.¹ As a sophisticated formal governance institution with distinct supranational properties, the ICC has significance well beyond international criminal justice. Its establishment and functioning has broader implications for emerging forms of multilateralism and transnational cooperation, the role of non-state actors in catalyzing, developing and monitoring progressive measures, the heightened standing and visibility of the individual person within the regulatory and protective precincts of international law, and the evolving role, capacity and disposition of the contemporary sovereign state in brokering,

¹ As of 1 January, 2008, there were 105 States Parties, each having signed and ratified the Rome Statute (ICC-ASP, 2008). An additional 34 states had signed the Rome Statute (CICC, 2008b).

implementing and enforcing innovative governance arrangements. In these fundamental respects, the ICC suggests new directions and expanded possibilities for international law and global governance. I now provide a brief contextual overview before outlining how the balance of this introductory chapter is structured and presented.

The ICC significantly embodies the novel judicial proceedings and pronouncements of the post-Second World War International Military Tribunal (IMT) at Nuremberg, and the related Tokyo trials. Though a permanent international criminal tribunal was envisaged at that time, the Cold War political climate stymied that initiative for decades. Finally, in the early 1990s, the UN Security Council established the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) to prosecute atrocities associated with those respective conflicts. Those ad hoc tribunals provided a normative impetus and practical working model that helped inspire and inform the negotiations. The Rome Statute's Overview articulates a range of objectives (1998):

Why do we need an international criminal court?

- ... To achieve justice for all
- ... To end impunity
- ... To help end conflicts
- ... To remedy the deficiencies of ad hoc tribunals
- ... To take over when national criminal justice institutions are unwilling or unable to act
- ... To deter future war criminals

Though these ideals can perhaps never be fully realized, they help illuminate the pressing and diverse impetuses behind the ICC initiative. The Court's final establishment suggests that fundamental *human security*-related values and concerns are beginning to more fully (if not equally) coexist with conventional understandings of state sovereignty.

The ICC has jurisdiction over “the most serious crimes of concern to the international community as a whole”: genocide, war crimes, and crimes against humanity (Ibid: Art. 5.1). Those select offences resonate globally, but not because they necessarily transcend borders per se. Indeed, a typical feature of such atrocities in the 20th century was their perpetration within states – often at the direction or with the complicity of governing authorities. Thus their intrinsic *global* character is normative, rather than their more circumstantial territorial or trans-boundary dimensions.² The Rome Statute’s Preamble recognizes those transcending concerns (1998: Para 2) [original emphasis]:

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

The ICC expresses a global resolve to punish, deter and denunciate those grave threats, and thus signals a decisive departure from a Cold War-era normative disjuncture.

Despite the progressive development and codification of international human rights and humanitarian law protections during that period, the global community as a whole consistently failed to enforce justice over flagrant and egregious transgressions of those standards. That experience demonstrates how progressive trends within international law have anxiously contended with the more traditional ‘Grotian’ principles of sovereignty and non-intervention (see Cassese, 2005: 59).

Those conventional markers constitute the analytical point of departure for this study’s appraisal of the ICC. The states-system forms the basic existential context for international law and governance. As a strict ideal type, state sovereignty implies a rigid horizontal ordering *between* states by which there is neither a super-ordinate (i.e.

² These offences are distinct from trans-boundary criminal activity such as cyber-fraud, money laundering and smuggling of psychotropic substances, which themselves present unique governance challenges.

constitutional) authority that supersedes inter-national rules, nor any subjects below or within states to or by which the law directly applies. Thus states are the pre-eminent subjects of international law: “They possess full *legal capacity*, that is, the ability to be vested with rights, powers and obligations” [original emphasis] (Cassese, 2005: 46; also see Byers, 1999: 13 & 75; and Heller and Sofaer, 2001: 26). Those exceptional legal attributes may be conceptualized along two interrelated dimensions – *internal* and *external* sovereignty. Internally, states possess exclusive competence within their borders and over their populations, as recognized by the UN Charter’s proscription against intervention in states’ domestic jurisdiction (1945: Art. 2.7). Externally, in their mutual relations, they are formally sovereign equals, as also enshrined in the Charter (Ibid: Art. 2.1).³ In these twin respects, states are bound only by the rules and mechanisms to which they have consented, whether by treaty or custom (Cassese, 2005: 153; Byers, 1999: 88). Thus, it may be said that international law presupposes states (see James, 1999: 46).

The norms of political discourse and exchange in the global arena reflect and reinforce this conception of equal and inviolable states. Thus Jackson describes sovereignty as “the basic norm, *grundnorm*, upon which a society of states rests” (1999: 10; also see Krasner, 2001b: 11). Cassese, likewise, characterizes sovereign equality as “the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest” (2005: 48; also see Byers, 1999: 35). Those *de jure* dimensions also tend to sustain the image of relatively autonomous and unitary (or

³ This formal designation diverges from the *de facto* “(in)equality of influence” in many international legal settings (see Simpson, 2004a: 49; also see Heller and Sofaer, 2001: 29-30).

self-contained) entities in a de facto sense – the notion of “Westphalian sovereignty” – however mythical or out-dated that idea is (Krasner, 2001b: 10; and Krasner, 1999: 20).

This socially entrenched structural context is integral to appreciating the Court’s distinct history, negotiation, substantive mandate, and regulatory functioning. The ICC has inherent implications above, below and across this rudimentary ordering and its attendant legal and political presuppositions. In other equally compelling respects, however, it substantially reaffirms that traditional format. These collective aspects raise intriguing complexities for state sovereignty as a doctrine and a practice. They suggest that sovereignty is neither absolute nor static. Notwithstanding its formal juridical dimensions, and its entrenched political connotations, its qualitative properties may evolve normatively. The ICC demonstrates how progressive understandings may become embedded in formal governance arrangements without explicitly altering or qualifying sovereign authority per se. Thus the Court uniquely embodies both stability and change in state sovereignty. This distinct blend of continuities and discontinuities transcends this study’s investigations, analyses and propositions.

This introductory chapter has three remaining components, which I present as follows. First, I survey the ICC’s principal architectural and mechanical features under the Rome Statute. This preliminary sketch helps situate my analyses of the Court’s history and negotiation in part I of this study, and my more in-depth and qualitative appraisal of its novel design and governance properties in part II. It also provides an opportunity to highlight certain basic aspects that are not otherwise directly addressed in this study. Second, I outline the main theoretical perspectives that inform my approach,

and how I aim to contribute to those schools of thought and inquiry. These considerations relate to the mutually constitutive nature of international law and politics, and how that complex intersection mediates state sovereignty as a meta-constitutive institution of legal and political authority. Third, I provide a chapter-by-chapter overview of this study. I preview the respective investigations, analyses and propositions of each chapter, and how they collectively advance the core proposition of this study.

II. The Rome Statute of the ICC: Architecture and Mechanics

Article 1 ('The Court') contains four essential components of the ICC's legal mandate and composition (Rome Statute, 1998) [my emphases]:

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

The Court's permanence distinguishes it from the Nuremberg and Tokyo tribunals, as well as the ICTY and ICTR. This obvious feature is vital to achieving universal respect and adherence to international criminal justice, and addressing charges of selectivity and retroactivity associated with those past enforcement efforts. The ICC's permanent seat is in The Hague, Netherlands (Ibid: Art. 3.1). It has entered into a Headquarters Agreement with the host state (as mandated by the Rome Statute, 1998: Art. 3.2). The Court may "sit elsewhere, whenever it considers desirable", as provided by the Statute (Ibid: Art. 3.3). The ICC has the same six official languages as the UN – Arabic, Chinese, English, French, Russian and Spanish – and its judgments shall be published in all of those (Ibid: Art. 50.1). Its working languages are English and French (Ibid: Art. 52.2).

The ICC has jurisdiction over individual perpetrators (Ibid: Art. 25). This principle of ‘individual criminal responsibility’ is a *sine qua non* of international criminal justice, as most authoritatively articulated by the IMT at Nuremberg. As I discuss in chapter 5, then, individual persons are the Court’s most direct and consequential subjects. This feature is amongst its most novel and significant governance properties. Though the Rome Statute regulates states as vital intermediaries in the administration of international criminal justice, they are not as such subject to the Court’s most essential or ultimate penal functions. It is noteworthy, however, that the Rome Statute does not affect the international law of state responsibility (Ibid: Art. 25.4). It also does not prejudice victims’ rights to take civil measures under national or international law (Ibid: Art. 75.6). Given the severity and stigma of the crimes within the Court’s substantive jurisdiction, suspected or accused persons are entitled to a range of generally accepted human rights protections at all stages of ICC proceedings.

As discussed in section I, the ICC has jurisdiction over an exceptional category of international crimes. In rationalizing and re-stating the three defined offences, the Rome Statute effectively provides a consolidated criminal code (see Crawford, 2003: 152). The drafters substantially reproduced the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (see Cassese, 2003: 107). International humanitarian law (i.e. war crimes), however, as well as the law of crimes against humanity, comprise a more complex assortment of legal instruments and customary rules.⁴ Here the Rome Statute

⁴ International humanitarian law regulates the means by which armed conflict is conducted, including protections afforded to combatants, civilians and other classes of ‘protected persons’ (*jus in bello*). It forms a separate body of law from that which regulates when the actual use of force is lawful (*jus ad bellum*), as most authoritatively expressed in the UN Charter (e.g. self-defence and/or authorization by the Security Council). These combined components constitute the laws of war (see Maogoto, 2004: 1).

provides significant clarification and synthesis (see Clapham, 2003: 47). It also progressively distinguishes war crimes in internal (or non-international) armed conflict situations, and recognizes specific offences as war crimes and crimes against humanity that specifically or disproportionately target women and children. The ICC will have jurisdiction over the fourth listed crime of aggression if and when a definitional provision is adopted in accordance with the Statute's amendment provisions (1998: Art. 5.2).⁵

The Court's *complementary* relationship with national justice systems is its defining governance property in the administration of international criminal justice, as I discuss in chapter 6. Under this arrangement, cases are generally only admissible to the ICC when states are demonstrably “unwilling or unable” to conduct genuine and effective proceedings, or when states' decisions not to proceed with a case stem from their “unwillingness or inability” to do so (Ibid: Arts. 17.1(a) & (b)).⁶ The Rome Statute provides criteria for making such determinations (Ibid: Arts. 17.2 & 17.3). This format's central objective is to facilitate legislative and capacity-building measures within states to enhance the vigilance and effective functioning of national systems. It reaffirms states' primary role and authority, and recognizes the policy benefits associated with national proceedings: “They remain the optimal venue for criminal forms of accountability due to their proximity – politically, psychologically, and logistically – to the events and people involved in atrocities” (Ratner and Abrams, 2001: 339).⁷ With two exceptions that I

⁵ As I discuss in chapter 8, seven years after its entry into force (1 July, 2002), a Review Conference will be convened, at which time amendments may be made to the Rome Statute, including to the list of crimes (Rome Statute, 1998: Art. 123). In December, 2007, the 6th Assembly of States Parties resolved that the Review Conference shall be held in early 2010. The exact dates and venue remain to be determined.

⁶ Also see Preamble, Para 10 and Art. 1.

⁷ A case is also inadmissible where the ICC has already tried the person for the conduct (Ibid: Art. 17.1(c)). As a further admissibility precondition, a case must be of “sufficient gravity” (Ibid: Art. 17.1(d)).

consider in chapter 6, the ICC may only address acts committed on the territories of States Parties or by their nationals (Ibid: Art. 12.2).⁸ In no circumstances may it prosecute conduct pre-dating the Rome Statute's entry into force [1 July, 2002] (Ibid: Art. 24.1). Proceedings may be triggered by State Party or Security Council referral, or by preliminary investigations initiated on the Prosecutor's own motion (Ibid: Art. 13).

Because the ICC lacks independent coercive enforcement power, including a police force, States Parties must comply with the Court's requests for "international cooperation and judicial assistance" (Ibid: Part 9, Arts. 86-102). Those obligations may include arresting and surrendering persons for trial, protecting victims and witnesses, securing crime sites, and preserving evidence. This state-cooperation arrangement is an essential structural feature and challenge for the ICC (Cassese, 2003: 355):

Without the help of these authorities, international courts cannot operate. Admittedly, this holds true for all international institutions, which need the support of States to be able to operate. However, international criminal courts are much more in need of such support, and more urgently, because their action has a direct impact on individuals living on the territory of sovereign States and subject to their jurisdiction.

For these reasons, the Court provides an instructive site of inquiry for examining the intersection of international law and politics (Broomhall, 2003: 60):

While legal factors and international considerations play an increasing role in State decision-making, the very fact that key decision-making powers remain in State hands ensures an ongoing role for a range of extra-legal (diplomatic, economic, strategic, and 'purely political') considerations.

The ICC may refer instances of noncompliance to the Assembly of States Parties (discussed below) or the Security Council, as appropriate (Rome Statute, 1998: Art. 87.7). It may also seek assistance from non-party states and intergovernmental

⁸ As I particularly discuss in chapter 6, the U.S. has criticized this format because an American national (e.g. service-member) could potentially be subject to ICC jurisdiction for crimes committed on the territory of a State Party, even though the U.S. is not itself a State Party.

organizations (Ibid: Art. 93). In operational and broader respects, therefore, the Court's effectiveness hinges critically upon the contributions of other actors, as expressed by ICC President Philippe Kirsch: "The success of the Court is the common aim and collective responsibility of the Court, States Parties, international organizations and civil society" (ICC-ASP-2007a: 4; also see UN-ICC, 2005: Para 5).⁹

The ICC is comprised of four organs (Ibid: Art. 34(a)-(d)):

1. The Presidency
2. An Appeals Division, a Trial Division and a Pre-Trial Division
3. The Office of the Prosecutor
4. The Registry

The President and First and Second Vice Presidents are elected by an absolute majority of the judges (Ibid: Art. 38.1).¹⁰ The Presidency has broad responsibility for the Court's administration, save for the Office of the Prosecutor, and for various other functions under the Rome Statute (Ibid: Arts. 38.3(a) & (b)). In the former instance, the Presidency shall coordinate with and seek concurrence of the Prosecutor on all matters of mutual concern (Ibid: Art. 39.4). The Chambers, including the members of the Presidency, is organized into three divisions, as listed above. The Appeals Division is composed of the President and four other judges, the Trial Division of the Second Vice President and five other judges, and the Pre-Trial Division of the First Vice President and six other judges.

⁹ The Office of the Prosecutor has declared (ICC-OTP, 2003: 1-2): "The Prosecutor will encourage States and civil society to take ownership of the Court. The external relations and outreach strategy of the Office will develop a network of relationships between the Prosecutor, national authorities, multi-lateral institutions, non-governmental organizations and other entities and bodies, to ensure that in any kind of situation in which the Prosecutor is called upon to act, practical resources are made available to enable an investigation to be mounted".

¹⁰ They are President Philippe Kirsch of Canada, First Vice-President Akua Kuenyehia of Ghana, and Second Vice-President René Blattmann of Bolivia (ICC-Presidency, 2008).

The 18 judges are elected by two-thirds majority of the States Parties (Ibid: Art. 36.6(a)).¹¹ States Parties may each submit one candidate, who need not be of the same nationality but must be a national of a State Party (Ibid: Art. 36.4(b)). Judges must be “persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices” (Ibid: Art. 36.3(a)). Candidates must have established competence in criminal law and procedures, or in relevant areas of international law such as international humanitarian law and human rights (Ibid: Art. 36.3(b)(i) & (ii)). The Rome Statute directs States Parties, in electing judges, to consider the need for representation of the principal legal systems of the world, equitable geographical representation, and a fair representation of female and male judges (Ibid: Art. 36.8(a)). It also directs them to consider the need for judges with legal expertise on specific issues, including violence against women and children (Ibid: Art. 36.8(b)). Judges may be excused or disqualified in cases in which their “impartiality might reasonably be doubted on any ground” (Ibid: Art. 41.2(a)).

The Office of the Prosecutor (OTP) is responsible for receiving and analyzing referrals and information respecting crimes within the Court’s jurisdiction, and for conducting appropriate investigations and prosecutions (Ibid: Art. 42.1). The OTP “shall act independently as a separate organ of the Court” (Ibid). The Prosecutor and Deputy Prosecutors “shall be persons of high moral character, and be highly competent in and

¹¹ In February 2003, the first Assembly of States Parties elected the 18 judges for terms of 3, 6 and 9 years. Seven judges were elected from the Western European and others Group of States, four from the Latin American and the Caribbean Group of States, three from the Asian group of states, three from the African group of states, and one from the Eastern European group of states (see ICC-Chambers, 2008). There were seven female and eleven male judges (Ibid). The 6th Assembly of States Parties filled three judicial vacancies in December, 2007, and maintained those initial compositional dimensions.

have practical experience in the prosecution or trial of criminal cases” (Ibid: Art. 42.2).¹² The Registrar is the Court’s principal administrative officer, including responsibility for matters of legal aid, court management, victims and witnesses, defence counsel, and the detention unit (ICC-Registry, 2008).¹³ The Registrar also channels communication between the ICC, the UN, the Assembly of States Parties (discussed below), other intergovernmental organizations, and individual states (Ibid). Judges, the Prosecutor, the Deputy Prosecutors, and the Registrar may be removed from office for “severe misconduct” (Rome Statute, 1998: Art. 46.1(a)). Those officials may face other disciplinary sanctions for “misconduct of a less serious nature” (Ibid: Art. 47). They must all also “make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously” (Ibid: Art. 45).

Though its negotiation was sponsored by the UN, the ICC exists separately from the UN system. It possesses distinct “international legal personality” and “such capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes” (Ibid: Art. 4.1). It may exercise its functions and powers under the Rome Statute “on the territory of any States Party and, by special agreement, on the territory of any other state” (Ibid: Art. 4.2). A Negotiated Relationship Agreement concluded in 2004 provides for regularized institutional relations and cooperation between the ICC and UN (as mandated by the Rome Statute, 1998: Art. 2). As mentioned above, the Rome Statute itself provides for Security Council referrals to the ICC pursuant to the Council’s international peace and security authority under Chapter VII of the UN Charter (Ibid: Art. 13(b)). The

¹² The Prosecutor, Luis Moreno-Ocampo of Argentina, assumed office in June, 2003 after unanimous election by the Assembly of States Parties (ICC-OTP: General, 2008).

¹³ The Registry is headed by the Registrar, Bruno Cathala of France, who was elected by an absolute majority of judges meeting in plenary session in June, 2003 (see ICC-Registry, 2008).

Council may also pre-empt or suspend ICC proceedings by that same authority (Ibid: Art. 16). The ICC is distinct from the International Court of Justice (ICJ), the “principal judicial organ” of the UN, which is also based in The Hague (UN Charter, 1945: Art. 92 and ICJ Statute, 1946: Art. 1). The ICJ only adjudicates cases between states (ICJ Statute, 1946: Art. 34.1).¹⁴ The Rome Statute does recognize the potential role of the ICJ in resolving disputes between States Parties (1998: Art. 119.2). The ICC itself, however, will resolve any disputes concerning its own “judicial functions”, including determining the admissibility of cases under the complementary framework (Ibid: Art. 119.1).

The Assembly of States Parties (ASP) is the Court’s legislative and management oversight body (Ibid: Art. 112). It meets annually, though may hold additional special sessions when circumstances require (Ibid: Art. 112.6). Each State Party has one formal representative, who may be accompanied by alternates and advisors (Ibid: Art. 112.1). Other signatories to the Rome Statute may be observers (Ibid: Art. 112.1). Each State Party holds one vote (Ibid: Art. 112.7). Where consensus cannot be reached, procedural decisions are taken by a simple majority; substantive decisions require a two-thirds majority (Ibid: Arts. 112.7(a) & (b)). Within the ASP, the Bureau consists of a President, two Vice Presidents and 18 members elected for three years, taking into consideration principles of equitable geographic distribution and adequate representation of the world’s principal legal systems (see ICC-ASP, 2008).¹⁵ The ASP may “establish such subsidiary

¹⁴ It may also provide *advisory opinions* at the request of UN organs and specialized agencies (Ibid: Art. 65.1). Its jurisdiction includes cases referred to it by states, and matters specifically provided for in the UN Charter or in treaties and conventions (Ibid: Art. 36.1).

¹⁵ The Bureau has established two working groups, with distinct mandates. The New York Working Group’s mandate includes reviewing the implementation of the ASP’s Plan of Action for achieving universality and full implementation of the Rome Statute. The Hague Working Group’s mandate includes interfacing with the ICC regarding the implementation of the Strategic Planning Process.

bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy” (Rome Statute, 1998: Art. 112.4). The ASP has established a Special Working Group on the Crime of Aggression. The Rome Statute is open to accession by all states (Ibid: Art. 125.3). States Parties may also withdraw, subject to a one-year effective date delay (Ibid: Art. 127.1). The ICC is financed by assessed contributions from States Parties, as well as UN funds (Ibid: Art. 115(a) & (b)). It may also receive voluntary contributions from governments, international organizations, individuals, corporations and other entities – subject to criteria adopted by the ASP (Ibid: Art. 116).

III. Theoretical Considerations and Objectives

In examining the ICC’s negotiation and novel governance properties, this study crosses a number of sub-fields within international relations and global governance scholarship. Those streams include international law and legal institutions (or legalization), international relations theory, international human rights and security, international diplomacy and transnational advocacy, international organization, comparative foreign policy, and international public policy. My core objective is to consider how the Court’s institutional and normative features complicate conventional understandings and practices of state sovereignty and authority. I examine those innovations in detail to highlight avenues they may present for progressively developing international law and global governance beyond international criminal justice.

I pose three questions to guide my investigations and analyses: *What has happened? How did it happen? What does it represent?* Addressing these questions

requires attention to the motives, methods and capacities of actors involved in the Court's establishment (and implementation and forward-operations), as well as its legal and normative features as an expression of those factors. The ICC invites a contextual and encompassing approach and scope of analytical inquiry. Keohane stresses (2002a: 14):

World politics and the processes of international law can only be understood from multiple perspectives, which encompass issues of state power, non-state actors, domestic politics, institutions, processes of interpretation, coalitions and bargaining, and the persuasiveness of competing sets of ideas.

Thus, I take a broadly interpretive and ontologically pluralistic approach to my investigations and analyses. The ICC presents a rich and contemporary empirical venue for examining the complex intersection of international law and politics, and contributing to the foundation of knowledge in political science, including its increasing engagement with legal scholarship (e.g. Slaughter et al., 1998; Byers, ed., 2000; Goldstein et al., eds., 2001; Beck et al., eds., 1996; Reus-Smit, ed., 2004). The Court's distinct history, negotiation and embedded state sovereignty implications are particularly salient to those inter-disciplinary research efforts: "One of the lasting, and still pertinent, questions for international studies concerns when and how transformation occurs in the fundamental social structures of international affairs" (Slaughter et al., 1998: 389).

My interpretive framework reflects the fundamental premise that international law and politics have a complex and mutually constitutive interrelationship (see Reus-Smit, 2004a: 4). Though the substance and functioning of legal rules and formal institutions are mediated by political factors, the law may also shape the substance and/or perception of political interests and values, and the means by which objectives are pursued. As Reus-Smit proposes, "states create institutions not only as functional solutions to co-operation problems, but also as expressions of prevailing conceptions of legitimate

agency and action that serve, in turn, as structuring frameworks for the communicative politics of legitimacy” (Ibid: 5). Elsewhere, Reus-Smit observes (2004b: 289-290):

[The] reduction of politics to material power or strategic action, and the law to a simple epiphenomenon or functional expression, seems to miss much that is fascinating about the contemporary politics of international law. To capture more of this richness and complexity, our strategy has been to reflect anew on the nature of politics, the institution we call international law, and their mutual constitution.

Reus-Smit concedes that this approach is more complex, at the expense of parsimony, but proposes that it is more broadly illuminate theoretically (Ibid).

Thus politics do not simply determine the law; the law also shapes and structures politics. My approach departs from *realist* views by which international law has a negligible role in shaping preferences and guiding or constraining conduct, and/or merely reflects and privileges underlying power structures (e.g. Mearsheimer, 1994-5). By such views, the law’s formality falsely implies a capacity to add certainty and depoliticize issues. My approach also diverges from *rationalist* accounts that tend to assess legalized institutions as a tool for overcoming collective action problems (e.g. Koremenos et al., 2001). Those accounts take a broader view of the potential efficacy of legal institutions in structuring cooperation and producing more efficient outcomes, but tend to deny the law any independent significance in actually shaping actors’ views and preferences.

Neither of those conventional perspectives can adequately explain the impetus for states cooperating to establish – and submit to – a permanent judicial institution with distinct supranational properties in the area of international criminal justice. Thus my approach broadly reflects the “normative optic” of international law and politics that treats norms as having a causal impact, in contrast to the fixed interest presuppositions of

the “instrumentalist optic” (see Keohane, 2002c: 117). I seek to utilize and contribute to interpretive schools of inquiry that consider normative inter-influences across law and politics. Goldstein et al. acknowledge: “The relationship between law and politics is reciprocal, mediated by institutions” (2001: 3). Those authors define ‘international institutions’ as “enduring sets of rules, norms, and decision-making procedures that shape the expectations, interests and behavior of actors” (Ibid). They characterize ‘legalization’ as a specific form of institutionalization, defined by three criteria: obligation, precision and delegation (Ibid).¹⁶ They broadly propose: “Legalized institutions can be explained in terms of their functional value, the preferences and incentives of domestic political actors, and the *embodiment of particular international norms*” [my emphases] (Ibid: 12). Within this context, a transcending dimension of my theoretical orientation and intended contributions is the idea of state sovereignty as a *meta-constitutive* institution that fundamentally structures international law and politics, but is itself subject to subtle normative changes in its qualitative meanings and implications

This analytical approach has implications for how core issues are identified and framed for investigation. For example, American abstention has prompted the question: Why won't the U.S. join and support the ICC? That is an important matter, but it is more theoretically instructive to extend and re-state the operative question as follows: Why

¹⁶ These criteria are drawn from “The Concept of Legalization”, within same the well-renowned compilation of essays on *Legalization and World Politics* (see Abbott et al., 2001: 23). Those authors define them as follows: “*Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments . . . in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules” (Ibid: 17). The ICC ranks high on each of those hallmark properties of “hard law” (Ibid: 23).

would any state agree to establish and support the ICC? Addressing that more fundamental issue requires an interpretive analytical approach that combines legal, political and normative considerations. As Wippman notes (2004: 153):

A more complete understanding of what transpired in Rome requires consideration of the ‘reasons for action’ of the various actors involved, including both states and NGOs. In particular, it requires consideration of how actors’ interests and identities interacted to produce positions on particularly contested issues. Further, it requires consideration of the context of the negotiations, which drove actors to frame their positions in ways compatible with the overall enterprise of creating a quintessentially legal institution.

Those motivations and aims must also be appreciated in historical context: “Rationalist approaches to politics and institutional rationality encourage – inadvertently or not – an ahistorical understanding of institutional development” (Reus-Smit 2004c: 32). As I discuss in chapter 2, the final establishment of the ICC seems inconceivable without the Nuremberg and Tokyo precedents, and the more recent experiences and contributions of the ad hoc tribunals (as well as the underlying human rights and humanitarian law regimes). Those respective institutions embodied underlying norms and principles existing at particular historical moments, but then authoritatively re-stated and elaborated upon those foundations, thereby enhancing their recognition and providing impetus for subsequent institutional initiatives. Thus international criminal justice has an inter-subjective cognitive foundation of ideas, beliefs and values, which has reflected and guided its progressive evolution – however protracted and disjointed. Its normative and structural dimensions are mutually constitutive and mutually reinforcing.

For these reasons, the ICC provides an instructive site of inquiry for considering how and to what extent international law both governs actors in the global system, and reflects the prevailing interests and values of that system. There are competing tendencies within that overall situation. Progressive trends – toward “community” (or

transnational) rights and obligations – have modestly conditioned, rather than fundamentally reconfigured, its essential horizontal format (see Cassese, 2005: 17). The awkward development of international criminal justice, including its striking acceleration in the post-Cold War era, exemplifies these ambiguities and inconsistencies. It also illustrates broader challenges and opportunities in a globalizing world. The diffusion and deepening of transnational normative bonds provide impetus for a shift toward *human security* as an encompassing and transcending basis for developing and implementing public policy on a global scale. That concept inherently challenges the conventional ideal type of equal and inviolable sovereign states, which has tended to privilege *international peace and security* proper as the law’s quintessential province.

The ICC also reflects a broader trend toward legalization and adjudication in managing global relations and contentions. Actors’ encounters and/or perceptions of specific rules and institutions may have a more diffuse and mutually constitutive impact. In appraising the recent proliferation of courts and tribunals, Buergenthal observes (2001: 271-272; also see Knoops, 2003: 1; and Sandholtz and Stone Sweet, 2004: 255):

They socialize states . . . to the idea of international adjudication, that is, they tend to make states less reluctant of and more agreeable to the idea of settling their disputes by adjudication or arbitration. Put another way, the proliferation of international tribunals is both the consequence of and a major factor contributing to the acceptance by states of international adjudication, as a viable and effective option for the resolution of disputes between them.

This observation suggests that international law and judicial institutions have achieved a threshold currency within global politics that implies continued development and regard for legal rules and mechanisms.¹⁷ This broader development further signals a departure from strict understandings and practices of sovereign authority, by which the *national*

¹⁷ According to Kahler, however: “Legalization in contemporary world politics is a complex and varied mosaic rather than a universal and irreversible trend” (2001: 277; also see Goldstein et al, 2001: 14).

interest is presumptively fused with preserving maximum discretionary latitude in international dealings, and particularly with avoiding binding and indeterminate legal entanglements and pre-commitments. Again, the ICC case is particularly striking: Why would any state voluntarily accede to an external site of *judicial* governance authority purporting to mediate fundamental aspects of the individual-state interrelationship?¹⁸

As discussed in section I, the socially entrenched features of the states-system are vital to contemporary discussions of international law and governance, however stale the idea of *sovereignty* has become or may seem (Jackson, 1999: 1):

Sovereignty is an academic or theoretical subject but it is also a profoundly practical arrangement of world politics. Sovereignty lays down the main conditions and standards of conduct in world politics

This subject is perhaps so banal that it risks being overlooked, taken for granted, or too rigidly conceptualized (see Pauly and Grande, 2005: 9). In fact, the ICC example suggests that *sovereignty as a concept* is increasingly significant and intriguing, precisely because questions of political authority, capacity and autonomy are ever more complex under globalizing conditions. That the contemporary state diverges from the conventional ideal type actually renews and reinvigorates discussions of sovereignty, including the complex normative interplay between its juridical and political meanings. Notwithstanding its formal connotations, sovereignty may be understood qualitatively as well. The rights and privileges it bestows, and the corresponding duties and obligations it

¹⁸ Abbot and Snidal employ the concept of *sovereignty costs* to emphasize the “high stakes states often face in accepting international agreements” (2001: 52-53). Those authors propose: “Greater sovereignty costs emerge when states accept external authority over significant decisions. . . . Sovereignty costs are at their highest when international arrangements impinge on the relations between a state and its citizens or territory . . .” They further observe that “sovereignty costs are especially high in areas related to national security” (Ibid: 53). As I will consider in this study, the U.S. has substantially framed its policy toward the ICC in these most-sensitive terms. Given its understandings of exceptional global responsibilities, moreover, these dimensions also relate to the idea of “perceived distributional costs” that may favour or militate against legalization (see Kahler, 2001: 296).

implies, are socially subjective and thus socially malleable (Jones, 2006: 233). Hurrell states: “Much of international law has to do with the creation of a framework of shared understandings, institutions, and practices by which substantive rules can be created and through which those actors interact and by which norms are developed” (2000: 346). The ICC development suggests that contextually unpacking the nuances and contradictions of contemporary sovereignty may reveal useful insights for understanding broader emerging trends in legal and political authority. That its implications for sovereign authority are more *inherent* than express (or explicit) makes this development all the more compelling.

Understanding why, when, and with whom states will cooperate, or not, are perennial questions within international relations and global governance scholarship. These considerations become particularly salient as states increasingly contemplate regulatory arrangements that qualify, circumscribe or otherwise alter their traditional sovereign authority and prerogatives. Mayall proposes that “any expansion of international co-operation, beyond the law of coexistence and inter-state reciprocity, can only be achieved by consensus, and therefore, almost certainly, also incrementally” (1999: 74). The ICC represents a significant progression beyond minimalist conceptions of international law and governance, and complicates the conventional proposition that states *jealously guard their sovereignty*. That abstract notion presupposes states’ objectives and priorities, and masks how they may leverage their exceptional international law-making capacities to establish cooperative legal formats to serve new interests, values and imperatives. As the ICC illustrates, states may simultaneously reaffirm their authority through such undertakings, while also expressing and/or implying novel constraints and conditions that are intrinsic or endemic to the enterprise. James

argues though, that “while there is nothing inherently sacrosanct about the concept of sovereignty, it seems likely that the world will remain politically organized on its basis for a long time to come” (1999: 48). The ICC example sustains that observation, but also introduces novel complexities that make the concept of sovereign authority *more* relevant to contemporary international relations and global governance scholarship. It signals neither the state’s retreat nor obsolescence, but rather a progressive evolution in understandings and practices of state sovereignty and a concomitant recalibration of the states-system as a whole.

In introducing a permanent site of supranational authority that juxtaposes itself with the individual and the state, the Court exemplifies increasingly “complex sovereignty” – a “reconstitution of political authority” above, below and across the states system (Pauly and Grande, 2005: 4). This admixture of continuities and discontinuities has fundamental theoretical implications. As Sorensen observes, “the study of international relations will have to face up to a situation where sovereign statehood and the relationships between ‘domestic’ and ‘international’ are variables that always undergo redefinition over time” (2001: 146; also see Boli, 2001: 63). The ICC also demonstrates how that conceptual segregation detracts from the reality that states are as much agents of change in their own transformation, as they are subject to it (Clark, 1999: 32). Abbot and Snidal propose: “International legalization in all its forms must be considered one of the most significant institutional features of international relations” (2001: 72). Given its innovative design and exceptional supranational competence, the ICC is a compelling institutional development in a human security-related area, and thus raises important theoretical questions and lines of inquiry.

IV. Outline of this Study and its Core Propositions

This study proceeds in three parts. Part I provides an extended historical background analysis of international criminal justice, together with a more recent appraisal of the Court's actual negotiation. These contextual aspects are essential for understanding why and how the ICC was finally established, and the specific legal form that it has taken. Part II examines its novel governance properties as a going concern. The Court uniquely juxtaposes itself with the individual and the state, and is the organizational and normative focal point of broader enforcement and supporting measures. Those collective features fundamentally distinguish the ICC from other formal governance institutions. Part III concludes by synthesizing this study's core propositions, examining major prospective issues for the ICC, and evaluating the Court's role and limitations in broader governance context. I now provide a chapter-by-chapter overview.

Part I: Historical Foundations and Process of the ICC Project

In chapter 2, I consider how the fundamental norms and principles of international criminal justice emerged and matured over several decades, and ultimately achieved permanent institutionalization in the ICC. Given the minimal legal and political visibility of individual persons prior to the Second World War, the novel judicial proceedings and pronouncements of the post-war International Military Tribunal (IMT) at Nuremberg constituted a decisive departure. The IMT embodied and articulated the novel proposition that individuals had rights and responsibilities that transcended the international law of states. In its aftermath, the conventional image of unitary and self-contained states was tempered by the powerful idea that individuals had distinct concerns

and vulnerabilities in their most immediate capacities. The states-system remained fundamentally intact, but sovereign states increasingly confronted new dimensions of internal contestation and external scrutiny that reflected the very human rights standards they enshrined and developed in the post-war era. Even though the Cold War political stalemate impeded consistent enforcement of international criminal justice, much less movement toward a permanent tribunal, Nuremberg's normative legacy helped shape political activism and discourses. In this way, I seek to demonstrate how cross-cutting political and normative dynamics may simultaneously inhibit and facilitate progress in international law and governance. I emphasize the role of the ad hoc tribunals in reflecting and contributing to the distinct post-Cold War normative setting within which the permanent ICC project was finally (re)visited in earnest. I conclude that progressive measures, and particularly ambitious projects like the ICC with significant or complex state sovereignty implications, may be more viable when they reflect robust normative recognition of essential principles and imperatives to be advanced or protected.

In chapter 3, I examine the novel dimensions of cooperation, consensus-building and compromise that defined the preparatory ICC negotiations in the mid-1990s. Those discussions proceeded in the midst of the ad hoc tribunals' operations and heightened global attention to the atrocities associated with the attendant underlying conflicts. The complex negotiating process drew and built upon shared purpose in elevating the ICC from a distant prospect to an increasingly viable proposition. I identify five distinct emerging properties of multilateralism to help describe the unique roles, contributions and relationships across state, non-state and institutional actors in building momentum and sustaining focus behind the undertaking. I particularly focus upon two cooperative

enterprises that embodied and spurred those escalating multilateral dynamics. First, I examine the so-called ‘Like-Minded Group’ of States (LMG). I draw upon unorthodox conceptions of *power* to evaluate how this relatively eclectic diplomatic grouping converged around a set of essential principles for an independent and effective tribunal, and propelled the negotiations forward through combined political will and leadership. Second, I examine the non-governmental Coalition for an International Criminal Court (CICC). I characterize the CICC as an exemplary *transnational advocacy network* by the breadth and diversity of its constituency, and its constructive and effective promotion of transnational ideas and values that were broadly compatible with the LMG platform.

In chapter 4, I propose that the final ICC negotiations in 1998 exemplified the procedural dynamics and substantive possibilities of emerging norms and modalities of multilateralism and transnational cooperation. The significance of this encounter lies particularly in the degree to which those novel dimensions were manifest in the drafting and negotiation of a substantively intricate and permanent governance institution with distinct supranational properties. Building upon chapter 3, I seek to provide an essential appreciation for the interrelated legal and political complexities involved. I examine the qualitative integration, engagement and contributions of the CICC and a range of other progressive non-state actors, which were unprecedented and fundamental to the final outcome. I then consider the LMG’s pivotal combined efforts in controlling and directing the procedural and substantive agenda of the proceedings to their successful conclusion, including adopting a fast-track negotiating process and a final package proposal. The LMG maintained its internal unity and resolve, and worked synergistically with the CICC to enlist the support of other more hesitant states, isolate major skeptics

and detractors, and more generally manage political sensitivities in preserving the Rome Statute's substantive integrity. I then survey the objections of the U.S. and other particularly noteworthy dissenting (or abstaining) states. I conclude that the decisive and positive result testifies to the effective negotiating tactics and strategies of the ICC project's proponents, including the effective packing of provisions for an independent and effective Court without jeopardizing its overall political appeal or acceptability.

Part II: The Novel Governance Properties of the ICC Project

In chapter 5, I examine how the ICC directly integrates individual persons as its principal subjects and objects. In these respective ways, individuals have fundamental legal responsibilities and protections under the Rome Statute. I describe how these penal and protective dimensions transcend the inter-national (horizontal) law of states and supersede the application of municipal law within states. They reflect and reinforce an exceptional *vertical* (or trans-national) plane within international law and governance that affirms the global standing and visibility of persons in their direct and individual capacities. The ICC entrenches the quintessential principle of 'individual criminal responsibility' as an institutional fulfillment of the Nuremberg legacy, and a novel affirmation that individual conduct warrants oversight and sanction at the global level. I examine the boundaries and distinctions of this and related provisions that define and sustain these super-ordinate duties and constraints. I also survey the major human rights protections accruing to suspected and accused persons under the Statute.

I then consider the Court's novel protective dimensions, which are defined by the intrinsically global nature of the offences within its jurisdiction. In seeking to punish,

deter and denunciate egregious threats to persons in their most essential capacities – as human beings, rather than as citizens or residents of states – the ICC is a unique institutional embodiment of *human security*. I also consider how the Rome Statute reflects recent lessons from the ad hoc tribunals, and progressive epistemic insights voiced in the ICC negotiations, in its sensitivity to the concerns and well-being of individuals as victims and witnesses. It also progressively recognizes the distinct susceptibilities of women and children to certain crimes that have been inadequately prosecuted and/or improperly characterized in the past, and seeks to address their particular vulnerabilities within the administration of justice. I conclude that the Court's correlative vertical dimensions signify an embryonic transnational order that directly binds individuals with the global community as a whole. These legal and normative features may inspire and inform governance initiatives in other human security-related policy domains. I stress that states are vital to giving expression to this *global citizenship* by participating in progressive and cooperative governance enterprises like the ICC.

In chapter 6, I consider the Court's 'complementary' relationship with national justice systems as its defining governance property in the actual administration of justice. As mentioned in section I, cases are generally only 'admissible' to the ICC when states fail to duly conduct national investigations and prosecutions. As a court of last resort, therefore, it exists primarily to facilitate and monitor national proceedings. I draw upon the concept of a *vertical judicial network* to describe how the Court's functions are fused with operations at the national level. I examine the criteria that prescribe and limit national priority under this arrangement, as well as aspects of judicial and prosecutorial discretion. This format extends beyond a mere (decentralized) division of powers to

constitute an intriguing and indeterminate process of signaling and adjustment between the ICC and national systems. Given legitimate policy reasons for privileging national justice systems, but also the Court's novel authority to evaluate the effectiveness and bona fides of national proceedings (or lack thereof), this arrangement is a coherent blend of innovation and practicality that is appropriately tailored to address past shortcomings of international criminal justice. I stress that the domestic implementation of the Rome Statute is an essential governance feature of the ICC project, in order to permit effective proceedings, as well as all forms of cooperation and judicial assistance to the Court.

I examine the three mechanisms for triggering ICC proceedings, and how they respectively converge with the 'admissibility' criteria and related provisions to govern the Court's competence to directly administer justice in a given situation. Because it lacks independent coercive power, however, the Court's proceedings will require the cooperation of states (in particular) in enforcing the law, including arresting and surrendering individuals for trial. I consider the fundamental political challenges this poses for its practical viability and normative effectiveness. I also consider the role of horizontal *government networks* that link counterpart national officials in joint or coordinated performance of enforcement and other functions. I propose that the complementary design may serve as a model for other governance initiatives, given its political feasibility and practical coherence in prescribing supranational authority for the ICC in reasonably precise and predictable terms. I conclude that this arrangement transcends often-skewed debates about the contemporary role, capacity and disposition of the state. Thus I conceive of a *reconstituted state* that is integral to brokering,

implementing and enforcing progressive governance arrangements like the ICC, but also subject to their super-ordinate purview and authority.

In chapter 7, I consider the Court's pre-eminent situation within a broader, multifaceted framework of measures for prosecuting, deterring and denouncing international crimes. I examine how those further components mutually support the core ICC-State Party juxtaposition by addressing temporal and spatial voids in the scope and application of the Rome Statute's complementary framework and related jurisdictional provisions. Those components include 'universal jurisdiction' as a broader basis for national prosecutions, the continued operations of the ad hoc tribunals, and the emergence of 'internationalized' or hybrid (mixed) tribunals that combine national and international features. I also examine how non-prosecutorial truth-seeking commissions may augment criminal prosecutions by pursuing distinct peace, justice and reconciliation objectives. Such approaches should not preclude or substitute for criminal adjudication, however, by granting sweeping amnesties or pardons for serious offences.

In considering their varying potential contributions and implications under the Rome Statute, I propose that these broader efforts are made coherent by the overarching understandings and ideals of international criminal justice as a common governance *program*, if not a fully integrated and structurally centralized system per se. I conclude that this collective program is not easily categorized within existing international relations and global governance terminology. Thus I conceive of a uniquely dynamic and contingent situation of *complex adjudication* by which the Rome Statute authoritatively governs the ICC-State Party juxtaposition under the complementary framework, but

otherwise fulfills a normative, non-exclusive governance role. I examine two principal features and challenges of this latter scenario, including the potential for multiple (competing) proceedings which may complicate or frustrate cooperative efforts, and the absence of overarching binding judicial precedent which may result in fragmentation and incoherence of the substantive law.

Part III: Expanding the Horizons of International Law and Governance

In chapter 8, I re-encapsulate my core analyses and propositions concerning the Court's distinct history, negotiation and novel governance properties as a going concern. These collective dimensions signal expanded horizons for patterns and possibilities of international law and governance. I also prospectively appraise the principal challenges for the Court's viability and effective functioning. Those aspects include facilitating genuine and effective national proceedings, securing state cooperation and judicial assistance when ICC proceedings are necessary, deterring individual transgressions, and progressing toward the ideal of universal ratification and implementation of the Rome Statute. A core prospective question is the extent to which the fundamental norms and principles of international criminal justice are socially embedded or entrenched as a central feature within the ordinary workings of law and politics across all levels and sites of governance. I conclude this study by considering the Court's role and limitations within the context of broader trends toward a comprehensive and integrated global human security agenda. I re-emphasize its vital contribution to this broader effort, but acknowledge that international criminal justice is inherently secondary (or supplementary) to more fundamental development, prevention and intervention measures.

PART I

**HISTORICAL FOUNDATIONS AND PROCESS
OF THE ICC PROJECT**

Chapter 2

HISTORICAL FOUNDATIONS OF THE ICC PROJECT *

Contents

- I. Interpreting the Historical Evolution of International Criminal Justice
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I. Interpreting the Historical Evolution of International Criminal Justice

In developing this study's core proposition that the ICC is implicative of new directions and expanded possibilities for international law and governance, this chapter considers how the core norms, principles and objectives of international criminal justice emerged and matured over several decades prior to their formal institutionalization in the Court. I argue that a contextual, qualitative and historical appreciation is essential for understanding how and why the ICC was finally established, and the specific legal form it has taken. Its conception and negotiation were fundamentally rooted in pre-existing legal and normative foundations. Notwithstanding its innovative legal architecture, the Court provides permanent institutional expression to well-established governance ideas and imperatives. This historical context suggests that progressive governance initiatives with significant or complex state sovereignty implications may be more viable when they reflect a robust inter-subjective consensus coalescing around a set of essential principles

* This chapter draws upon my involvement and contributions to the following Major Collaborative Research Initiative (William D. Coleman, Project Director) • Adrian L. Jones, "Paradigm Shift and the Post-WWII Nuremberg Trials: The Emergence of the Individual as a Subject and Object of International Law," in Stephen Streeter, John Weaver and William D. Coleman, eds. *Empires and Autonomy: Moments in the History of Globalization*. Vancouver, B.C.: University of British Columbia Press, forthcoming.

and objectives to be advanced or protected. I now provide a brief overview in this introductory section before outlining how this chapter's analyses and propositions are structured and developed.

In tracing and interpreting the ICC project's historical foundations, the post-Second World War trials of the International Military Tribunal (IMT) at Nuremberg constitute the major point of departure. Without discounting the subsequent corresponding proceedings of the International Military Tribunal for the Far East (Tokyo), Nuremberg is widely considered the "watershed" in international law because the Tokyo tribunal essentially followed the Nuremberg Tribunal's jurisprudence in applying its own charter (Ratner and Abrams, 2001: 6; also see Kittichaisaree, 2001: 19). Prior to the Second World War, individuals had negligible legal standing and visibility outside of the sovereign state. The Nuremberg Tribunal catalyzed a fundamental shift in norms, expectations, and understandings of individual human worth, dignity and responsibility, which came to be enshrined and developed within international human rights and humanitarian law in the succeeding decades. Those progressive ideas ultimately formed the basis for the ICC as an institutional fulfillment of the Nuremberg legacy. The core crimes within the Court's jurisdiction, together with the principle of individual criminal responsibility and its attendant parameters, had essential legal and normative foundations well before the formal ICC negotiations in the 1990s. Appreciating these broad continuities, as well as their inter-mediate-level disjunctures, is essential for interpreting the progressive evolution of international criminal justice and the Court's broader implications for international law and governance.

In developing these propositions, this chapter proceeds in four parts. First, I examine certain precursory ideas and expressions of individual rights and responsibilities under international law. Those early developments were exceptional and under-fulfilled, but helped set the stage for the breakthrough at Nuremberg. Second, I survey the Nuremberg Tribunal's novel judicial proceedings and pronouncements, which elevated or affirmed the distinct situation of individual persons as direct subjects of regulation by international law, and as ultimate objects of the law's protection. As I discuss in chapter 5, those transcending legal dimensions are now institutionally and prominently embedded in the Rome Statute. Third, I consider Nuremberg's legacy prior and contributing to the ICC: the progressive development of international human rights and humanitarian law standards, which reflected and reinforced evolving norms and practices of individual identity and empowerment that corresponded with novel constraints and connotations upon the exercise, scope and exclusivity of sovereign authority. Those normative trajectories continued throughout the Cold War, even though enforcement of international criminal justice at the international level was effectively paralyzed during that period. Fourth and finally, I consider how the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) embodied renewed international commitment and resolve to enforce justice in the post-Cold War era, and provided a vital working and inspirational model for the ICC negotiations. In situating the Court as a permanent institutional fulfillment of the Nuremberg legacy, I conclude that historical events and trajectories may catalyze and nurture transcending global norms, which substantially frame the possibilities for progress in international law and governance.

II. Pre-Second World War: Precursory Developments

Though the immediate physical destruction, human suffering, and atrocious wrongdoings committed against both combatants and civilians in the Second World War were the proximate causes for the Nuremberg trials, those proceedings had deep social foundations and historical antecedents. Indeed the ancient Stoic philosophical tradition conceived of a *natural law*, premised upon fundamental notions of ethics and virtue, and encompassing concern for an extension of one's self to one's kin and to all of humanity (Heater, 2002: 28). Those sentiments resurfaced within the classical revivals of the Renaissance and Enlightenment (Heater, 1999: 135). Embryonic forms of human rights enactments such as the French Declaration of the Rights of Man and the Citizen, and the American Bill of Rights, however, further fused ideas of citizenship, patriotism and nationhood (Heater, 1999: 97). They did not contemplate external scrutiny much less invite formally sanctioned global accountability. Cosmopolitanism of that period was "corralled, domesticated, and harnessed to new national interests" (Hopkins, 2002: 6).

The oldest 'international' crime is piracy (Broomhall, 2003: 23). Efforts to punish and deter piracy through international law, however, constituted more a loosely coordinated response to a practical problem than collective normative condemnation per se. Piracy was deemed an international crime because of its inherent *trans-boundary* perpetration on the high seas. The underlying offences were essentially domestic legal transgressions – theft, hijacking and so on – which happened to be committed in international settings. What was distinct about the Nuremberg trials, therefore, was the introduction or affirmation of contemporary international crimes, or what I characterized in chapter 1 as distinctly *global* crimes with transcending normative resonance.

Rules governing armed conflict also pre-dated Nuremberg. In fact, informal norms associated with “the warrior’s honour” are timeless (Ignatieff, 1999: 117):

Wherever the art of war was practiced, warriors distinguished between combatants and noncombatants, legitimate and illegitimate targets, moral and immoral weaponry, civilized and barbarous usage in the treatment of prisoners and the wounded. Such codes may have been honored as much in the breach as in the observance, but without them war is not war – it is no more than slaughter.

The modern codification of those principles in international humanitarian law was catalyzed by Henri Dunant, the central founder of the International Committee of the Red Cross (ICRC) in 1863, and recipient of the first Nobel Peace Prize in 1901. His commitment to alleviating the tragedies of unregulated warfare stemmed from his chance eyewitness account of a horrific French-Austrian battle in June, 1859, which he detailed in his 1862 classic *A Memory of Solferino* (Dunant, 1986). Dunant detailed acts of valiance, bravery and heroic volunteerism, but also grippingly portrayed the utter tragedies of war: “Here is a hand-to-hand struggle in all its horror and frightfulness. No quarter is given; it is a sheer butchery; a struggle between savage beasts, maddened with blood and fury” (Ibid: 19). Gustave Moynier, another founder of the ICRC, is particularly recognized for having made a specific proposal for international criminal law enforcement at that time (see Maogoto, 2004: 20; and Glasius, 2006: 6).

The ICRC was originally established to mitigate the most basic and glaring tragedies of armed conflict for war victims including a lack of water, food and medical attention. The broader contemporary transnational Red Cross/Red Crescent movement pursues a diverse agenda in seeking global fulfillment and advancement of international humanitarian law protections. It is guided by seven fundamental principles – humanity,

impartiality, neutrality, independence, voluntary service, unity, and universality (ICRC, 2008). It is a self-described “impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance” (Ibid). As I discuss in chapter 4, the ICRC provided compelling epistemic contributions to the ICC negotiations, and continues to fulfill a particularly authoritative monitoring role.

The 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field codified basic protections for combatants as war victims. It was succeeded by the 1899 and 1907 Hague Conventions, which distinguished between combatants and civilians, but was otherwise very conservative relative to contemporary standards. As Sadat stresses (2000: 32)

The attempts to regulate warfare that emerged from the two Hague conferences were firmly linked to notions of state sovereignty prevalent at the time: first, that the ruler of a state exercises sole authority over the territory of that state; second, that all states are juridically equal; and third, that states are not subject to any law, other than their own, to which they do not consent.

The Martens Clause adopted at the 1899 Hague Peace Conference, however, made a crucial breakthrough, not only for international humanitarian law, but also as a more general precursory infusion of transnational values into the broader corpus of international law (Cassese, 2005: 160). In the continued absence of a complete code of the laws of war, it was resolved that reference should also be had to “the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience” (Hague Convention, 1899: Para 8). Thus purely humanitarian imperatives achieved the same legal footing as states’ military objectives and necessities (Cassese, 2005: 160). Those principles remain a generally recognized *subsidiary* source of customary law, and have actually recently

attained greater significance in the development of substantive international criminal law, which “is still rudimentary and replete with lacunae” (Cassese, 2005: 193).¹⁹

Nuremberg’s most direct historical antecedent was the post-First World War Commission on the Responsibility of the Authors of the War and on Enforcement, which proposed that the envisaged peace treaties conferred criminal jurisdiction over individual persons (Kittichaisaree, 2001: 16). The Nuremberg Tribunal specifically referenced that Commission as a crucial precedent for the principle of individual criminal responsibility under international law (IMT Judgment, 1946: 220). Part VII of the 1919 Treaty of Versailles, entitled ‘Penalties’, was intended to deal with such questions in the case of Germany (1919: Arts. 227-230). In particular, Wilhelm II of Hohenzollern, formerly the German Kaiser, was to be tried for “a supreme offence against international morality and the sanctity of treaties” (Ibid: Art. 227). This episode highlighted the political uncertainties and anxieties associated with international trials (Simpson, 2004b: 49):

It can become a political contest over historical truth or political responsibility and this can prove embarrassing for the prosecuting State or organization. Austen Chamberlain anticipated some of this when he cautioned against plans to prosecute the Kaiser after the Great War by remarking that ‘his defense will be our trial’.

In any event, in the interests of promoting stability within the Weimar Republic, the Western Allies merely requested Germany to prosecute a limited number of war criminals before its Imperial Supreme Court in Leipzig (McGoldrick, 2004a: 12).

The Allies’ intent to prosecute Turkish officials under the Treaty of Sevres in relation to mass atrocities – now widely recognized as *genocide* – perpetrated against the

¹⁹ These principles are distinct from the “general principles of law recognized by civilized nations”, which are cited as a core source of law in the Statute of the UN International Court of Justice – the most definitive statement of *primary* international law sources (1945: Art. 38.1(c); see Cassese, 2005: 193).

Armenians also succumbed and deferred to half-hearted national proceedings (see Maogoto, 2004: 57-62; also see Power, 2002: 16; and Adalian, 1997: 59). That case was particularly distinct because the Allies recognized Turkey's culpability to exist primarily with respect to large-scale and systematic crimes committed against its own citizens within the Ottoman Empire (Maogoto, 2004: 57). As Power observes (2002: 3):

The atrocities were carried out against women, children and unarmed men. They were not incidental "by-products" of war but in fact resulted from carefully crafted decisions made by Turkey's leaders.

The genocidal enterprise consisted of a three-part plan involving deportation, execution and starvation (Adalian, 1997: 43). The death total is estimated to exceed one million people (Adalian, 1997: 57; and Maogoto, 2004: 42). In retrospect, the Armenian tragedy and its aftermath were eerily foreshadowing of events to come (Maogoto, 2004: 62):

Many see the lack of attention following the Armenian genocide as an important precedent for the subsequent Holocaust of World War II. Indeed, it has been reported that, in trying to reassure doubters of the desirability and viability of his genocidal schemes, Hitler stated, "Who, after all, speaks today of the annihilation of the Armenians?"

It was that Armenian episode that sparked Raphael Lemkin's remarkable, decades-long efforts to achieve international recognition and penalization of *genocide* – what was then "a crime without a name" (see Power, 2002: 17). In any event, those "early abortive attempts" to impose individual criminal responsibility in the First World War's aftermath ultimately failed as questions of such accountability were overtaken by considerations of political expedience and convention (Cassese, 2003: 329; Cassese, 2002: 5).

Proposals for a permanent tribunal occurred outside or at the margins of discussions within the League of Nations (LON) – the institutional predecessor to the United Nations (see Glasius, 2006: 7-8). In fact, the League's own failed experience reflected a broader inter-war ambivalence toward international law and institutions. The

Versailles Peace Conference established the League to “promote international co-operation and to achieve international peace and security” (Covenant of the LON, 1919: Preamble). Member states pledged to resolve disputes peacefully, maintain open diplomacy, and mutually guarantee each others’ territorial and political independence (Ibid). The League was a partial fulfillment of then-U.S. President Woodrow Wilson’s famous 1918 appeal for collective security through a “general association of nations” (Safe for Democracy: Point XIV). The abstention of the Soviet Union and the U.S. itself, however, compromised the League’s credibility and effectiveness. Given the its weak enforcement capacities, moreover, together with the unanimity requirement for most substantive decisions, and the lack of political will among its most powerful members, it failed to effectively confront Nazi, Japanese and Italian aggression in the 1930s, and prevent the Second World War. That conflict involved unprecedented atrocities, which prompted a global normative awakening and a novel judicial response that provided the essential foundations for the contemporary ICC project.

III. Paradigm Shift: The International Military Tribunal at Nuremberg

The Nuremberg Tribunal’s novel judicial proceedings and pronouncements constituted a decisive departure – a “paradigm shift” – from previous eras of international law and governance (Clapham, 2003: 33; Maogoto, 2004: 6). The term *paradigm* invokes reference to the prevailing and fundamental ontological premises from which the international (or global) social system is conceptualized, and thus from which substantive policies and legal and governance arrangements are undertaken or contemplated. That crucial juncture contributed to grafting novel *vertical* (individual-oriented) dimensions of

international law onto what still remains a predominately *horizontal* (inter-state) ordering. It is precisely because of that traditional format's overall resilience that these historical developments are so noteworthy, and that the final establishment of the ICC itself is so broadly significant. In chapter 5, I discuss how the Court provides unique institutional expression to those transcending legal relationships.

As victory for the Allies became increasingly certain, and in the midst of widespread reports of mass atrocities, there arose the issue of responsibility for such wrongdoings, and the mechanisms by which justice would be administered. In October 1943, the United States, United Kingdom, Soviet Union, and China signed the Joint-Four Nation Declaration (see generally Moscow Conference, 1943). By that accord, national prosecutions would be conducted pursuant to the laws of free governments in the liberated countries, but “without prejudice to the case of German criminals whose offenses have no particular geographical localization” and who would be prosecuted by joint declaration of the Allies (Ibid: Statement on Atrocities). Those proceedings were to become the Trial of the Major War Criminals before the IMT at Nuremberg.

In August, 1945 the Allies – France, Great Britain, the Soviet Union, and the United States – agreed to the “Prosecution and Punishment of the Major War Criminals of the European Axis” of the Allies, which formally established the Charter of the IMT (London Agreement, 1945: Annex). The Charter provided for the constitution, jurisdiction and functions of the Nuremberg Tribunal. It recognized three crimes against international law: crimes against peace; war crimes; and crimes against humanity (Ibid: Art. 6). Other significant principles included the following [condensed and paraphrased]:

- Individual criminal responsibility (Ibid);
- Irrelevance of official position for considering responsibility or mitigation of punishment (Ibid: Art. 7);
- Superior orders would not excuse, but may mitigate, criminal responsibility (Ibid: Art. 8);
- Defendants would receive a fair trial (Ibid: Art. 16);
- The Tribunal’s judgment would be final and not subject to review (Ibid: Art. 26);
- Convicted persons would face death or other just punishment (Ibid: Art. 27).

The judges and prosecutors were all appointed by the original four powers, constituting a significant drawback for the legitimacy of the proceedings (Cassese, 2003: 332). The adherence of the other 19 Allied states to the Charter, however, helped mitigate those shortcomings (McGoldrick, 2004a: 15).

Beyond differences in their respective legal traditions, the Allies had specific concerns in the precise charges to be laid in the Nuremberg indictments (McGoldrick, 2004a: 16; Maogoto, 2004: 93). Notwithstanding Lemkin’s efforts, *genocide* was not included. That omission may have stemmed in part from French and Soviet concerns that their own war-time persecution of their respective populations might be impugned (Overy, 2003, 21). In any event, the charge of *crimes against humanity* was adopted, which was more closely linked to *crimes against peace* (see Cassese, 2003: 69-70). For that reason, Lemkin was a harsh critic of the IMT (Power, 2002: 49) [author’s emphasis]:

Nuremberg was prosecuting “crimes against humanity” but the Allies were not punishing slaughter whenever and wherever it occurred . . . The court treated aggressive war (“crimes against peace”), or the violation of another state’s sovereignty, as the cardinal sin and prosecuted only those crimes against humanity and war crimes committed *after* Hitler crossed an internationally recognized border.

The Nuremberg Tribunal declared (IMT Judgment, 1946: 243):

The persecution of Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale.

The atrocities committed against the Jews preceding the outbreak of war, however, were found to rest outside of the Tribunal’s jurisdiction, not having been committed “in execution of, or in connection with” any of the crimes listed in the Charter (Ibid: 249).

The novel conception of *crimes against humanity* was nonetheless a remarkably progressive advance in proscribing criminal conduct of “‘meta-national’ concern” (Cassese, 2003: 70). The Nuremberg trials, moreover, helped catalyze the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and “ensured that the Holocaust was ‘the’ defining event of the twentieth century” (McGoldrick, 2004a: 45). As I discuss in chapter 5, genocide is now firmly established as a distinct atrocity under international criminal law. As the quintessential *global hate crime*, it is particularly distinguished by the specific “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” (Rome Statute, 1998: Art. 6).

The Nuremberg Tribunal demonstrated a progressive view of international law and the social ills with which it is properly concerned (IMT Judgment, 1946: 219):

The law of war is to be found not only in treaties, but in the customs and practices of states [and] from general principles of justice. This law is not static, but by continual adaptation follows the needs of a changing world.

In perhaps its most well-recognized and influential passage, the Tribunal rejected the notion of collective state responsibility (IMT Judgment, 1946: 221):

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

This articulation of *individual criminal responsibility* was a striking departure from conventional understandings of sovereign authority, including the legal immunity of state

officials. Individualized guilt did not, however, detract from the trials' broader social objectives "as part of a more general program of re-education in Germany, and, by implication, in the rest of Europe" (Overy, 2003: 26; also see Jorgensen, 2000: 25). The IMT also affirmed the overarching status of international criminal law. In rebuking the defense of superiors' orders, for example, it declared (IMT Judgment, 1946: 223):

That they [the accused] were assigned their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.

As I further discuss in chapter 5, those progressive pronouncements are embodied and elaborated upon in the Rome Statute of the ICC.

Insofar as the substantive crimes within the Tribunal's jurisdiction departed from strict principles of *legality* (or established legal convention), and given its judicial and prosecutorial composition, the IMT proceedings were subject to critiques such as *victors' justice* and *retrospective law* (Overy, 2003: 1-2; also see Crawford, 2003: 117):

The unease was not confined to those who were to stand before it. Legal opinion in Britain and the United States was divided on the right of the victors to bring German leaders before a court for war crimes.

Those objections have tainted Nuremberg's legacy to some degree, even though the IMT addressed them (see IMT Judgment, 1946: 216-7). Its overall enduring impact was "less prejudiced and more self-evidently just" than those concerns imply (Overy, 2003: 28-29):

What is striking . . . is not that the trials were in some sense arbitrary and in defiance of legal convention, but that so much was achieved in the chaos of post-war Europe in building the foundation for contemporary international law on war crimes, and contemporary conventions on human rights. The International Criminal Court established in 2002 is a direct descendant of the Nuremberg Military Tribunal.

It also remains "historically remarkable that after the most destructive and uncivilized conflict in human history, there should have been resort to the civilized institutional drama of a trial at law" (McGoldrick, 2004a: 19-20). That recourse is particularly

noteworthy, given that Winston Churchill had reportedly invoked the “outlaw principle” and the summary execution of enemy leaders upon their capture (Overy, 2003: 3-4).

Practical considerations limited the number of defendants who could be tried. Also, several top Nazi officials had not survived the war. Twenty-four defendants were charged, selected from amongst the most senior ranks of the Nazi apparatus. One committed suicide, and one was determined to be unfit to stand trial. Twenty-two were tried, one in *absentia* (Martin Bormann). The trial lasted ten months. Three defendants were acquitted. Of the nineteen convicted, twelve were sentenced to death (including Bormann), three received life sentences, and four received lesser terms of imprisonment (see IMT Judgment, 1946: 272-333).

The Tribunal’s core pronouncements were affirmed by the UN General Assembly (UNGA, 1946), and then formulated by the UN International Law Commission as the seven Principles of Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (ILC, 1950) [condensed and paraphrased]:²⁰

1. Individual responsibility for crimes under international law;
2. Internal laws do not relieve such responsibility;
3. Irrelevance of official capacity for the determination of such responsibility;
4. Irrelevance of government or superior orders where a ‘moral choice’ is available;
5. Rights of accused individuals to a fair trial;
6. Crimes punishable under international law: Crimes against peace; War crimes; Crimes against humanity;
7. Complicity in the commission of such crimes is a crime under international law.

²⁰ As I further discuss in chapter 3, the UN General Assembly established the International Law Commission in 1947 as a subsidiary expert body and globally representative forum to promote the “progressive development and codification of international law” (ILC Statute, 1947: Art. 1.1).

Though the ICC negotiations were contentious in many respects, these authoritative dicta remained solidly above the fray of diplomatic and legal debate. Thus the Court's jurisdiction is limited to the individual criminal responsibility of natural persons (Rome Statute, 1998, Art. 25). The law shall be applied without any distinction based on official capacity (Ibid: Art. 27). Duress may exculpate an accused, but acting pursuant to superiors' orders is not a defence per se (Ibid: Art. 33). I discuss these and other related provisions in greater detail in chapter 5.

In other respects, however, the Rome Statute progressively diverges from the Nuremberg model, as I also further examine in chapter 5. Pursuant to the legal maxim of *Nullum crimen sine lege* ('no crime without law'), a person cannot be held criminally responsible under the Rome Statute unless the impugned conduct was, at the time of its alleged commission, a crime within the Court's jurisdiction (Ibid: Art. 22.1).²¹ To preemptively guard against suggestions of retroactivity, moreover, persons may not be held criminally responsible by the ICC for conduct occurring prior to the Rome Statute's entry into force – 1 July 2002 (Ibid: Art. 24.1). ICC Judges are elected by the Assembly of States Parties (Ibid: Art. 36.6). Also unlike the IMT, there may be no trials in *absentia* (Ibid: Art. 63). The maximum penalty is life imprisonment (Ibid: Art. 77.1(a)). There are also extensive appeal provisions (Ibid: Arts. 81-84). Given these and other departures, Nuremberg was a "provocation to action but not a direct precedent" (Simpson, 2004b: 51).

²¹ As I discuss in chapters 5 and 7, however, that temporal provision does not correspondingly restrict national prosecutions (see UNHCHR, 1970 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity [including Genocide]; see Kittichaisaree, 2001: 261).

Nuremberg did not occur in an historical vacuum, but rather punctuated underlying and more fundamental evolutionary dynamics within the global system – social, political, and legal. It was not purely the culmination of linear trends in these domains, however, which is consistent with the broader proposition that stages of globalization typically “co-exist” with their predecessors and successors, whether symbiotically or competitively (Hopkins, 2002: 3). From the Second World War’s physical and social destruction, Nuremberg catalyzed a progressive reorientation of the contours and provinces of international law to encompass the distinct standing of persons in their direct and immediate capacities. The proposition that individuals, including state officials, could be held accountable outside of the state for acts committed during armed conflict and for acts committed against their own citizens was unprecedented.

The inverse proposition, also novel, was that all individuals are entitled to basic protections, irrespective of their citizenship and residency within states. Indeed, those entitlements are held by individuals principally vis-à-vis their own governments. As Robertson observes (2002: xxii):

For the first time it could be said that individuals had a ‘right’ to be treated with a minimum of civility by their own governments, which ‘right’ all other governments had a correlative duty to uphold by trying the torturers who fell into their hands, or else by setting up international courts to punish them.

Thus the Nuremberg Principles established a “new relationship” between individuals, states and the international community which, together with the UN Charter, constituted a “revolution in public consciousness” (Broomhall, 2003: 19). They reflected and reinforced normative foundations of individual worth and dignity, and validated global concern and responsibility for such ends. In chapter 8, I consider some of the major

implications of such responsibility beyond international criminal justice, including the progressively evolving norms and principles of international humanitarian intervention and the broader *responsibility to protect* (see ICISS, 2001).

IV. Normative Progress: Globalizing Human Rights and Humanitarian Law Standards

After Nuremberg, the conventional image of the sovereign states-system was eclipsed by a more complex view of global society which encompassed individuals, as such, through the underlying principles and objectives of international criminal justice. Those conceptual understandings and sentimental connotations became globalized through legal conventions and institutions, as well as political norms and discourses. The contemporary international human rights regime reflects the same post-Second World War normative concerns that founded the Nuremberg proceedings and their embodiment of respect for the worth and dignity of all persons. Though human rights have achieved widespread global acceptance, scholarly debates continue as to their precise theoretical basis. The prevailing view is that they are “inherent in the very idea of being human [and] have force whether or not they are explicitly recognized” (Ignatieff, 2000: 28). Their progressive codification has, however, generated heightened normative regard for fundamental individual freedoms, protections and entitlements.

Apart from the Genocide Convention, the three primary agreements – sometimes collectively referred to as the International Bill of Rights – are the 1946 Universal Declaration of Human Rights, and the 1966 International Covenants on Civil and Political Rights, and on Economic and Cultural Rights. Also significant are the 1973

International Convention on the Suppression and Punishment of the Crime of Apartheid, and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Beyond criminalizing such conduct, those two instruments, as with the Geneva Conventions I will discuss below, commit their parties to take judicial measures to actually punish those crimes (Sands, 2003: 85):

The commitment to root out impunity is extended to what has become known as ‘universal jurisdiction’: the right of states to exercise national jurisdiction over a criminal act irrespective of where it occurred. This is not a new development – international law had long recognized universal jurisdiction for piracy and slavery, for example – but it marks an extension of the principle, in a modified form, into new subject areas.

As I discuss in chapter 7, this principle is complex, contentious and under-utilized, but provides a potentially broad and effective basis for states to prosecute offences exceeding the ICC’s competence under the Rome Statute.

Human rights are also expressed as a “fundamental purpose” within the UN Charter (1945: Art. 1.3). The Charter mandates that the UN “shall promote universal respect for, and observance of, human rights and fundamental freedoms” (Ibid: Art. 55(c)). It further provides that all members shall take “joint and separate action” for achieving such purposes (Ibid: Art. 56).²² In practice, those prescriptions have anxiously contended with the proscription against intervention “in matters which are essentially within the domestic jurisdiction of any State” (Ibid: Art. 2.7). Nonetheless, they constitute a compelling distinction and juxtaposition between individuals’ concerns and states’ prerogatives in the foremost global constitution-like document (see generally Fassbender, 1998; also see Drinan, 2001: 4; and Maogoto, 2004: 128). Thus the Nuremberg legacy “extends beyond the confines of international criminal law to underpin

²² The UN Charter also provides for the expulsion of member-states from the organization for persistently its Charter principles, though such action has never been taken (1945: Art. 6).

the relationship between sovereignty and the international system in the post-War era” (Broomhall, 2003: 42).

The breadth of the broader international human rights regime is underscored by the range of more specific instruments and their monitoring bodies. Those components address, *inter alia*, self-determination, national, ethnic, religious and linguistic minorities, indigenous peoples, prevention of discrimination, rights of women, rights of the child, rights of older persons, rights of persons with disabilities, human rights in the administration of justice, social welfare, progress and development, marriage, health, the right to work and fair conditions of employment, freedom of association, rights of migrant workers, and rights of asylum, refugees and internally displaced persons. It is increasingly recognized, moreover, that civil and political rights, as well as economic, social and cultural rights, are inherently equal and interrelated, and more broadly linked with matters of development, democracy, the environment, and peace and security (see UNGA, Vienna Declaration and Programme of Action, 1993).

A range of formal institutions has been established to advance these transcending imperatives. Most prominent among those organizations is the UN Office of the High Commissioner for Human Rights (UNHCHR), which rests atop a range of UN bodies mandated with overseeing the protection and promotion of human rights. They include conventional treaty-monitoring bodies, extra-conventional initiatives (e.g. investigators, experts, and working groups), and an expanding number of field offices providing advisory services and technical expertise for the development of national institutions and procedures. The High Commissioner has primary responsibility for human rights, and

reports directly to the UN Secretary-General. She travels globally to promote human rights values, and to make public appeals on human rights crises. The UNHCHR also supports various educational initiatives, and administers trust funds for non-governmental organizations. On a more formalized basis, the UNHCHR provides research and administrative services to the UN Human Rights Council – a separate body under the Economic and Social Council. Those and other international institutions are complemented by significant regional bodies such as the European Commission of Human Rights, and the Inter-American Commission on Human Rights.

In addition, the nature and scope of international humanitarian law – what it aimed to accomplish and how – fundamentally changed after the *total war* and *home front* dimensions of the Second World War. Mirroring the codification of international human rights, international humanitarian law took a progressive and individual-focused turn. The 1949 Geneva Conventions 1-IV “represented a shift from the methods of warfare to the protection of the victims of war, leading to a preference for standards rather than rules” (Maogoto, 2004: 129).²³ Those respective instruments aim to safeguard the following categories of war victims:

- (I) Wounded and sick soldiers in the field;
- (II) Wounded, sick and shipwrecked soldiers;
- (III) Prisoners of war; and
- (IV) Civilians.

²³ Maogoto further explains (2004: 129): “The reason for this change was largely pragmatic: the technology of war outpaced the ability of legislators to author effective prohibitions. Generalized standards that focused on classes of individuals . . . , rather than prophylactic prohibitions aimed at actions that are likely to cause excessive harm, were seen as less likely to become outdated as military technology rushed ahead.”

The following are amongst the most significant provisions: civilians and other non-combatants are entitled to respect for their lives and their moral and physical integrity; surrendering enemy soldiers are not to be killed or injured; the wounded and sick are to be collected and cared for; captured combatants, and civilians under the authority of an adverse party, are not to be subjected to physical or mental torture, corporal punishment, or cruel or degrading treatment; weapons causing unnecessary loss of life or excessive suffering are prohibited; civilian populations are not to be targeted (ICRC, 1983).

Those instruments require governments to enact legislation to provide effective penal sanctions for *grave breaches* of those protections, including third-party prosecution by states exercising universal jurisdiction (Maogoto, 2004: 132). Thus they distinguish the individual as the essential perpetrator and victim of war crimes (Ibid: 130):

The four Geneva Conventions marked a redefining moment in international humanitarian law, which was still dominated by the state-centric Hague Laws of the nineteenth century, whose deficiencies had been exposed by the two world wars. [They] mirrored international developments in the twentieth century. The significant developments were the shift of some state-to-state aspects of international humanitarian law to individual criminal responsibility, and a move away from the interests of states to the rights of individuals and populations – the primary victims of the world wars and a profusion of others.

Two Additional Protocols in 1977 further supplemented and modernized the 1949 Geneva framework in providing additional protections to war victims in *international* and *non-international* armed conflicts respectively. Additional Protocol I enshrines the foundational principle of *distinction* (1977: Art. 48; see Maogoto, 2004: 131):

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objectives and military objectives and accordingly shall direct their operations only against military objectives.

It also mandates that “care shall be taken to protect the natural environment against widespread, long-term and severe damage” (Ibid: Art. 55.1).²⁴

Further progress has been made in the adoption of more specialized accords, which include the 1954 Hague Convention on Cultural Property, and the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the ‘Ottawa Convention’). Particularly noteworthy is the latter instrument’s recognition that “the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited” and such methods or means may not be “of a nature to cause superfluous injury or unnecessary suffering” (1999: Preamble). As I discuss in chapter 4, the negotiation experience of the landmines convention resembles the ICC project in several novel respects.

Nuclear weapons have not been banned by international convention –including the Rome Statute, as I discuss in chapter 4 – but their potential use has been greatly restricted, if not prohibited, by customary law. This development is reflected in the 1996 Opinion of the International Court of Justice (ICJ), *The Legality of the Threat or Use of Nuclear Weapons* (ICJ Advisory Judgment, 1996). The UN General Assembly requested the ICJ to render an advisory opinion on the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” (Ibid: Para 1). Particularly noteworthy was the ICJ’s recognition of the interrelated legal aspects raised by this question, including human rights and genocide, the environment, the UN Charter

²⁴ It also declares that “women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault” (1977: Art. 76), and that “children shall be the object of special respect” (Ibid: Art. 77.1).

and humanitarian law. As I discuss more generally in chapter 8, those dimensions reflect what Cassese describes as the “gradual interpenetration and cross-fertilization” across international legal domains (2005: 45) [author’s emphases]:

In the previous developmental stages, *special bodies of law* gradually emerged: for instance, human rights law, the humanitarian law of armed conflict, environmental law, international trade law, international criminal law, the law on international responsibility of States. They tended to make up separate and tight compartments. At present, they are gradually tending to influence one another, and States and international courts are coming to look upon them as parts of a whole.

The ICJ centrally declared that there is neither a “specific authorization of the threat or use of nuclear weapons” under international law nor a “comprehensive and universal prohibition” (Ibid: Para.105.2A & B; see generally Bello and Bekker, 1997).

Though these developments within international law and institutions reflected broader social trajectories in the post-Second World War era, sovereign authority remained the dominant structuring norm of international law and politics. Indeed, heightened preference for the state-form of polity was evidenced by formal decolonization, and then the disintegration of the Soviet Union, which together almost quadrupled the number of UN member-states between 1945 and 2005. The sovereign state’s further ascendance, however, was simultaneously accompanied by new constraints and connotations. Acceptance and approval was increasingly contingent upon their conduct toward their own peoples, signifying a new “legitimation environment” (Broomhall, 2003: 188). Infringing governments risked losing the requisite “legitimacy capital” for full and equal participation in international organizations and aid programs (Fox, 2000: 77). The shunning of the South African apartheid regime is perhaps the most prominent example.

This shifting environmental context had internal and external dimensions. Internally – within domestic political settings – individuals and groups engaged progressive normative trends in more boldly challenging abuses of state authority. Those practices referenced or embodied the very individual human rights protections that states themselves had erected. Within the broader proliferation and diversification of global civil society, human rights-based constituencies were among the most mobilized, sophisticated and assertive. Those groups and networks increasingly lodged appeals and grievances not only with the subject state, but also with outside governments, international organizations, non-governmental associations, and to the collective conscience of the global community as a whole (Risse and Sikkink, 1999: 17-24).

Those *external* actors, in turn, became emboldened in confronting subject states for their impugned *internal* actions. In inter-state relations, the discourse of human rights was no longer restricted to insular diplomatic channels, but became increasingly manifest in public condemnations. Advocacy groups and networks effectively championed and legitimated the claims of domestic opposition groups (Ibid: 5). Subsumed within such tactics are now-familiar practices of “name and shame” politics (Keck and Sikkink, 1998: 16; also see generally Drinan, 2001). Again, such displays embodied and contributed to the broader normative impact of human rights upon the substantive and rhetorical practices of global politics. As Lynch observes, “legal norms do not arise in a vacuum, but are socially contested, promoted, and legitimized” (2000: 142). Those developing sentiments and practices of individual worth and empowerment all rested within Nuremberg’s shadow, and have been loosely analogized to a “secular religion” (Cassese, 2003: 335). Core aspects of individual and collective identity, affiliation and allegiance

became increasingly complex and subjective, and were less presumptively or simplistically equated with state-based citizenship and residency.

Those progressive legal and normative developments, and their attendant features of social agency and contestation, correspond with a broader foundation of *globality* or the notion of a “world society” (Beck, 2000: 9; also see Giddens, 1998: 4). Iriye characterizes this phenomenon as “global consciousness” (2002: 8):

The idea that there is a wider world over and above separate states and national societies, and that individuals and groups, no matter where they are, share certain interests and concerns in the wider world.

Those normative sentiments and expressions evidence expanding and deepening transnational bases of community and social concern. As I propose in chapter 5, they reflect and contribute to an embryonic, quasi-metaphorical conception of *global citizenship*. Though aspects of an incipient globality pre-dated Nuremberg, it constituted a transformative historical rupture: a legal and normative tipping point whereby individuals and transnational constituencies became decidedly more visible, aware and mobilized as such. The implication is that progressive legal and governance measures occur neither spontaneously, nor apart from broader social and political dynamics.

The actual justice demanded by Nuremberg and the lofty human rights and humanitarian law standards enacted in its wake were left glaringly wanting for decades. Here the proposition of a *paradigm shift* confronts a more sobering appraisal of the post-Second World War era – the “fifty years’ crisis” – during which no prosecutions occurred at the international level (see generally Dunne and Wheeler, 1999). Thus enforcement was left to extra-legal responses and sparse national prosecutions (Maogoto, 2004: 127):

Instead of following the Nuremberg principle (punishing the guilty only after a fair trial), economic sanctions and other curbs imposed on civilian populations – many of which disagreed with the aggressive policies of their governments – became the sole means of censuring rogue governments. With the failure at the international level, the key juridical moments of international criminal law were confined to the domestic circuit. . . . Few, if any, of these trials were satisfactory from a strictly legal perspective. Cases of mistaken identity, failing memory, and dubious assertions of jurisdiction would undercut all that.

The first international conviction for genocide did not occur until a 1998 case before the International Criminal Tribunal for Rwanda (MColdrick, 2004: 38). Thus Nuremberg did not forestall the so-called “century of genocide” (Totten et al. eds. 2004; also see Power, 2002). Those contrasting narratives reflect a novel normative tension or disjuncture within global politics. Nuremberg’s legacy endured, but the powerful rhetoric of *sovereignty* and *human rights* was often selectively distorted for political advantage in the great power struggle (see Maogoto, 2004: 126; and Robertson, 2002: xxii-xxiii).

The UN General Assembly resolution of 1946 endorsing the Nuremberg Charter envisaged that some more permanent arrangement would be made. There were a range of institutional proposals, but efforts to this end became fragmented and half-hearted in the Cold War political climate (see Sadat, 2000: 38). Though some proposals entailed a permanent criminal chamber of the UN International Court of Justice, the prevailing view was to proceed with a separate tribunal by design of the International Law Commission (Kittichaisaree, 2001: 21). Its report was essentially disregarded, however, while a UN General Assembly sub-committee “labored for years on the definition of aggression, producing eventually, in 1974, a text of such vagueness and imprecision as to be incapable of practical application” (Crawford, 2003: 119). Other initiatives aimed to address *transboundary crimes* such as terrorism and the trafficking of psychotropic substances: “On the whole, these developments took us further away from, not closer to

an international criminal court” (Ibid: 121).²⁵ Throughout this period of relative stagnation, however, academics and activists continued to bring expertise and moral suasion to bear upon discussions of international criminal justice, including Benjamin Ferencz – a truly global public intellectual since serving at the age of twenty-seven on the U.S. Prosecution team at Nuremberg.

V. Post-Cold War: The Ad Hoc Tribunals and the Re-Birth of the ICC Project

The UN General Assembly declared the 1990s the UN Decade of International Law to “promote acceptance of and respect for the principles of international law” (UNGA, 1999a: Preamble, Para (a)). That formal gesture expressed renewed interest and possibilities for the progressive development of international law and judicial institutions in the post-Cold War era, which was underscored by the creation of the International Criminal Tribunals for the former Yugoslavia (ICTY) in 1992 and for Rwanda (ICTR) in 1994. It is particularly noteworthy that, in establishing those ad hoc tribunals, the UN Security Council characterized the underlying situations as *threats to international peace and security*, pursuant to its exceptional competence under Chapter VII of the UN Charter (1945).²⁶ In chapter 7, I examine the scope, mechanics and situation of the ad hoc tribunals within the broader emerging *program* of enforcement and supporting efforts. Their principal significance in this chapter concerns their embodiment of consensus and resolve to enforce justice. Their establishment, operations and

²⁵ As I stressed in chapter 1 and further examine in chapter 5, the ICC and international criminal justice proper are concerned with exceptional *global* crimes. In chapter 4, however, I consider the contentious negotiations respecting the crimes within the Court’s jurisdiction.

²⁶ As I discuss in parts II and III of this study, the Council made the same determination in referring the Darfur, Sudan situation to the ICC in March, 2005.

jurisprudence provided normative momentum and practical guidance for renewed discussion of an old idea: a permanent international criminal court.

In this chapter, I have argued that the ICC's novelty and significance must be appreciated in historical perspective. I have examined how events and trajectories catalyzed and nurtured fundamental legal norms and principles, which ultimately achieved formal institutionalization in the Court. That appraisal does not imply linearity, however, much less inevitability. As Robertson more generally observes, the "evolution of international law is never a linear process: there are backwards steps, and recessive genes" (2002: xxiv). At every stage along the protracted and disjointed path from Nuremberg to the ICC, global politics presented challenges and opportunities, which themselves reflected broader fluctuating contexts. Thus cross-cutting normative trends may simultaneously inhibit and facilitate progress in international law and governance. Normative maturation and coalescence, then, is not necessarily a *sufficient condition* for progressive initiatives. Advancements may be impeded by countervailing forces associated with conventional ideas of sovereign equality and non-intervention, and territorially-bounded (and limited) conceptions of citizenship, community and public policy.

Normative factors are certainly, however, a *necessary condition* for expanding the horizons of international law and governance, particularly for bold initiatives with significant or complex state sovereignty implications in human security-related areas. Notwithstanding the Cold War-era enforcement paralysis, progressive normative

trajectories continued during that period (McColdrick, 2004a: 19; also see Robertson, 2002: xxv):

The piercing of the veil of sovereignty by the notions of human rights and duties, along with extensive international procedures to implement them, has moved international law away from its classical inter-state sovereignty focus. None of this is to gainsay that human rights violations remain extensive in practice. However, they are at least assessed against normative standards and monitored under international procedures. They are no longer regarded as matters within the domestic jurisdiction of sovereign states.

Thus the proscription against interference yielded to a more nuanced juxtaposition with normative concerns for fundamental human rights, security and well-being. Sovereignty was increasingly understood as a “product of the recognition of the international system itself, rather than as a pre-existing trait inherent in States” (Broomhall, 2003: 59). Within that more extended and integrated context, the rights and prerogatives of the enduring sovereign state were met with a powerful normative undercurrent acknowledging and celebrating the transnational existential situation of the individual.

The Court’s final establishment constitutes a progressive infusion of cosmopolitan morality into the formal architecture of international law and governance. It was the IMT at Nuremberg, however, which represented the crucial normative and legal paradigm shift that was ultimately institutionalized in the ICC. The IMT established or affirmed the novel parameters of individual rights and responsibilities that transcend the states-system and import novel complexities for the scope and sanctity of sovereign authority. Thus broad normative coalescence around the essential norms, principles and objectives of international criminal justice suggests progression in state sovereignty as a meta-constitutive structuring institution of international law and politics. As both a doctrine and a practice, it is increasingly recognized as implying overarching responsibilities to respect and enforce justice. Here the notion of an “international protection regime” is

instructive (see generally Cronin, 2003). Viewed as an “institution for the common good”, the ICC reflects evolutionary understandings of state sovereignty which ensure the continued integrity of international society (Ibid: 207). By that account, states are cognizant of a broader social order, and hence there is a self-sustaining and self-adjusting dynamic toward which they will gravitate and contribute. In fact, constructivist and rationalist theory may be combined to explain the ICC: “States came to intersubjectively identify the ‘public good’ of prosecution and deterrence” (Fehl, 2004: 371).

The progressive evolution of international criminal law and judicial institutions reflects the generation, articulation and dissemination of knowledge, values and ideas. Counterfactually, it seems inconceivable that the ICC project could have achieved the Rome Statute milestone were it not for the cumulative significance of the Nuremberg precedent, the progressive development of international human rights and humanitarian law standards in the ensuing decades, the increasing scale and intensity of civil society mobilization and advocacy, the evolving norms of sovereign legitimacy and recognition in global politics, and the ad hoc tribunal experiments and their broader normative context. In fact, notwithstanding all of those contributing factors, the Court’s final establishment was still improbable. A permanent, independent and universalistic international tribunal remained an ambitious proposition, even in the midst of progressive ideas of sovereign responsibilities and transcending human security-related imperatives. Thus the final consensus and resolve to successfully advance the formal ICC project testifies to the robust and compelling Nuremberg legacy, the distinct governance challenges and opportunities of the 1990s, and the facilitative properties of novel trends in multilateralism and transnational cooperation which I now discuss in chapters 3 and 4.

Chapter 3

LAUNCHING, PROPELLING AND GLOBALIZING THE ICC PROJECT

Contents

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 - II. Launching the ICC Project: A Window of Opportunity
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I. Multilateralism, Transnationalism and the ICC Project

In developing this study’s core proposition that the ICC is implicative of new directions and expanded possibilities for international law and governance, this chapter examines the novel dimensions of transnational cooperation, consensus-building and compromise over several years approaching the final 1998 negotiations in Rome. As distinct from the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and particularly from the Nuremberg and Tokyo tribunals, the ICC was designed and established by a protracted and complicated multilateral process. This undertaking reflected both a substantively progressive governance agenda and a broader post-Cold War trend toward negotiation as “the principal means of collective decision-making, rule-making and dispute-settlement” (Albin, 2001: 2). This complex and dynamic process, culminating in and combined with the final Rome negotiations, forged new ground in several important respects. It exemplified the procedural dynamics and substantive possibilities of emerging forms of multilateralism and transnational cooperation. I elaborate upon those and related conceptions in this introductory section, but my attendant propositions are developed in both this chapter and next. I build upon

my previous historical analysis, and present the most salient aspects of those deliberations and debates that collectively illuminated several of the most fundamentally changing properties of multilateralism as a whole. I also offer an appreciation for the delicate intersection of international law and politics which characterized the preparatory and final negotiations. I now provide a brief theoretical overview before outlining how the specific propositions of this chapter are structured and developed.

In a conventionally recognized definition of multilateralism, Ruggie refers to “an institutional form that coordinates relations among three or more states on the basis of generalized principles of conduct” (1993: 11). Elsewhere he stresses that “what is distinctive about multilateralism is not merely that it coordinates national policies in groups of three or more states, which is something that other organizational forms do, but that it does so on the basis of certain principles of ordering relations among those states” (1998: 106). Several more recent interrelated trends in international law and governance, however, illuminate the inadequacies of this and other state-centric conceptions when it comes to newer transnational elements.

Scholars have responded to these novel developments with a range of new descriptive terminology. Some authors use terms such as *new* and *complex* multilateralism to distinguish these new forms from conventional understandings. In formal multilateral economic settings, for example, O’Brien et al characterize the *new* multilateralism as an ideal type; one which reflects a “strategy” espoused and employed by global civil society actors to achieve grassroots or bottom-up representation (2000: 208-210). This strategy, however, remains incomplete or has met with limited success

thus far. They then posit *complex* multilateralism to describe the existing “hybrid” stage of development, theoretically situated between the *new* multilateralism ideal type and conventional state-centric multilateralism respectively (Ibid). In his conception of the “new” or “emergent” multilateralism, Cooper highlights the role of middle and smaller states in catalyzing and sustaining the multilateral initiative, the heightened involvement of non-governmental organizations, a more general “bottom up” dynamic providing expression to previously suppressed values and ideas, and a relatively “intense” negotiating approach involving more expeditious or ad hoc decision-making procedures (2004: 92-94). He too employs “complex” multilateralism as a hybrid demarcation, which encompasses hallmarks or degrees of both “old” and “new” multilateralism (Ibid).

Other theorists have coined or used alternative terminology. Alvarez, for example, refers to the “new treaty makers” to describe the increasingly pivotal role of intergovernmental organizations in administering treaty-making regimes (2003: 114). This role bolsters the prominence and impact of less powerful governments, non-governmental organizations, international civil servants and experts, and public intellectuals (Ibid). These dynamics may involve a concomitant erosion of traditional state power, as intergovernmental organizations provide both structural and normative inputs for these actors to participate and exert influence (Ibid: 116-118). In Ku and Diehl’s conception of a “bottom-up approach” to international law-making, networks of civil society and intergovernmental organizations coordinate prior to the involvement of states proper (2006: 166-171). At this stage, they seek not merely to set norms and standards as in the past, but also to devise operational rules for their implementation, monitoring and enforcement (Ibid).

The lack of settled terminology, and indeed the increasing range of terms, reflects the novelty and significance of these developments. Overarching these vibrant discussions is the essential fact that the formal rules and informal practices of multilateralism are fundamentally changing. Those and related conceptions generally encompass or permit, with varying emphases, an admixture of the following properties:

- 1) A socially progressive governance agenda itself, including concerns with fundamental human rights and security;
- 2) The collective assertiveness and influence of progressive and smaller and/or less powerful states in articulating, and implementing that agenda;
- 3) The qualitative integration and influence of non-state actors in setting and advancing that agenda;
- 4) The increasing density and intensity of transnational relationships forged between and across state, non-state and institutional actors;
- 5) A range of comparatively unorthodox modes of negotiation, contestation and exchange in both formal and informal multilateral settings.

These properties are also dynamic and contingent – socially and structurally – thereby permitting a broader possible range of substantive outcomes from multilateral settings. The ICC case uniquely demonstrates how these novel and complex procedural variables may engender and facilitate substantive progress in multilateral governance initiatives.

In arguing that those negotiations expanded the horizons of international law and governance, I mean that they exemplified several of the most salient and novel properties of multilateralism and transnational cooperation. I do not proffer yet another new theoretical conception here, however, because the existing terminologies surveyed above collectively capture the essence of what I seek to describe and analyze. The significance

of the ICC case, in other words, lies in the degree to which those novelties were manifest in the negotiation of a substantively large and complex governance initiative.

In fact, those unique dimensions did not cease with the Final Act's adoption in Rome on 17 June 1998, or even with the Rome Statute's entry into force on 1 July 2002. Indeed, as part of an ongoing process furthering a substantive project, those dynamics, together with their governance outcomes, are mutually and indeterminately constitutive, including promoting States Parties' compliance with their international cooperation and judicial assistance obligations under the Rome Statute, which I consider in chapter 6. In many respects, therefore, the Court's practical significance or impact for international criminal justice should be assessed qualitatively and cautiously, and in any event over an extended time horizon – many years or even decades. Its broader or ultimate implications for multilateralism and transnational cooperation are correspondingly long term and contingent. My use of the term *ICC project* reflects these fundamental analytical premises. That conception does not, however, detract from my core proposition that the ICC has already fundamentally expanded the horizons of what may be realistically contemplated or undertaken in international law and governance. To the contrary, it has not only introduced a permanent and innovative architecture for administering international criminal justice, but also set forth in earnest an unprecedented governance process with potentially vast multilateral possibilities going forward.

In outlining this study's investigations in chapter 1, I posed three seemingly straightforward questions respecting the ICC: *What has happened? How did it happen? What does it represent?* I caution, however, that these analytical queries have the

deceptive appearance of being discrete from each other. In fact, they are fundamentally interrelated, particularly respecting its novel governance properties as a going concern, which I examine in Part II of this study. Those aspects are best appreciated when viewed in light of the Rome Statute's negotiation and formulation. Integral to this study, therefore, is the story behind the Court: how the ICC project reached the crucial Rome Statute milestone after the previously insurmountable hurdles I considered in chapter 2.

This chapter proceeds in four parts. First, I examine how the distinct political and normative conditions of the early 1990s instigated a protracted drafting and negotiation process, which drew and built upon shared purpose and compromise in elevating the ICC from a distant prospect to a genuinely viable proposition. The mutually empowering capacities and contributions of two cooperative entities were both pivotal and reflective of that escalation. Second and third, then, I examine the so-called 'Like-Minded Group' of States (LMG) and the non-governmental Coalition for an International Criminal Court (CICC) respectively. Those eclectic enterprises were decisively influential in the final negotiations, but their earlier origins and impact warrant analyses for the purposes of this chapter and this study. I draw upon alternative conceptions of *power* to evaluate how the LMG converged around a set of essential principles for an independent and effective tribunal, and propelled the process forward through combined political will and suasion. I characterize the CICC as an exemplary *transnational advocacy network* by the breadth and diversity of its constituency, and its sophisticated promotion of transnational ideas and values. Fourth, I survey the achievements of the preparatory stages, and provide context for the outstanding challenges to be confronted in the final negotiations.

II. Launching the ICC Project: A Window of Opportunity

In this section, I analyze how the formal ICC project achieved serious consideration at the highest levels of international law-making and institutional authority in the 1990s. Given my historical appraisal in chapter 2, it is instructive to situate this new traction within the broader context of the distinct normative trends accompanying the Cold War's unpredicted and abrupt end. Those developments included a sense of relative optimism and resolve to promote fundamental human rights and security, and corresponding concern with novel threats posed by emerging patterns of communal ethnic conflict and civil strife (Cassese, 2003: 334-335; Crawford, 2002b: 24-25). Within academic and policy-making circles, there were renewed discussions of foreign policy ethics and global responsibilities in the area of international criminal justice (e.g. Economides, 2001: 112-113). Global civil society's facilitative efforts over several decades were finally met with a political window of opportunity. Keck and Sikkink observe that "new ideas are more likely to be influential if they fit well with existing ideas and ideologies in a particular historical setting" (1998: 204). The ICC was certainly not a 'new idea' per se, but this serious and sustained official consideration was a notable departure from prior eras.

As mentioned in chapter 2, reflecting those unique permissive conditions and pointing to a new sense of shared purpose or duty, the UN Security Council established the ICTY and ICTR. Those ad hoc tribunals "provided the strongest support for the idea that a permanent international criminal court was desirable and practical" (Booth, 2003: 159). They also increased global attention and support for international criminal justice concerns, in conjunction with global civil society's awareness-raising campaigns and

epistemic insights (Cassese, 2003: 341; Kittichaisaree, 2001: 28). Thus the proposition of a permanent tribunal regained momentum in diplomatic, academic and activist circles. Formal discussions to that end were actually instigated via a 1989 referral by Trinidad and Tobago to the UN General Assembly, which contemplated an extra or ultimate formal governance institution to prosecute international traffickers of psychotropic substances. Drug trafficking was ultimately excluded from the Court's jurisdiction, however, and Trinidad and Tobago was ironically one of the few abstaining voices in the final Rome vote. Perhaps more interesting and telling is that it nonetheless became the second States Party to the Rome Statute on 23 March 1999 (ICC-ASP, 2008).

The General Assembly referred Trinidad and Tobago's request to the International Law Commission (ILC) to develop a template proposal in 1989 (UNGA 1989b). Though there are a range of modalities and forms which multilateral treaty undertakings may take, the Commission's involvement exemplifies treaty-making "in solemn form" (Cassese, 2005: 172). The Assembly established the ILC in 1947 as a subsidiary expert body and globally representative forum to promote the "progressive development and codification of international law" (ILC Statute, 1947: Art. 1.1). Recall that it formulated the Nuremberg Principles and was the principal governance institution remaining attuned to international criminal justice during the Cold War. Subsequent Assembly directions to the ILC signaled a heightening resolve that the ICC project would not only be seriously undertaken, but would also be bolder and more complex than initially contemplated.

In November 1992, the Assembly requested the Commission to produce a draft statute “as a matter of priority” (UNGA 1992: Para. 6). The initiative drew further momentum from its endorsement in the Vienna Declaration and Programme of Action (UNGA, 1993: Para 92). Amongst the major enduring features conceived by the ILC was the proposed tribunal’s *complementary* relationship with national justice systems, which I discuss in detail in chapter 6 (Crawford, 2002b: 26).²⁷ Overall, the Commission proceeded cautiously in formulating its draft proposal (Sadat, 2000: 38):

Deferential to the politics of states and perhaps wary of having its work shelved once again, the ILC took no position on some of the more difficult political questions involved in drafting the Statute (such as the definitions of crimes and the financing of the Court) or took positions deferential to state sovereignty on others (such as jurisdictional regimes and organizational structure).

Having considered the ICC project from its forty-second session in 1990 to its forty-sixth session in 1994, the ILC submitted its 1994 draft statute to the Assembly as the expert preparatory foundation for more diplomatic negotiations (Broomhall, 2003: 70-71).

The Assembly then established the Ad Hoc Committee on the Establishment of an International Criminal Court in December 1994 “to review the major substantive and administrative issues” stemming from the ILC draft statute and “consider arrangements for convening a major international conference of plenipotentiaries” (UNGA 1994: Para 2). The Ad Hoc Committee continued to develop the principle of *complementarity*, as chair Adriaan Bos recalls (2002: 44) [author’s emphasis]:

There was a consensus that the issue of complementarity was of major importance to the whole Statute. It was a point of general agreement that the Court is not meant to *replace* national

²⁷ Crawford recalls: “The Court was to be integrated within the existing system of international criminal assistance: it would not displace national systems in cases where those systems were capable of acting to prosecute those suspected of grave international crimes. This was the principle of ‘complementarity’, a term coined in order to avoid borrowing from the EU term of ‘subsidiarity’” (2002b: 26). Crawford further stresses: “The term ‘subsidiarity’ was also misleading, in that ICC jurisdiction was not subsidiary to that of national courts in those cases in which it was invoked” (Ibid: 26).

jurisdictions. Even though the Court's jurisdiction was limited to a small number of core crimes, the jurisdiction of the Court should never be exclusive. It was also generally felt that the principle of complementarity should be clearly defined. The relationship to national jurisdictions should be clarified, as well as the consequences of the application of the principle for the exercise of jurisdiction by the Court and its impact on international judicial cooperation.

The Ad Hoc Committee also concurred with the ILC's recommendation that the tribunal should be established as an independent judicial organ – outside of the UN system – via multilateral treaty and express state consent (Ibid: 40; also see Crawford, 2002b: 26). To that end, it concluded “that issues can be addressed most effectively by combining further discussions with the drafting of texts, with a view to preparing a consolidated text of a convention . . . as a next step toward consideration by a conference of plenipotentiaries” (UNGA, 1995a: Para 257). Further refining the vast range of outstanding issues required a more intensive, broad-based and sustained deliberative forum (Bos, 2002: 46).

In December 1995, the Assembly established the final Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) to further consider the major outstanding issues from the ILC's draft statute and prepare a widely acceptable consolidated draft text for ultimate consideration by a major diplomatic conference (UNGA 1995b: Para 2). The Assembly urged participation “by the largest number of states in order to promote universal support for an international criminal court”, and invited broad participation by non-governmental and international organizations (Ibid: Para 4). The Assembly reaffirmed the PrepCom's mandate in December 1996, and further resolved to convene a major diplomatic conference in 1998 with a view to finalizing and adopting a convention (UNGA, 1996: Para 3 & 5).

Amongst the principal leaders within the PreCom were chair Adriaan Bos of the Netherlands, vice chair M. Cherif Bassiouni of Egypt, head of the NGO coalition William R. Pace, and director of the codification division of the UN Office of Legal Affairs Roy Lee.²⁸ Though the PrepCom was tasked with preparing a draft treaty resolving as many issues as possible, the interrelated legal and political complexities made broad agreement very difficult (Benedetti and Washburn, 1999: 5):

The middle-level diplomats, experts and lawyers who composed most of its delegations, should settle as many *technical* questions as possible. There would also be fundamental *political* issues on which only the diplomatic conference could agree. To make the agreement possible, the PrepCom should simplify, define and clearly present these issues. In practice, of course, the technical matters proved to be troublesome politically as well.

Indeed many issues – the definitions of crimes, jurisdiction, prosecutorial powers, and the role of the UN Security Council – not only had both legal and political dimensions, but were also fundamentally interrelated with each other. Thus the consensus achieved for the broad parameters of the *complementarity* regime constituted a major breakthrough for progressing with those other fundamental matters (Holmes, 1999: 43).

Amongst the Court's most central and contentious features are the so-called *trigger mechanisms* for ICC investigations and prosecutions, which I discuss in chapter 6. The ILC draft statute envisaged Security Council referrals as the sole mechanism, which would have effectively enabled permanent Council members to pre-empt ICC involvement in any given situation involving their nationals (see Broomhall, 2003: 82). Here the Commission's political caution was particularly pronounced, as acknowledged by James Crawford who was responsible for its draft statute (2002b: 25):

²⁸ Due to illness, Bos was unable to chair the Committee of the Whole in Rome. He was replaced by Kirsch in April, 1998, though Kirsch had not been involved in the preparatory process until its final session (see Benedetti and Washburn, 1999: 27)

It was one thing to contemplate the ICC as a possibility and another thing to produce a specific proposal capable of being taken seriously by governments. Looked at in perspective, the ILC's work had this effect: it put onto the agenda of the United Nations a proposal modest enough to gain initial support and not to scare potential and influential States, in particular, the United States, thereby (as it turned out) allowing a range of pressures for a more ambitious system to have their effect at the diplomatic level.

As I seek to describe in this chapter and chapter 4, the diplomatic proceedings did in fact achieve a dynamic momentum producing a final arrangement that is more *progressive* than the ILC had envisaged, in the sense of the Court's overall effectiveness and judicial independence. Apart from Council referrals, then, the Rome Statute includes two additional mechanisms: referrals from States Parties, and preliminary investigations initiated by the ICC Prosecutor's own authority (1998: Art. 13). In the midst of those and other progressive enhancements, however, the ICC also lost the support of the U.S.

Related to *referrals* was the issue of Council *deferrals*: pre-empting or suspending ICC proceedings in situations in which it was concurrently involved under chapter VII of the UN Charter: 'Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression' (1945: Arts. 39-51). The ILC draft statute proposed that the ICC could not commence prosecutions in such circumstances except in accordance with the Council's authorization (see Bos, 2002: 49). Beyond the permanent Council members, that provision was derided as risking an undue politicization of the Court's operations. A Singaporean proposal was tentatively accepted such that the Council, instead of having to approve of ICC proceedings, would require a majority resolution to block such action (Bos, 2002: 49; Yee, 1999: 150; and Kirsch and Robinson, 2002a: 82).²⁹

Notwithstanding that progressive adaptation, which was secured in the final Rome

²⁹ A Canadian proposal added a 12-month time limit, which requires the Council to renew such deferrals (see Kirsch and Robinson, 2002a: 82; also see Yee, 1999: 151).

Statute, the very existence of the deferral prerogative was “bitterly opposed by some delegates who saw it as a blemish on the independence and impartiality of the Court” (Schabas, 2001: 66).

Another politically sensitive issue – also perhaps related to the Council’s role – regarded the crime of aggression. Beyond the offence’s elusive definition, questions persisted as to whether it should even be included within the Court’s jurisdiction, and how it would relate to the Council’s authority to determine acts of aggression under the UN Charter: must ICC prosecutions of aggression be subject to the Council’s pre-determination of aggression? As I discuss in chapter 4, aggression was ultimately listed in the Rome Statute as a fourth, undefined crime. As such, it is beyond the Court’s jurisdiction until a definition is adopted in accordance with the Statute’s amendment provisions, which I consider in chapter 8. The Statute provides that a definition “shall be consistent with the relevant provisions of the Charter of the United Nations” (1998: Art. 5.2). That passage may be understood as a “reference to the role the Security Council may or should play in identifying an act of aggression” (Schabas, 2001: 27). The CICC and other progressive constituencies, however, have expressed a clear preference for avoiding such linkage.

In total, the PrepCom convened twice in 1996, three times in 1997, and for a sixth and final session in March and April, 1998, when it completed the draft convention and transmitted it to the conference (see UNGA, 1997). Benedetti and Washburn, participants within the PrepCom at the time of writing, describe an escalating psychological dynamic characterizing those proceedings (1993: 3):

The quickening pace of the action took some observers and participants by surprise. Countries that hoped to bog down the drive toward an international criminal court with more studies or in the ad hoc committee found instead that this momentum had extraordinary power. The court's supporters were deterred neither by the difficulty of drafting a long and complicated statute nor by conventional concerns about sovereignty and the unknown. The outrage and hope that had spurred the International Law Commission into action had continued.

The PrepCom's most pivotal, albeit most obvious, accomplishment was securing a broad-based commitment to furthering the very idea of a permanent tribunal. It is challenging to do justice to those complex proceedings here, but their essential normative foundations were integral to the Rome Statute's ultimate realization.³⁰ Central to those dynamics in both the preparatory and final negotiations were the synergistic contributions of the Like-Minded Group of States (LMG) and the non-governmental Coalition for an International Criminal Court (CICC), which I now discuss in sections III and IV respectively.

III. Propelling the ICC Project: The 'Like Minded Group' of States

The so-called 'Like Minded Group' of States (LMG) began to take shape in 1995 as a loose association of states broadly supporting the ICC project (Kirsch and Robinson, 2002: 70). Its cooperative posture facilitated normative coalescence as the Court's broad contours were debated and constructed. It expanded and evolved as a unique collective enterprise, which drew upon a range of capabilities and perspectives in *propelling* the ICC project forward: providing the political will, resources and leadership to sustain focus and build compromise and momentum. Beyond its sense of shared purpose, it recognized the need to engage other actors, and to seek to address all legitimate issues and concerns. Its broad and diverse membership, collective assertiveness and suasion,

³⁰ Schabas has observed: "As with all international treaties and similar documents, students of the subject are encouraged to consult the original records of the 1998 Diplomatic Conference and the meetings that preceded it. But the volume of these materials is awesome, and it is a challenging task to distil meaningful analysis and conclusions from them" (2001: vii-ix). For a comprehensive three-volume commentary, see M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Transnational Publishers, 2005).

and forging of constructive working relationships with non-state and institutional actors exemplified emerging forms of multilateralism and transnational cooperation.

In 1997, the LMG adopted ‘cornerstone positions’ for an effective Court: inherent jurisdiction over the listed crimes; a defined and constructive relationship with the UN; an independent prosecutor; and recognition of victims’ experiences, particularly those of women and children (Canada, DFAIT, 2008b; also see Kirsch and Robinson, 2002a: 70-71). Those positions were informal, however, and were never included in any official document (see Benedetti and Washburn, 1999: 21; and Glasius, 2006: 22-23).

Notwithstanding their apparent simplicity – indeed precisely due to that – these baseline standards effectively parceled enormous legal complexities inherent to any conception of an effective tribunal into digestible and politically saleable negotiation points. Their parsimonious character lent itself to both building broad consensus and confidence amongst ICC supporters, and to disarming skeptics and opponents. As Glasius notes: “This brief but significant list of common positions allowed many states to join the LMG while still pursuing their own policies on various more minor aspects of the Court (2006: 23). Similarly Cooper observes: “The bottom line throughout the campaign was to transform diplomacy from a narrow confined vehicle of statecraft to embracing a wider and diffuse dynamic” (2005: 15).

I offer two essential observations concerning the LMG membership. First, although there was a sizeable core, the collective enterprise was relatively informal and somewhat fluid, with certain states being closer to the core and the margins respectively. Broomhall identifies six states as being at its “progressive vanguard” – Argentina,

Australia, Belgium, Canada, Germany and the Netherlands (2003: 74; also see Bos, 2002; 50-51).³¹ The United Kingdom, the only permanent UN Security Council member, only joined the LMG after the election of Tony Blair’s Labour government in May 1997, which reversed the skeptical U.S.-style policy of the previous Conservative government (Sands, 2005: 47; also see Kirsch and Robinson, 2002a: 70). France adopted a similar policy reversal in the same year with the election of the Lionel Jospin government, though did not actually join the LMG.

Second, the LMG was more globally representative or transcending than typical factions within UN or WTO governance settings, and attracted broad North-South support in particular (see Kirsch and Holmes, 1999: 4). Early within the PrepCom, the General Assembly established a special fund to ensure participation by the least developed countries (see Bos, 2002: 53). Many of those states ultimately gravitated toward the LMG. As Glasius notes, the “absence of customary polarizations, together with the resulting defections from traditional groups to the LMG, was one of the group’s strengths” (2006: 24; also see Schabas, 2001: 16). Together with the CICC’s own *global* credentials, which I discuss in section IV, this characteristic bolstered the LMG’s legitimacy and that of the ICC project itself. Hampson and Reid observe a “new” multilateral diplomacy, which is distinctive to human security initiatives and is defined by two features – coalition size and diversity – each of which is instrumental for the

³¹ Schabas list the following as members (2001: 15): Andorra, Argentina, Australia, Austria, Belgium, Brunei, Benin, Bosnia-Herzegovina, Bulgaria, Burkina Faso, Burundi, Canada, Chile, Congo (Brazzaville), Costa Rica, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, Gabon, Georgia, Germany, Ghana, Greece, Hungary, Ireland, Italy, Jordan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Malawi, Malta, Namibia, the Netherlands, New Zealand, Norway, the Philippines, Poland, Portugal, Republic of Korea, Romania, Samoa, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Swaziland, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, Venezuela and Zambia.

promulgation and internalization of new norms (2003: 11). As Malone more generally observes: “In international relations, there is not only safety but also legitimacy in numbers” (2003: 22). The breadth of the LMG’s constituency, moreover, including states such as Argentina and South Africa with recent histories marred by international crimes, further enhanced the authority and suasion of its collective efforts.

Here it is instructive to consider Cooper’s conception of the LMG as a “coalition of the willing” as a model distinct from conventional understandings of that phrase (2005: 1):

At odds with the familiarity of its tight association with the foreign policy of the dominant global power, coalitions of the willing have an expanded identification as well with an alternative set of options, ones based on extending a rules-based regulatory system via introduction of innovative governance practices.

Cooper observes the latter type of collective enterprise to be relatively egalitarian rather than hierarchical in organization (2005: 2-6), to be motivated by “non-material” rather than “structural” or “situational” objectives (Ibid: 6-7), to be relatively transnational and “horizontal” rather than state-centric in association (Ibid: 7-9), and to be mobilized by an “extended security agenda” (Ibid: 9-10). The LMG’s constitutive, dispositional and behavioural properties closely comported to those indicia. The operative dynamic is the manner by which its broad and diverse membership subscribed to a shared vision of major challenges and opportunities for the administration of international criminal justice, and thereby committed to a concerted course of action to advance the ICC project. In this context, conventional power was relatively inconsequential, especially absent any significant countervailing pact between more powerful, populous and skeptical states such as China, India and the U.S., as I further consider in chapter 4. In fact, as a subordinate deliberative body of the General Assembly, the PrepCom

proceedings were markedly egalitarian such that “the permanent members of the Security Council had to get used to dealing on a more nearly equal footing with other countries on the substance of a peace and security issue” (Benedetti and Washburn, 1999: 4).

The LMG was essentially comprised of what Grande and Pauly would describe as “cooperation states”, being both able and willing to constructively engage in increasingly dynamic and multi-faceted governance frameworks which encompass broader and more eclectic complements of state and non-state actors (2005: 288). That overall posture toward transnational cooperation contrasts with corresponding notions of “egoistic states” (possessing the capacity to cooperate, but reluctant or refusing to engage), “weak states” (willing to cooperate, but lacking the capacity), and “rogue states” (neither willing nor capable of constructively engaging) (Ibid: 294). Beyond its own internal unity, therefore, pivotal to the LMG’s effectiveness was its mutually empowering interrelationship with the non-governmental Coalition for an International Criminal Court (CICC), which I discuss in section IV. Indeed, the CICC directly assisted the LMG with developing its core positions. The LMG took considerable measures to ensure a diverse representation of global civil society actors, including providing funding for participation of groups from developing regions (Canada, DFAIT, 2008). The legacy of those transnational working relationships and norms is manifest in scores of joint initiatives and burden-sharing arrangements in furtherance of the ongoing ICC project.

The *cooperation state* notion is consistent with, though broader than, earlier conceptions of “middle power states” (e.g. Cooper et al., 1993). Canada and The Netherlands, for example, have been leading proponents of the ICC project as

cooperation states, and have also been cited within discussions of middle power states

(Ibid). Those states also possess “soft power” capacity, as articulated by Nye (2004: 11):

The soft power of a country rests primarily upon three resources: its culture (in places where it is attractive to others), its political values (when it lives up to them at home and abroad), and its foreign policies (when they are seen as legitimate and having moral authority).

Those alternative notions of *power* are instructive if one accepts Reus-Smit’s notion of power as a “social conception” such that an actor may utilize a range of capabilities in pursuing its objectives (2004b: 279). As I discuss in chapter 4, the LMG was uniquely innovative and resourceful in directing and navigating the procedural milieu of the final negotiations, and withstanding various degrees and dimensions of opposition from the permanent Security Council members and other ICC skeptics. In fact, the LMG was substantially defined by its initial and overarching goal of advancing the ICC project in the midst of such resistance and delaying tactics (Pace and Schense, 2002: 112-113).

Leadership and emulation are integral to those alternative conceptions of power.

Nye distinguishes soft power from hard power, but also from mere influence (2004: 5):

A country may obtain the outcomes it wants in world politics because other countries – admiring its values, emulating its example, aspiring to its level of prosperity and openness – want to follow it. In this sense, it is also important to set the agenda and attract others . . . This soft power – getting others to want the outcomes you want – co-opts people rather than coerces them.

As Hampson and Reid observe, in both the ICC case and the Landmines Convention, which I mentioned in chapter 2 and further discuss in chapter 4, there was an escalating recognition amongst states that embracing the initiative would be perceived as exercising responsible stewardship in the international community (2003: 35):

As the size and diversity of the international coalition in both cases grew, there was practically a stampede to join the coalition in the final stages of the negotiations, as former hold-outs or states that were deeply ambivalent about these institutions decided it was better for a country’s reputation (and a politician’s reputation too) to be seen to be supporting norms and values that a growing majority in the world shared.

That dynamic illustrates the pooling or amplifying effects of soft power. By this, I mean that the respective capacities of individual states may be augmented as other states (and other actors) adopt or emulate their policies, which results in a consensus-based course of action that is broadly deemed to be correct or just. Again, the LMG's broad platform was expressed and promoted in such a manner that opposition to it would virtually be tantamount to opposing the very ICC project itself.

Thus the LMG was characterized by novel dimensions of cooperation and leadership by middle and less powerful states in assembling a broad constituency for a substantively progressive and complex initiative. As Wippman notes (2004: 160):

Some countries have clearly opted to identify themselves, both at home and internationally, as champions or at least supporters of this new 'human security' agenda. For these states, support for a 'strong' ICC was attractive to their domestic publics and consistent with their self-image. Most, such as Canada, are developed Western states, but others, such as Senegal, are in the developing world. These states have varying motivations for their stances but most relate to their own conception of their identity and their role in international affairs as well as to more traditionally defined conceptions of national interest.

As I discuss in chapter 4, however, the ICC case also demonstrates that states are not uniformly inclined toward supporting new multilateral modalities and progressive substantive pursuits. This is broadly consistent with O'Brien et al's proposition that emerging forms of multilateralism – again what those authors characterize as *complex multilateralism* – entail a “differential impact upon the role of the state depending upon the state's pre-existing position in the international system” (2000: 5). Grande and Pauly also identify power asymmetries across states as one of three main clusters of variables mediating states' dispositions vis-à-vis transnational cooperative initiatives (2005: 295).

Integral to my conception of an *ICC project* as a central theme of this study is the idea of an ongoing process that both pre-dates and post-dates the Court's final

establishment. The LMG asserted itself in the Rome negotiations as a full-blown diplomatic alliance of approximately sixty members, but it did not instantaneously mobilize and appear there. It was constituted during the preparatory proceedings, and continued to expand and gain momentum throughout. Its members approached the final proceedings, therefore, having not only achieved a coherent normative vision and framework for the proposed court, but also having invested considerable political capital in the ICC project. Appreciating those continuities across the preparatory and final negotiations is fundamental to the Court's broader implications for multilateralism and transnational cooperation. As with the CICC, therefore, which I now discuss, my analysis takes those earlier stages as the analytical point of departure.

IV. Globalizing the ICC Project: The Coalition for an International Criminal Court

The CICC worked synergistically with the LMG in *globalizing* the ICC project: bringing transnational interests, values and perspectives to bear upon the proceedings. Its qualitatively dense integration, sophistication and influence reflect hallmarks of emerging forms of multilateralism and transnational cooperation. Corresponding with the UN's renewed interest in the ICC project, the Coalition was formed by twenty-five non-governmental organizations (NGOs) in New York in February, 1995 to mobilize and rationalize civil society efforts in support of a fair, effective and permanent tribunal (Pace and Thieroff, 1999: 391; Pace and Schense, 2002: 138). Through its posture of constructive engagement toward state and institutional actors in furthering a broadly common governance agenda, the Coalition exemplified Keck and Sikkink's conception of a "transnational advocacy network" (1998: 2-3):

Activists in networks try not only to influence policy outcomes, but to transform the terms and nature of the debate . . . Simultaneously principled and strategic actors, they ‘frame’ issues to make them comprehensible to target audiences, to attract attention and encourage action, and to ‘fit’ with favourable institutional venues. Network actors bring new ideas, norms, and discourses into policy debates, and serve as sources of information and testimony.

As with the LMG, this cooperative umbrella association continued to amass support within the PrepCom, and achieved a membership of approximately 800 NGOs by the final negotiations (Pace and Thieroff, 1999: 392; Pace and Schense, 2002: 115). By then, the Coalition’s Steering Committee, in consultation with its membership and the LMG, had informally formulated eleven principles to guide its approach to the Rome proceedings (Pace and Schense, 2002: 123-124). Those principles were more progressive and detailed than the LMG platform, but were broadly compatible with it.

As discussed in chapter 2, civil society efforts were critical in sustaining over several decades the very proposition of a permanent tribunal, including by organizations such as the International Law Association, the Association Internationale de Droit Penal and the World Federalist Movement (WFM), as well as global public intellectuals such as Benjamin Ferencz. As Glasius stresses, the “moral and intellectual impulse” of global civil society is vital to governance initiatives seeking to graft “the interests of humanity” onto the inter-national law of states (2006: 3). The determination of those progressive actors is underscored by an encounter in the years just prior to the final ICC negotiations in which William Pace, WFM Executive Director and CICC Coordinator, was reportedly advised by a leading international expert to “keep working on this, but don’t get your hopes up too high for it isn’t going to happen in your lifetime, or your children’s lifetime, or your grandchildren’s lifetime” (cited in Glasius, 2006: 111).

Beyond its sheer size, the Coalition's novelty is underscored by the breadth of its constituency, to which Pace and Schense attribute three factors (2002: 111):

The first was the conclusion . . . that given the obstacles confronting the successful creation of the Court, it might not happen at all if NGOs did not pool their political strength and expertise and learn to speak with a united voice.

Second, if the effort was to proceed, it was clear that it would quickly grow technical in nature and would expand to touch upon many areas of relevant international law. Therefore, following and contributing to every facet of work on the Court would be beyond the reach of almost every individual NGO, no matter how large or influential.

Third, these NGOs also recognized that many States would have to be integrally involved and would have to support consistently the effort to create the Court, if the resulting institution were to be as strong and independent as possible. Establishing and maintaining working relationships with representatives of so many States would again stretch the resources and capacity of any single NGO.

Those inclusive and encompassing features reflect the essential nature and objectives of the CICC as a transnational advocacy network. Pace and Thieroff recount (1999: 392):

A key goal of the Coalition was and is to foster awareness and support for the Court among a range of civil society organizations, including those focusing on human rights, international law, humanitarian issues, peace, the rights of women and children, religion and many other sectors. The Coalition has served as both a facilitator for civil society involvement in the negotiation process as well as, in the words of one government official, "the world's principal source of information on the ICC".

The involvement and support of civil society groups from so many governance and policy sectors underscores the ICC project's substantive complexity and implications, as well as the Court's fundamental situation within a broader and transcending normative human security agenda, as I discuss in chapter 8. As with the LMG's platform, the Coalition's broad mandate reflected and invited vast and diverse support and expertise. Thus the CICC demonstrated how "network activists can operate strategically within the more stable universe of shared understandings at the same time that they try to reshape contested meanings" (Keck and Sikkink, 1998: 5).

The Coalition utilized sophisticated publicity and lobbying strategies to impact the political content of the negotiations, but also made purely epistemic contributions that were ultimately reflected in the Rome Statute, which I discuss in chapters 4 and 5. Thus the CICC demonstrated the *soft power* of global civil society itself: “Because they are able to attract followers, governments have to take NGOs into account as both allies and adversaries” (Nye, 2004: 90). The Coalition organized its efforts into thematic caucuses to address particular issue areas – for example, the Women’s Caucus for Gender Justice, the Children’s Rights Caucus, and the Victim’s Rights Caucus (Pace and Schense, 2002: 117). I examine the insights and contributions of those particular caucuses in chapter 5. Beyond its targeted lobbying initiatives, the CICC also performed invaluable *services* to the undertaking as a whole, especially by preparing and distributing expert analyses of issues and positions (Pace and Schense, 2002; also see Pace and Thieroff, 1999: 395):

For all delegations, but especially for smaller delegations, which often did not have sufficient members to cover all aspects of the Preparatory Committee’s work, it was tremendously helpful to have additional sources of information, summarizing relevant international law and practice, clarifying different government positions on issues, and setting forth, in a succinct way, the options from which delegates had to choose.

Those sophisticated contributions reflect the proposition that the “density and strength of networks comes from both their identity as defined by principles, goals, and targets, and from the structural relationships among the networked organizations and individuals” (Keck and Sikkink, 1998: 207).

Critical to the Coalition’s overall effectiveness, therefore, were the cooperative working relationships forged with state officials, particularly from the LMG. Indeed, fundamental to the ICC project’s momentum within the PrepCom was the mutually empowering LMG-CICC relationship, as Benedetti and Washburn note (1999: 23):

As the NGO coalition grew in strength, an alliance developed between it and the Like-Minded Group. The coalition assisted delegations in the latter group by preparing thoughtfully researched commentaries on every issue discussed. It made the commentaries available to group members and other delegations prior to the PrepCom sessions. Through regular meetings, the coalition helped the Like-Minded Group develop guiding principles [the ‘cornerstone positions’] to serve as the first unified “position” of the group before the diplomatic conference.

That dense and constructive integration exemplified the mixed-actor properties of transnational cooperation. The CICC demonstrated how increasingly sophisticated strategies and subtleties, including the manner of personal exchanges with state and institutional officials, evidence a certain maturation of global civil society and a broader commitment to further a positive agenda (see generally Glasius, 2006).

State and UN officials received and integrated civil society with novel legitimacy and access. After a few delegations challenged the presence of NGOs in the PrepCom – arguing that they did not have access to the UN General Assembly or its subsidiary bodies – the bureau of the PrepCom, together with the UN Secretariat, determined in a closed session that NGOs would have access to formal and informal working group sessions, the right to distribute materials, and the right to meet with delegates in the conference room before and after sessions (Pace and Schense, 2002: 120):

This experience established the Coalition as a legitimate participant and established a conduit for communications and the development of mutual trust between the Coalition and the [UN Office of Legal Affairs], a section of the UN Secretariat that did not have much previous experience working with NGOs. This break-through was to be the basis for future consultations between the Coalition and the UN Secretariat, especially at the Rome Conference.

Those civil society actors, in turn, adeptly refined their strategies and tactics to the institutional culture and style of the proceedings (Benedetti and Washburn, 1999: 25):

This included matters of procedure, timing, access to documents, decorum, and even dress. Without yielding their often justified suspicion of governments, NGOs came to accept that national positions, however obstructive, frequently have specific genuine causes, better addressed by dialogue than by simple condemnation.

Thus the CICC demonstrated that civil society's contestation of international law and governance is not inherently self-marginalizing, relentlessly critical or otherwise incoherent (see generally Glasius, 2006). Albin identifies seven types of NGO activities which may potentially influence the process and outcome of multilateral negotiations: problem definition, agenda setting and goal setting; enforcement of principles and norms; provision of information and expertise; public advocacy and mobilization; lobbying; direct participation in the formulation of international agreements; and monitoring and other assistance with compliance (1999: 378).³² The CICC undertook all of the applicable types during the preparatory stages with unprecedented levels of coordination, integration and sophistication.

In 1998, Keck and Sikkink observed that the “number, size and professionalism, and the speed, density and complexity of international linkages among transnational action networks has grown dramatically in the last three decades” (1998: 10). They also observed, however, that network issues “are *in their general form* issues around which sustained mass mobilization is unlikely” [authors' emphases] (1998: 204). In fact, since the Court's establishment in 2002, the permanent CICC has evolved into an even broader, more diverse and sophisticated entity. As of 1 January 2008, the Coalition's membership had expanded to 2,000 (CICC, 2008a). Its national and regional networks advance its overarching goals that I outline below (CICC, 2008f). It also encompasses thematic caucuses which, as mentioned above, were formed during the PrepCom “for the purpose of ensuring that the perspectives of particular constituencies were incorporated into all

³² It is also instructive to consider the five levels of “goal achievement” posited by Keck and Sikkink (1998: 25): (1) Issue creation and agenda setting; (2) Influence on discursive positions of states and international organizations; (3) Influence on institutional procedures; (4) Influence on policy change in ‘target actors’; and (5) Influence on state behaviour.

aspects of the negotiations” (CICC, 2008h). NGO Teams on Issues (e.g. communication and outreach) are particularly involved with sessions of the Assembly of States Parties and through meetings with organs of the Court (CICC, 2008c). Beyond its members’ resources, the CICC receives major financial contributions from organizations such as the Ford Foundation, as well as from governments, including Canada (CICC, 2008e).³³

The CICC continues to coordinate global strategies toward ratification, implementation and adherence to the Rome Statute. Some members monitor compliance and report wrongdoings to states or the ICC Prosecutor, and may even fulfill a more direct role in national and ICC proceedings (Human Rights First, 2004; Human Rights Watch, 2004). A core group of relatively prominent NGOs – each with its own ICC programs, staff and resources – constitutes the Coalition’s Steering Committee, which determines its goals, advises the Secretariat to ensure global policy coherence, and provides strategic oversight (CICC, 2008g).³⁴ Those contemporary goals are as follows (CICC, 2008a):

Through the concerted efforts of member groups and in cooperation with governments and international organizations, we work toward:

- protecting the letter and spirit of the Rome Statute;
- raising awareness of the ICC at the national, regional and global level;
- monitoring and supporting the work of the Court;
- promoting ratification and implementation of the [Rome Statute];
- monitoring and supporting the work of the Assembly of States Parties;

³³ The CICC is also supported by an unofficial group of prominent individuals, known as the “Friends of the Coalition of the International Criminal Court” (CICC, 2008d).

³⁴ The Coalition’s breadth is underscored by the Steering Committee membership, which includes the following as of 1 January 2008 (CICC, 2008g): Amnesty International, Asian Forum for Human Rights and Development (FORUM-ASIA), Asociación Pro Derechos Humanos, Civil Resource Development and Documentation Centre (CIRDDOC), Comisión Andina de Juristas (Andean Commission of Jurists), Fédération Internationale des Ligues des Droits de l’Homme, Human Rights First, Human Rights Watch, No Peace Without Justice, Parliamentarians for Global Action, Women’s Initiatives for Gender Justice, World Federalist Movement, Human Rights Network-Uganda, and The Redress Trust.

- facilitating involvement and capacity building of NGOs in the ICC process; and
- expanding and strengthening the Coalition’s worldwide network.

That agenda reflects the CICC’s pivotal role in the ICC project, and more broadly underscores the possibilities for civil society integration into the actual implementation, supervision and enforcement of international law and governance arrangements.

The CICC is an exemplary transnational advocacy network through which a vast range of progressive civil society actors collectively conditioned the process and substance of the ICC negotiations. As with the LMG, it is crucial to appreciate the Coalition’s formation, evolution and impact prior to the Rome negotiations (Pace and Schense, 2002: 115):

While the Coalition’s impact at the Rome Conference has been the subject of consistent high praise from governments, the UN, the media, and others, this influence resulted from a lengthy process of evolution. The steady growth of the Coalition, both in numbers of members and in scope of activities; its increasingly sophisticated political and diplomatic approaches to the negotiations . . . ; and the strengthening sense of solidarity among Coalition members from all regions of the world can literally be measured from session to session of the PrepCom.

The weight of the CICC’s transnational presence and legitimacy in the final proceedings, therefore, largely stemmed from its origins and development during those preliminary phases. Likewise, the effectiveness of its ongoing efforts is owed to the expertise, sophistication and authority it achieved and projected throughout the ICC negotiations.

V. Countdown to Rome: Common Cause – Uncommon Challenges

In this chapter, I have examined how the novel dimensions of cooperation, consensus-building and compromise between and across state, non-state, and institutional actors launched, propelled and globalized the formal ICC project in the 1990s. I have argued that those complex preparatory processes exemplified emerging forms of

multilateralism and transnational cooperation, with reference to the five properties I have enumerated. Those dimensions assume a heightened and broader significance when considered within the context of the ICC project's substantive magnitude and complexity. I have situated this analysis within the context of broader post-Cold War normative trends that were conducive to renewed discussions of a permanent tribunal. In reflecting upon the entirety of the PrepCom's work, Benedetti and Washburn declared (1999: 2):

This is a record of the nature and dynamics of a high act of international creativity. Whatever its ultimate outcome, the PrepCom should be remembered and learned from. The remarkable changes in psychology, the strong if uneven rise of a sense of common purpose and effort within it, and the importance to these of the conduct and substance of the negotiations produced a surprising and compelling achievement for its participants and for the UN. The journey as well as the arrival can inspire, instruct, and reveal the future.

Those dynamics were indeed continued and built upon in Rome. A common cause had long been acknowledged, and now a collective determination to decisively act had been forged and cemented. Pivotal to this were the LMG and CICC as the defining collective actors, not only in mobilizing and sustaining a transnational constituency, but also in providing "didactic leadership" which extends further to foster "a sense of moral urgency and vision to the human security enterprise at hand" (Hampson and Reid, 2003: 36-37). Their mutually empowering roles and contributions substantially defined the broad parameters of the envisaged court in the preparatory stages, which achieved considerable political momentum approaching the Rome negotiations.

Those final proceedings would be fraught with variables and contingencies, however, including the very issue whether the ICC would in fact be established at all. Outstanding and fundamental issues presented a range of political and logistical challenges (Ratner and Abrams, 2001: 209; also see Kirsch and Robinson, 2002a: 68):

As a result of gaping differences of opinion among states that characterized the deliberations preceding the Rome Conference, the draft text transmitted to the conference was, rather than a unified text, more of a working document setting forth various proposed alternatives, leaving it to the Rome delegates to resolve these issues.

In many ways, therefore, the Court itself and the some of its most salient and novel features remained in doubt. Those aspects include the ICC Prosecutor's authority to independently initiate preliminary investigations as a distinct trigger mechanism for ICC proceedings from State Party or Security referrals. That is amongst the Court's defining supranational components, which I examine in chapter 6. In this and other respects, the overall ICC negotiations were characterized by a dynamic momentum that resulted in a more robust and independent tribunal than was initially envisaged. Because the Court had now become a very serious and official proposition, however, the final negotiations attracted heightened attention and scrutiny, especially from the U.S. and other ICC skeptics. More generally, policy challenges presented by divergent legal traditions were further exacerbated by their attendant linguistic and broader cultural variances. Overcoming those and other fundamental obstacles would require an even more skillful and resolute exercise of multilateralism and transnational cooperation.

Chapter 4

NEGOTIATING THE FINAL ROME STATUTE: EXPANDING THE HORIZONS OF MULTILATERALISM AND TRANSNATIONALISM

Contents

- I. Multilateralism, Transnationalism and the Rome Milieu
 - II. Global Civil Society: Integration, Engagement and Impact
 - III. The Like-Minded Group: Controlling the Agenda
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 - V. Expanding the Horizons of Multilateralism and Transnationalism
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I. Multilateralism, Transnationalism and the Rome Milieu

In developing this study's core proposition that the ICC is implicative of new directions and expanded possibilities for international law and governance, this chapter builds upon chapter 3 to present the heightened multilateral and transnational novelties exhibited in the final ICC negotiations in Rome in 1998. In chapter 3, I examined several years of preparatory drafting and negotiation proceedings during which the ICC project became an increasingly viable undertaking. I proposed, however, that the Court's establishment was still improbable: "An institution of truly historical importance, something difficult to have imagined, let alone achieved, only a few years ago" (Kirsch and Oosterveld, 2001: 1160). Such declarations are not restricted to ICC officials, others involved with the ICC project, or to international legal scholars. Globalization theorist Jan Aart Scholte, for example, concurs that it "was a utopian fantasy before the 1990s", its final establishment reflecting progressively evolving conceptions of transnational community and social solidarity (2000: 179). The Rome proceedings entailed similar dynamics of cooperation and compromise as in the preparatory phases, but obviously in a

much shorter time-frame and with a heightened element of seriousness and finality. They also bore witness to more ardent contestation and resistance, particularly from the U.S. Thus the final Rome Statute's final adoption stands as a remarkable diplomatic and governance accomplishment. I now provide a brief overview before outlining how the specific propositions of this chapter are structured and developed.

The Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) submitted its final report and draft final act in April, 1998. The UN General Assembly then formally convened the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The final negotiations occurred in Rome from 15 June to 17 July, 1998 at the UN Food and Agriculture Organization headquarters. The delegations of 160 states participated in the conference (UNDCP-Final Act, 1998: Annex II), together with 124 non-governmental organizations (Ibid: Annex IV). There were also a broad host of other organizations and entities represented by an observer: *organizations* (Palestine); *intergovernmental organizations and other entities* such as the European Union, the League of Arab States and Interpol; *specialized agencies and related organizations* such as the International Labour Organization and the International Atomic Energy Agency; *UN programmes and bodies* such as UNICEF, the offices of the UN High Commissioners for Refugees and for Human Rights, the ad hoc tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), and the International Law Commission (ILC) (Ibid: Annex III). In addition, 474 journalists were accredited to cover the proceedings (UN Press Release, 17 July 1998).

Major committees established by the conference included the General Committee, the Committee of the Whole, the Drafting Committee and the Credentials Committee (see UNDCP-Final Act, 1998: Para 19). The Committee of the Whole was assigned the core function of considering the PrepCom's draft convention (Ibid: Para 22). The Bureau of the Committee of the Whole managed the overall day-to-day negotiating process, which I further discuss below. It was comprised of representatives from Canada, Argentina, Romania, Lesotho and Japan, who were elected pursuant to the Rules of Procedure (see Kirsch and Robinson, 2002a: 17; Kirsch and Holmes, 1999: 3; and Kirsch, 1999: 452). On the basis of the deliberations recorded in the records of the conference, and of the Committee of the Whole and the Drafting Committee, the conference produced the final Rome Statute (see UNDCP-Final Act, 1998: Para 23). On 17 July 1998, the Statute was adopted and opened for signature (Ibid: Para 24). The conference also adopted several resolutions, including establishing the Preparatory Commission for the International Criminal Court, which was tasked with preparing a range of practical arrangements and draft texts for the Court's establishment and coming into operation (Ibid: Resolution F).³⁵

In chapter 3, I outlined five distinct emerging properties of multilateralism to help describe and analyze the unique capacities, contributions and relationships across state, non-state and institutional actors in amassing broad support and momentum behind the ICC project. Some of those novelties have been associated with comparatively discrete initiatives, where problem identification, mobilization and resource allocation are relatively fast and precise. The so-called 'Ottawa Process' establishing the 1997

³⁵ Those instruments include the Rules of Procedure and Evidence, the Elements of Crimes, the Negotiated Relationship Agreement with the UN, the Headquarters Agreement with The Netherlands as the host state, financial rules and regulations, and the Agreement on the Privileges and Immunities of the Court (see Kirsch and Oosterveld, 2002: 95).

Landmines Convention that I mentioned in chapter 2, for example, has been recognized as a breakthrough in international relations and progressive international law-making. In fact, Cooper couples that Convention's negotiation with the ICC proceedings as the twin "prototypes" of the "new diplomacy", principally respecting their speed, momentum and intensity (2004: 96; also see Behringer, 2005). The two respective experiences do have those and other intriguing parallels: the decisive influence of a like-minded coalition of progressive states; the parallel formation and integration of a broad and diverse global civil society network; and the use of fast-track and package negotiations to overcome resistance by more *powerful* states including the U.S. (see generally Behringer, 2005).

Those novel multilateral dimensions assume a heightened significance in the ICC project's case, however, given its relative magnitude in legal, political and historical context. As a substantive human security-related initiative – legally constituting a formal and permanent governance institution with distinct supranational properties – the Rome Statute is unprecedented in magnitude and scope (Schabas, 2001: 20):

The International Criminal Court is perhaps the most innovative and exciting development in international law since the creation of the United Nations. The Statute is one of the most complex international instruments ever negotiated, a sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of more political propositions that touch the very heart of State concerns with their own sovereignty.

The global attention, resources and expertise deployed toward designing and negotiating the final Rome Statute represent a progressive new stage of multilateral and transnational cooperation, thereby expanding the horizons of international law and governance.

In developing these propositions in conjunction with chapter 3, this chapter proceeds in four parts. First, I analyze the qualitative integration of global civil society

actors in the negotiations. The political tactics, epistemic contributions, and overall constructive posture by the Coalition for an International Criminal Court (CICC) and a range of other progressive-oriented non-state actors were both unprecedented and fundamental to the final outcome. Second, I consider the pivotal role of the Like-Minded Group of states (LMG) in controlling and directing the procedural and substantive agenda of the negotiations to their successful conclusion. The LMG worked synergistically with the CICC to enlist the support of other more hesitant states for a final compromise package proposal, and effectively isolate major ICC opponents and skeptics. Third, I consider the broader political dimensions of the negotiations, as reflected in diplomatic factions beyond the LMG and the primary issues and concerns those constituencies raised. I also survey the composition of the final vote, and examine in more detail the explanations proffered by select states for opposing or abstaining. Fourth, I conclude that the Rome negotiations built upon the foundations of the preparatory phases to exemplify the process and substantive possibilities of emerging forms of multilateralism and transnational cooperation. I also provide a broader conclusion to part I of this study.

II. Global Civil Society: Integration, Engagement and Impact

Building upon the preparatory proceedings, the qualitative integration and contributions of the CICC and other progressive civil society actors in the final negotiations illustrated unique and fundamental transnational trends in multilateralism and governance. Indeed, according to Glasius, those dimensions represented a “revolution in international law and in the conduct of international relations” (2006: xiii; also see Broomhall, 2003: 73; and Benedetti and Washburn, 1999: 33-34). They did not,

however, diminish civil society's more traditional role of bringing moral and political suasion to bear upon the substantive talks. Benjamin Ferencz of the Pace Peace Center declared: "If we care enough and dare enough, an international criminal court – the missing link in the world legal order – is within our grasp. The place to act is here and the time to act is now!" (UNDCP-Speeches, 1998: 16 June). The Lawyers Committee for Human Rights particularly cautioned against undue political expediency (Ibid: 18 June):

The challenge is not just to create an international criminal court. The challenge, rather, is to create a court that is independent, effective and fair. . . . The Lawyers Committee therefore urges the delegations to resist the inclination to accept the lowest common denominator merely for the sake of creating a court, no matter how weak it might be. . . . Above all, the court must be – and must be perceived to be – a judicial body whose functioning is guided by legal rather than political considerations.

Global civil society contributions were instrumental to achieving the final Rome Statute, which does indeed constitute the basis for an independent, effective and legitimate ICC.

As discussed in chapter 3, the CICC remains an exemplary *transnational advocacy network* in terms of its size, diversity, sophistication and governance objectives (see generally Keck and Sikkink, 1998). The legitimacy it had earned in the preparatory stages was signified by the unprecedented self-governing accreditation role assigned to it by the UN in the final negotiations (UNDCP-Final Act, 1998: Annex IV; see Glasius, 2006: 45). The CICC organized itself into twelve teams to shadow the various formal and informal working groups established by the conference (Pace and Schense, 2002: 126-127). Building upon its prior experiences, those teams provided debate summaries and expert analyses of negotiation positions, apart from conducting more purely advocacy-like activities, including candlelight marches and demonstrations in support for the Court (Ibid: 128). The Coalition also continued to nurture and develop constructive working relationships with state and institutional officials, which were critical to its

effectiveness. As expressed by Coordinator William Pace: “The NGOs and governments have forged a partnership in the ICC process which was unprecedented in many ways [demonstrating] another example of the extraordinary development of the ‘new diplomacy’ characteristic of the post-Cold War period” (UNDCP-Speeches, 1998: 18 July). The CICC’s overall posture vis-à-vis state actors has been described as a “creative tension”, and markedly distinct from the more militant stance of relentless contestation with which global civil society activism is often associated (see Glasius, 2006: 46).

That constructive exchange was most strikingly borne out by the Coalition’s successful lobbying efforts to equip the ICC Prosecutor with authority to independently initiate preliminary investigations, as a distinct trigger mechanism for ICC proceedings from State Party or Security Council referrals (see Rome Statute, 1998: Art. 15.1). Recall that an independent prosecutor was also amongst the LMG’s ‘cornerstone positions’. As Kirsch and Robinson recall, however, that authority was politically sensitive (2002a: 83):

The proposal to allow the independent Prosecutor to initiate proceedings, which during the preparatory negotiations was initially greeted with skepticism, gradually earned the support of like-minded states and indeed the great majority of delegations. However, some delegations raised very serious concerns about the prospects of frivolous prosecutions.

Notwithstanding the provisions that narrow and circumscribe its operation, this is a defining supranational component of the ICC, as I examine in chapter 6. It also constitutes a major progression from the 1994 draft statute of the International Law Commission (ILC), as acknowledged by James Crawford of the ILC (2002: 34):

The most important difference between [the ILC draft statute and the Rome Statute] is the introduction in the Rome Statute of a prosecutor with a power of independent action. Under the ILC’s model, the Prosecutor could only act on receipt of a complaint; this modest proposal was adopted, not because it was thought to be desirable but out of the fear that an international prosecution system with a power of independent action was utopian, and could lead to rejection of the Draft by States. It is testimony to the development of international opinion that the Rome Statute goes so far.

Key LMG leaders acknowledge that civil society efforts were perhaps determinative in securing this provision, given its absence from preparatory texts and the tenacity of U.S. concerns with an unaccountable court (Glasius, 2006: 57; also see Bos, 2005; and Lee, 2005). In addition, the “integrity, neutrality and good judgment of Richard Goldstone [former ICTY and ICTR prosecutor] and his successor, Louise Arbour, answered those who warned of the dangers of a reckless and irresponsible ‘Dr. Strangelove Prosecutor’” (Schabas, 2001: 13; also see Brown, 2002: 328; and Pace and Schense, 2002: 133).

As discussed in chapter 3, the Coalition helped *globalize* the ICC project by pressing transnational ideas and values in the deliberations and debates. In seeking such independent prosecutorial authority, for example, the CICC was determined to maximize the Court’s operational independence from political influence. As Wippman describes (2004: 164) [my emphases]:

These organizations lobbied tirelessly for their conception of a strong ICC, both among the delegates in Rome and in national capitals. *They saw themselves, far more even than the most staunch like-minded state, as the guardians of the international public interest.* They prepared countless position papers, summarized and disseminated information on the proceedings, offered advice to and even served as members of official delegations, and publicized and criticized any state proposals that threatened to undermine their conception of the court.

The Coalition’s cohesive sophistication in Rome was matched by the density and strength of its coordination with national networks, which undertook concurrent advocacy campaigns world-wide (Pace and Thieroff, 1999: 395) [my emphases]:

When national delegations or portions thereof (e.g. specific ministries) needed reinforcement, or when concerns arose that a delegation might be compromising on key principles, the Coalition contacted ministers, parliamentarians and media in the capital through its national networks. This type of *conference-to-capital coordination* has been a goal of NGOs at many conferences; for many of us its effective implementation in Rome was a first.

Indeed, its pursuits in the ICC negotiations and in the ongoing ICC project span the entire “typology of tactics” that networks use in their efforts at persuasion, socialization, and

pressure: (1) *information politics*, (2) *symbolic politics*, (3) *leverage politics*, and (4) *accountability politics* – or the “efforts to hold powerful actors to their previously stated policies or principles” (see Keck and Sikkink, 1998: 16).

As I also stressed in chapter 3, beyond its size and sophistication, the CICC is also novel by the breadth and *expertise* of its constituency (Pace and Schense, 2002: 128):

Many Coalition members brought to Rome a strong knowledge of international humanitarian and human rights law and practice, as well as the history of the [ad hoc tribunals] and the history of efforts to establish a permanent international criminal court. This base of knowledge legitimized the presence of NGOs at the Conference and also signaled to government delegations that NGOs were prepared to engage with them in a professional technical manner in pursuit of their shared goal, the completion and adoption of the Court’s statute.

The Coalition’s thematic caucuses brought particularly compelling epistemic insights and suasion to bear upon discussions around the distinct concerns and vulnerabilities of women, children and victims, which I consider in chapter 5. Those efforts were particularly bolstered by the continued operations and revelations of the ICTY and ICTR (Steains, 1999: 359). In terms of substantive penal jurisdiction, the ICC is equipped to address various crimes specifically affecting women and children, including offences that have evaded prosecution and/or appropriate legal characterization in the past. The Rome Statute also includes a range of progressive innovations for involving and protecting victims and witnesses – including specific provisions for victims of sexual violence – which aim to safeguard vulnerable persons in the actual administration of justice.

The Coalition’s most fundamental objectives – a strong and effective tribunal, an independent prosecutor, sensitivity to gender concerns, and jurisdiction over internal armed conflict – were all substantially attained (see Kirsch and Holmes, 1999: 5). Though some aspects of its platform were not fully realized – for example ‘universal

jurisdiction’, which I discuss in chapters 6 and 7 – the substantive integrity of the Rome Statute as a whole points to an efficacious campaign across the preparatory and final ICC negotiations (see Pace and Thieroff, 1999: 395). Hans Correll, the UN Secretary General’s representative, declared: “The non-governmental organizations, in particular, have contributed significantly, setting an example by coordinating their efforts and focusing on the substance of the negotiations” (UNDCP-Speeches, 1998: 17 July). Indeed, it has even been suggested that the CICC was “the most influential single player” in Rome (see Broomhall, 2003: 73; also see Schabas, 2001: 15). Brown stresses: “In formulating its own ICC policies, the United States was responding to NGO initiatives as much as to the policies and positions of other countries” (2002: 331).

There were tensions, however, when it came to the relative cohesion and progressive orientation of civil society groups as a whole. A minority of groups outside of the CICC were less progressive or constructive, some expressly or implicitly opposing the Court’s very proposition. A particularly significant schism involved socially conservative groups such as REAL (Realistic Active for Life) Women of Canada, which aligned with the Holy See and certain Catholic and Arab states to contest the inclusion of ‘gender’ and ‘forced pregnancy’ within the definition of crimes (Glasius, 2006: 77; also see Oosterveld, 2005: 56; Bedont and Martinez, 1999: 74; and Steains, 1999: 365). Those actors essentially opposed wording that might implicitly condone homosexuality or abortion practices. I consider the final compromise provisions in chapter 5. I now survey the contributions of two unique types of non-state actors, which have immediate significance for the ICC and broader implications for international law and governance.

First, the International Committee for the Red Cross (ICRC), the Sovereign Military Order of Malta (SMOM), and the Holy See are what Cassese describes as “*sui generis entities* of international law”, each having distinct and limited ‘legal personality’ due to historical circumstances, though without possessing sovereign territory (2005: 131). The ICRC and SMOM were accredited as *intergovernmental organizations and other entities* (UNDCP-Final Act, 1998: Annex III). Each organization brought unique perspectives and influence to bear upon the negotiations. Reflecting its distinct expertise in patterns and consequences of armed conflict, the ICRC’s pre-Rome position stressed that the Court “must have jurisdiction over all crimes committed in all types of armed conflict, whether international or otherwise” (ICRC, 1998). In Rome, it also emphasized the importance of broader supporting components for an effective system of justice, including preventive action, education and training (UNDCP-Speeches, 1998: 16 June).

The SMOM maintains official diplomatic relations with many Catholic states due to its traditional humanitarian assistance and relief activities spanning nine centuries (Cassese, 2005: 132-3). Its Ambassador declared very broad support in urging that the complexity and implications of all issues be subject to “very careful consideration in order to obtain an independent, functional, effective and credible Permanent International Criminal Court” (UNDCP-Speeches, 1998: 18 June). The Holy See was accredited amongst the 160 states represented in Rome (UNDCP-Final Act, 1998: Annex I). Apart from the specific concerns mentioned above, the Holy See broadly supported the ICC project “as a sign of its deep interest in matters which touch upon the questions of justice, reconciliation and the good of the human person” (UNDCP-Speeches, 1998: 16 June).

Second, I now briefly review the roles and perspectives of Parliamentarians for Global Action (PGA) and the Inter-Parliamentary Union (IPU); organizations which transcend traditional conceptual categories within international relations scholarship. Slaughter characterizes these entities as “advocacy groups for legislators” within the broader conceptual category of “parliamentary networks” (2004: 115-6). PGA was an accredited *non-governmental organization*, however, whereas the IPU was accredited amongst *intergovernmental organizations and other entities* (see Final Act, 1998: Annexes III & IV). PGA was established in 1978-1979 by “concerned parliamentarians from around the world to address global problems, which could not be solved by any one government or parliament” (PGA, 2008a). As described by Slaughter (2004: 117):

By its own account, the PGA offers a chance for legislators from small and medium-sized countries that do not have strong political, military, or economic leverage to exercise group diplomacy in order to make decisive contributions to world policy. Two recent examples of this kind of work are the PGA’s assistance to Canada in promoting the International Convention to Ban Landmines and its role in promoting the creation of the permanent International Criminal Court.

The PGA delegate emphasized the network’s 1,300 parliamentarians from 99 different legislatures, and stressed the vital aspect of national implementation for the Court’s viability going forward (UNDCP-Speeches, 1998: 17 June):

Active support from elected lawmakers will be essential for the acceptance by governments and international legal institutions of the permanent [ICC]. It is Parliamentarians who must ensure both ratification by their parliaments and implementation by their governments. They are crucial players and could be a useful instrument for political persuasion and when necessary pressure. PGA members will be on the forefront of the coming struggle for ratification and implementation.

PGA is thus an intriguing organization (or network) of civil society activists simultaneously holding positions of formal authority and influence within states.

The IPU was founded in 1889, with a broad agenda of working toward international peace and security, and improving domestic political institutions (Slaughter,

2004: 127). The IPU echoed the PGA in highlighting the significance of national ratification, and particularly emphasized the Court's *complementary* relationship with national justice systems (UNDCP-Speeches, 1998: 16 June):

Every state – and therefore also every Parliament – will want to know in which circumstances its citizens may be brought to justice before the international criminal court. To achieve early ratification of the Statute we must therefore also ensure that it provides clarity without for that matter emasculating the proposed court.

As with the CICC, therefore, of which the PGA is a founding member, the role and significance of PGA and the IPU continue beyond the ICC negotiations to include promoting ratification, implementation and good faith adherence to the Rome Statute.

III. The Like Minded Group: Controlling the Agenda

Building upon its momentum from the PrepCom, the LMG's collective resolve and influence permitted it to maintain control of the procedural and substantive agenda of the final proceedings to their successful conclusion – the Rome Statute's decisive adoption. Though remaining informal, the LMG was the only diplomatic grouping with an "operational strategy" (Benedetti and Washburn, 1999: 30):

All its key meetings were carefully prepared, and its issue subgroups, meetings and briefings for smaller delegations were well organized. The group had also designated issue coordinators early in the meeting. The Like-Minded Group planned and thought through the entire progress of the conference.

The novel challenges and complexities of the final proceedings required a deft navigation of existing institutional procedures, as well as the devising of new ones. The relatively egalitarian and nonhierarchical nature of the proceedings made this concerted stance possible and effective (see Krisch, 2003: 63). LMG members recognized the permissive law-making conditions of this structural milieu, and progressively utilized and combined their sovereign capacities as equal and constructive participants. They collectively

advanced the ICC project as an initiative they broadly identified with, however-much their respective preferences on specific issues may have diverged. Those dynamics reflect the proposition that international law and politics are mutually constitutive, and that there is “a distinct logic or argument through which legal norms and discourse condition actors’ identities, interests, and strategies” (Reus-Smit, 2004b: 273).

LMG members dominated the structure of the negotiations, chairing most of the working groups and controlling the Bureau of the Committee of the Whole, which delicately managed the most contentious issues such as jurisdiction, trigger mechanisms for ICC proceedings, and the Security Council’s role (Schabas, 2001: 16-17). Addressing those and other major issues required blending divergent domestic legal traditions, as well as reconciling complex principles across areas of international law (Kirsch, 1999: 457-458; also see Kirsch and Robinson, 2002a: 68; and Ratner and Abrams, 2001: 209):

Problems of harmonization were not limited to conflicts between different domestic legal systems. The Statute also had to be compatible with international law, including the Charter of the United Nations and specifically the role of the Security Council, humanitarian law, and human rights law.

Cassese stresses the pivotal roles of distinguished diplomats in skillfully crafting a number of compromise formulas, particularly Canadian Philippe Kirsch who chaired the Committee of the Whole (2003: 343; also see Benedetti and Washburn, 1999: 27-28).

Kirsch and Robinson describe that Committee’s central role within the broader mechanics of the negotiations (2002a: 73):

In general, major issues were debated in the [Committee], and were then referred to a specific Working Group for closer discussion and drafting of a comprehensive text. The result of these Working Groups were then transmitted to the full [Committee] for discussion and approval. Approved text received a technical review in the Drafting Committee and then was referred back to the [Committee]. Ultimately, the [Committee’s] responsibility was to attempt to develop a Draft Statute (by general agreement if possible) that could be referred to the Plenary for final adoption.

It was particularly critical that the Committee avoided substantially re-visiting the parameters of *complementarity* developed in the PrepCom (Holmes, 1999: 51-52).

In chapter 3, I examined Nye's conception of *soft power*, which "rests on the ability to shape the preferences of others" (2004: 5). I proposed that the collective LMG became disproportionately influential in pooling and amplifying the capacities and suasion of its respective members during the preparatory stages. I considered how its formulation of 'cornerstone positions' helped coalesce support around the ICC project's core values and objectives. Nye observes: "Since the currency of soft power is attraction based on shared values and the justness and duty of others to contribute to policies consistent with those shared values, multilateral consultations are more likely to *generate* soft power than mere unilateral assertion of values" [my emphasis] (2004: 64). In that sense, the LMG's ideals achieved a heightening momentum approaching the Rome negotiations, which bolstered and fortified its ranks, and also conditioned the overall tenor of those proceedings. Broad consensus regarding the essential correctness and imperatives of the ICC project contributed a sense of moral urgency and duty to the discussions. As the Samoan delegate stressed (UNDPCP-Speeches, 1998: 18 June):

For almost fifty years now, the international community has sought . . . to create a permanent international criminal court. While the need had been acknowledged, sadly the political matching will had not been there. With the passing of the cold war, the political climate is now opportune. Let us not forget that in large measure we are here by the force, indeed, by the authority of world public opinion [and] we must heed their demands and expectations.

Within this context, the LMG ultimately engineered a decisive and positive result that would have been impossible without novel dimensions of multilateral and transnational cooperation, and fundamental commitment to an overarching governance enterprise.

Beyond maintaining its own internal unity – an impressive display in its own right, given the vast complexities and possibilities for disagreement – and bolstered by the CICC’s sophisticated efforts, the LMG effectively sought to address the diversity of concerns expressed by other states (and other actors). Some of those issues and objections were, of course, more fundamental and/or complex than others. It was able to secure France’s support, for example, which had stressed the need for a “good reciprocal relationship” between the Court and the Security Council (UNDACP-Speeches, 1998: 17 June). The LMG also strove to accommodate a range of U.S. concerns, including provisions recognizing the Council’s role and authority under the UN Charter, and a range of safeguards to prevent prosecutorial abuse that I examine in chapter 6 (Nolte, 2003: 74; Brown, 2002: 327-328). Kirsch and Robinson stress (2002a: 90):

It must be emphasized that, although not every position articulated by the United States was reflected in the ICC Statute, the U.S. delegation was in fact exceptionally effective in advancing U.S. views and having them reflected in the Statute. In fact, it appears fair to suggest that the United States had a greater impact on the Statute than any other State . . . Many of these provisions were designed to bolster the effectiveness of the Court. Other positions successfully advocated by the United States will provide extensive safeguards that will prevent the Court from carrying out frivolous investigations or prosecutions or otherwise act inappropriately.

Notwithstanding those diplomatic achievements, however, the U.S. ultimately expressed fundamental objections to the Rome Statute, as I discuss in section IV.

Practical constraints prevented detailed negotiation on an item-by-item basis (Malanczuk, 2000: 78; also see Kirsch and Holmes, 1999: 3; and Kirsch, 1999: 452):

The draft text submitted to the Rome Conference by the Preparatory Committee (PrepCom) was riddled with about 1,400 square brackets, indicating controversial points with quite a number of alternative texts as to complete or partial provisions. Within the limited time available, it was therefore quite clear from the beginning that the outstanding issues could not have been possibly resolved in a systematic manner by many participating states.

Crucial to the LMG’s success, therefore, was its structuring and implementation of a fast-track negotiation process (Benedetti and Washburn, 1999: 28):

With a deadline of five weeks to adopt a treaty, everyone attending the Rome conference knew that time would be a constant factor and have a major influence on the negotiation tactics employed there. They accepted as a given that the chair [Kirsch] would attempt to use time and lack of time as a negotiating tool throughout the conference. Ultimately, the swift pace of the negotiations exhausted delegates and at least weakened otherwise zealous filibusters.

The U.S. was particularly disadvantaged by this approach because it required time-consuming bilateral diplomacy to explain and build support for its positions (Behringer, 2005: 324). Though the U.S. had not articulated a comprehensive pre-Rome platform, perhaps portraying that its demands were flexible, it became clear that it was not inclined to compromise significantly: “According to some diplomats, the United States adopted a duplicitous position during the Rome negotiations: Specifically, it publicly affirmed its general support for the project, but in reality it worked against the ICC behind the scenes” (Nolte, 2003: 80-81; also see Brown, 2002: 330).

As time became an increasing factor in the final week, UN representative Hans Correll appealed for relaxing rigid national positions (UNDCP-Speeches, 1998: 13 July):

Unless a solution on major outstanding issues emerges very soon, there will be difficulties in putting together all of the provisions of the Statute and coordinating them in such a way that the Statute can be ready for adoption later this week. . . . There seems to be emerging an agreed approach that commands wide support. On behalf of the Secretary-General, I plead with those delegations that insist on very firm positions, based on national considerations, to make every possible effort . . . to find common ground.

Kirsch ultimately abandoned the standard UN practice of working from a fluid bracketed text and, after considering responses from two Bureau discussion papers, adopted a package proposal containing compromise provisions across a range of complex and interrelated negotiation points (Kirsch and Robinson, 2002a: 74-75). According to Kirsch and Holmes, the only option to proposing a final package at this juncture would have been to postpone the negotiations to a subsequent conference (1999: 9-10; also see Kirsch and Robinson, 2002a: 75). As Kirsch states elsewhere, however (2001: 6-7):

The only alternative, a deferral of the conclusion of the Conference, was impossible because most delegations were adamant that a statute should be adopted in Rome. They believed that, should a conclusion be deferred, states would be subject to so much pressure after Rome that either the process would not resume or a future statute would be much weaker than what was possible in Rome.

Strigards is even more emphatic about the urgency of the moment (1999: 679):

If the diplomats in Rome had not reached agreement regarding a consolidated final draft . . . it would have been – in the words of the UN – a *retrograde evolution*. Compared to the trials of Nuremberg and Tokyo, we would have been back to ‘square one’. In other words: we could have forgotten about the Court for the coming four decennia. That would have been disastrous for international criminal law.

Again, then, it is instructive to recognize the human and psychological dimensions associated with the ICC negotiations: “State representatives or diplomats are usually conceptualized in international relations theory as empty vessels, neutral implementers of whatever policies their employers devise. In reality, they do of course have opinions, beliefs, even feelings, on the subjects they negotiate” (Glasius, 2006: 45)

There were critics of this procedural departure, however, including Israel, which objected that delegates were denied the opportunity to vote on specific war crimes provisions (discussed below): “The exigencies of lack of time and intense political and public pressure are obligating all of us to by-pass very basic sovereign prerogatives to which we are entitled in drafting international conventions” (UNDCP-Speeches, 1998: 17 July). The procedure was nonetheless broadly supported, including by the European Union, as expressed by Gerhard Hafner (Ibid: 17 July):

Everybody at this Conference made every effort to bridge the gap between opposing views and to reach a positive result even at the last minute. We recognize that the Chairman of the Committee of the Whole [Kirsch] did his utmost to achieve this end. The EU has always expressed its full support for him and the procedure envisaged by him which in our view was the most appropriate to produce a positive result.

Thus it was widely agreed that the unique window of opportunity in Rome could not be forsaken in seeking to further appease ICC opponents and skeptics. That atmosphere was

accentuated by reports of mass atrocities in Sierra Leone (see UN Press Release, 17 June 1998). The Dutch delegate emphasized: “Media reports confront us daily with the atrocities that this permanent International Criminal Court will be set up to address” (UNDCP-Speeches, 1998: 17 June). There was a particular reluctance to make further concessions to the U.S., as other delegations had grown increasingly skeptical of its bargaining sincerity (Nolte, 2003: 77).

As with the Ottawa Process, the operative effect of this package approach was augmented by the prohibition of reservations purporting to limit or otherwise modify States Parties’ obligations under the Rome Statute (1998: Art. 120). Contemporary treaty-making is increasingly characterized by the practice of stipulating reservations, since states may find that a treaty’s clauses are too onerous but nonetheless wish to enter into the treaty (see Cassese, 2005: 173; also see Aust, 2000: 108). The prevailing view in the ICC case, however, was the reverse: states should take legislative (and perhaps constitutional) measures, as appropriate, to comply with the Rome Statute. According to the Hungarian position, reservations “would defeat the object and purpose of the Court and would lead to an unworkable system” (UNDCP-Speeches, 1998: 17 June). Jordan, the only Arab state member of the LMG, likewise warned of “taking away with one hand what the other hand has given” (Ibid: 18 June). As I discuss below, however, the U.S. has identified this provision as amongst the Rome Statute’s major flaws.

The U.S. and India attempted to introduce fundamental amendments on the final day of the conference (July 17), but consecutive Norwegian ‘no action motions’ to leave the package intact carried convincingly (Kirsch and Robinson, 2002a: 77; Strigards,

1999: 672). According to Benedetti and Washburn, that concerted response was “carefully choreographed by the Bureau and the UN Secretariat” (1999: 26). The Committee of the Whole adopted the Statute and referred it to the Plenary for a final meeting that evening. At the Plenary, the U.S. called for a non-recorded vote on the text, apparently confident that states would hesitate to take such an important decision without the diplomatic convention of consensus (Sands, 2005: 56; also see Kirsch and Robinson, 2002a: 77). The result was striking: 120 in favour and 7 against, with 21 abstentions (UN Press Release, 1998: 17 July). The U.S. was one of few dissenting voices in perhaps the “most serious diplomatic defeat the U.S. has suffered since the end of the Cold War” (Nolte, 2003: 71; also see Strigards, 1999: 671). Brown observes: “The result was all the more embarrassing because the United States had raised the diplomatic stakes by warning other states that their relations with [the U.S.] could suffer if they failed to support U.S. proposals on the language of the statute” (2002: 337).

Given that the LMG constituency accounted for only about half of the 120 votes cast in favour of the final package, the decisive result testifies to the effective negotiating tactics and strategies of the ICC project’s proponents, and the broader facilitative dynamics of emerging multilateral norms and modalities. Those aspects together permitted the coalescence of the requisite political support for the ICC, and the crafting of a broadly acceptable instrument for adoption. As Kirsch and Holmes acknowledge, inherent to any viable conception of the Court was its political acceptability (1999: 10):

The draft statute presented by the bureau represented the state of the negotiations to that point and the clear trends that had emerged from the debates and consultations. However, in developing the final package, the bureau maintained the approach it had taken since the beginning of the conference: it sought to attract the broadest possible support for the statute.

This course was not only mandatory under the rules of procedure; it was also essential, in the bureau's view, for the sake of the future court. The bureau was firmly convinced that a strong court required more than strong provisions in the statute. The court would also need widespread political and financial support to ensure its credibility and effectiveness in the world.

Kirsch and Oosterveld consistently argue (2001: 1154; also see Kirsch, 2000: 258; and Kirsch and Robinson, 2002a: 87):

An equilibrium had to be found between two undesirable outcomes: on one hand a statute with weak provisions that no state would oppose but which would make the ICC pointless, and on the other, a statute consisting of highly progressive provisions adopted by only a handful of 'virtuous states'. Politically, either of these alternatives would have spelled the end of the ICC project.

An appropriate balance was indeed achieved between those respective legal and political concerns, as I now consider in section IV, which examines diplomatic factions beyond the LMG and provides a more detailed appraisal of the final vote's composition.

IV. Beyond the Like Minded Group: The Politics of the ICC

Apart from the LMG, there were other smaller diplomatic groupings that tended to be more issue-specific, and therefore, less potent diplomatically (see Kirsch and Holmes, 1999: 4). They were useful to the overall negotiation process, however, in helping to clarify alternative proposals and approaches to outstanding questions (Kirsch and Oosterveld, 2001: 1153). Those factions included the five permanent members of the Security Council (the P-5) which, with the exception of the U.K., were bound principally by a strong envisaged role for the Council (Kirsch and Robinson, 2002a: 71). As discussed in chapter 3, the Council's referral and deferral powers are diluted from the ILC's 1994 draft proposal, and yet remain objectionable to some observers as risking undue political intrusions upon the Court's judicial independence. China, Russia and the U.S. particularly opposed including aggression within the list of crimes, and including nuclear weapons in the list of prohibited weapons in the war crimes provisions (Ibid). As

discussed in chapter 3, aggression is listed amongst the crimes within the Court's jurisdiction, but is undefined and thus not presently within its jurisdiction. Nuclear weapons are not proscribed in the war crimes provisions, as I discuss below.

Most directly opposed to the core P-5 position were states traditionally skeptical of the Council's influence and prerogatives such as India, Mexico and Egypt, though they also advocated for an otherwise generally restricted court (Kirsch and Holmes, 1999: 4). Beyond those trends, Kirsch and Holmes refer to a complex "mosaic of positions that transcended political and regional groupings" (1999: 4; also see Kirsch and Robinson, 2002a: 72). Kirsch and Oosterveld identify some broad diplomatic coherence amongst the Arab group, the Non-Aligned Movement, and the Southern African Development Community respectively (2001: 1153; also see Schabas, 2001: 16). Most developing states advocated for including aggression, and many endorsed prohibiting nuclear weapons (Cassese, 2003: 342). The Caribbean states particularly lobbied to include psychotropic drug trafficking (Ibid). Given the Court's mandate regarding exceptional international crimes, it would have been inappropriate to burden it with such oversight (Crawford, 2003: 122). India, Turkey and Sri Lanka were foremost amongst states seeking to include terrorism (Cassese, 2003: 342). Though that crime was not listed within the Rome Statute, the ICC may assist broader efforts to combat terrorism (see generally Arnold, 2004; Goldstone and Simpson, 2003; Morris, 2004: 480-489).

No factions or individual states expressly opposed the ICC. Most states opposing or abstaining in the final vote were thoroughly engaged in the process, as recognized by Italian Foreign Minister Lamberto Dini (UNDCP-Speeches, 1998: 18 July):

Every country has played a part in drafting the Statute, including those which have declared their unwillingness to sign it. And we understand their reasons. But we earnestly hope that once the nature and the operation of the Court has been more carefully appraised, they will come to a different determination in the not too distant future and will accede to the new Institution.

Because the final vote was not taken by roll call, only declarations made by states indicate which ones supported or abstained from it (Schabas, 2001: 18). China, Israel, and the U.S. stated that they had voted against the statute. India, an apparent abstainer, also registered a markedly critical declaration. According to the unofficial records of most conference observers, the other dissenters were Iraq, Yemen, Libya and Qatar (Benedetti and Washburn, 1999: 27). Mexico, Singapore, Sri Lanka, Trinidad and Tobago, and Turkey indicated their abstention (Kittichaisaree, 2001: 36). A number of Caribbean and Arab states also reportedly abstained (Schabas, 2001: 18).

I now examine in greater detail the declarations made by China, India, Israel and the U.S., which remain noteworthy outliers from the ICC project. Rather than impugning the overall result, however, their respective positions underscore the remarkable consensus that was achieved in the negotiations. According to Wippman (2004: 156):

The arguments of both supporters and critics of the proposed new court evinced a combination of normative, material, and identity-based concerns. Ultimately, those concerns reflected fundamentally divergent conceptions of the role of international law and legal institutions in international relations.

The stances of those states, then, reveal broader and longer-standing governance tensions, rather than shortcomings of the multilateral and transnational dimensions of the ICC negotiations. It is noteworthy that they failed to amass broader supporting constituencies. Russia might have seemed a natural diplomatic ally to the U.S. and/or China, for example, but it declared: “It was a reason for satisfaction that a compromise package has been crafted that the Russian Federation has been able to support” (cited in UN Press

Release, 17 July 1998).³⁶ Kirsch and Robinson stress that the package was able to receive support from both Russia and France (2002a: 76; also see Pace and Schense, 2002: 132).

China's stated concerns were quite fundamental: it opposed the ICC Prosecutor's independent power to initiate investigations, and sought a much more restricted jurisdictional regime by which state consent would necessarily precede any ICC proceedings (cited in UN Press Release, 17 July 1998). It also declared that the Statute should have been adopted by consensus (Ibid). China has subsequently expressed that, as an "active participant" in the negotiations, it is interested in the Court's effective operation, particularly in strictly adhering to the principle of complementarity, limiting its involvement to the gravest international crimes, respecting the UN Charter (especially regarding crimes of aggression), and more generally executing its duties objectively and impartially: "As to the question of acceding to the Statute, the Chinese Government adopts an open attitude and the actual performance of the Court is undoubtedly an important factor for consideration" (China, Ministry of Foreign Affairs, 2008).

India's "fundamental objections" focused primarily upon the Security Council's referral and deferral powers, which purportedly invite political influence and violate international law by permitting the Council to refer situations involving non-States Parties (UNDCP-Speeches, 1998: 17 July) [my emphases]:

Throughout the long process of preparing for this Conference, India negotiated in the expectation that an International Criminal Court will emerge to which we can be a signatory. As the world's largest democracy, which is fortunate to have in addition one of the most independent and far-

³⁶ Russia signed the Rome Statute on 13 September, 2000, but has not yet taken ratification and implementation measures to become a State Party.

sighted judiciaries in the world, whose contribution to the jurisprudence to the rights of individuals is almost unmatched, we would have wanted to be one of the first signatories of the ICC; equally, it should have been in the interests of the ICC to have a country like India on board.

Instead of legislating for the exception, the scope of the Statute has been broadened so much that it could be *misused for political purposes* or through misplaced zeal, to address situations and cases for which the ICC was not intended, and where, as a matter of principle, it should not intrude. What the zealots have achieved, therefore, is a contradiction in terms: A Court framed with Armageddon in mind is set up in utopia.

As mentioned above and in chapter 3, the U.S. had in fact sought an even more prominent Council role, consistent with the ILC's 1994 draft proposal. In this and other respects, that draft statute is the appropriate analytical "point of departure" for evaluating the Rome Statute's substantive integrity as the basis for an independent and effective Court (Kirsch and Oosterveld, 2001: 1152; also see Kirsch and Robinson, 2002a: 88).

India also criticized the failure to prohibit, as war crimes, the threat or use of nuclear weapons or other weapons of mass destruction (UNDCP-Speeches, 1998: 17 July). In fact, the scant treatment of prohibited weapons in the war crimes provisions is a more widely acknowledged shortcoming of the Rome Statute (see Glasius, 2006: 94). In perceiving the sensitivities of nuclear and non-nuclear states respectively to be potentially deal-breaking, the LMG leadership was markedly cautious and uncharacteristically secretive on these matters, whereas the CICC was rendered relatively ineffectual by a lack of cohesion and deliberation (see Glasius, 2006: 107). Proposals to ban nuclear weapons was strongly resisted, since the use or threat of such weapons was not definitively or exhaustively prohibited under existing international law, as mentioned in chapter 2 (Kirsch and Holmes, 1999: 7; Kirsch and Robinson, 2002a: 79-80). Given the political sensitivities of non-nuclear states, conversely, the drafters also omitted "language that would explicitly prohibit the 'poor man's atomic bomb, that is, chemical

and biological weapons [and landmines]” (Schabas, 2001: 49; also see generally Clark, 2004). Kirsch and Robinson acknowledge these combined shortcomings (2002a: 80):

With all other options closed, the Bureau proceeded in the only manner possible: the exclusion of *all* weapons of mass destruction for the time being, with the matter to be reviewed in the future by a review conference. Thus, the Statute now reflects the painful but necessary compromise on the issue – an agreement to disagree and to defer the issue until a review conference.

The ICRC expressed particular regret: “The exclusion of weapons of mass destruction from the Statute is hard to understand” (cited in UN Press Release, 17 July 1998).

Israel’s objections focused principally upon Article 8(2)(b)(iii) which includes, as war crimes, “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” (Rome Statute, 1998). As Judge Eli Nathan explained (UNDCP-Speeches, 1998: 17 July):

Mr. President, it causes me great pain, both personally as a victim of the Nazi persecution of the Jewish people, and on behalf of the Israeli delegation which I proudly head, to have to explain the negative vote of which Israel has been unwillingly obliged to cast today with the regard to the Statute of the International Criminal Court. . . . This was, Mr. President, *inter alia*, our idea! . . .

With this aim in mind . . . Israel has enthusiastically and responsibly, and with a sense of acute sincerity and seriousness, actively participated in all stages of the preparation of the Statute, not imagining, in our wildest dreams, that even this, of all things, would ultimately be blemished and abused as a potential tool in the political war against Israel. Despite our entreaties, during the discussions of the PrepCom as well as here in Rome, this paragraph still remains as a symbol of politicization, sullyng the entire statute.

Israel has subsequently reiterated that that provision is “the clearest example of distorting existing principles of international law, as part of a political agenda” (Israel, Ministry of Foreign Affairs, 2008). It has also expressed concern with the potential for undue politicization of the Court’s operations in the manner of selecting judges, and in the nature of the prosecutor’s independent investigatory powers (Ibid). Having signed the Rome Statute on 31 December, 2000, Israel has indicated that it is “closely following the

development of the court to see whether indeed it will genuinely prove to be impartial and effective, and whether, in light of this, it can ratify at a later stage” (Ibid).

The U.S. has registered the broadest and most fundamental objections. In the immediate aftermath of the vote, the U.S. expressed particular concern with the Court’s potential jurisdiction over nationals of non-States Parties (see UN Press Release, 17 July 1998). As I discuss in greater detail in chapter 6, the ICC may address crimes committed on the territory of a States Parties or by a national of a States Party (Rome Statute, 1998: Art. 12.2). Though this format falls short of ‘universal jurisdiction’, as mentioned above, an American national could be subject to ICC jurisdiction for crimes committed on the territory of a State Party, even though the U.S. is not a State Party. The U.S. also criticized listing aggression as a fourth crime (see UN Press Release, 17 July 1998). Its concerns were subsequently more comprehensively formulated to include the Court’s potential jurisdiction over nationals of non-States Parties, the listing of aggression as a fourth crime and its potential conflict with the Security Council’s authority under the UN Charter, insufficiently-checked prosecutorial powers, the prohibition against reservations to the Rome Statute, and the state sovereignty implications of the Court’s complementary jurisdiction which I discuss in chapter 6 (see U.S. Department of State, 2008c).

According to Nolte, the U.S. was increasingly isolated in the Rome negotiations (2003: 87; also see Brown, 2002: 335):

In the end, the consensus in Rome appears to have been in large part a reaction against the U.S. negotiating position. It was, after all, U.S. concerns that increasingly became the focus of the negotiations. No other state could completely identify with the U.S. position in Rome, as the United States sought to influence the treaty so as to conform to its self-perceived special position.

Thus the ICC experience may have broader implications for the relative role and capacity of the U.S. to determine the substantive governance agenda, and project its preferences within multilateral settings: “For the United States in particular, Rome represents a relatively unusual form of international law-making, in which other states, acting without U.S. consent, can fashion an international institution and international legal rules that could constrain U.S. power” (Wippman, 2004: 187). Indeed, the U.S. has taken the perceived threat of the ICC very seriously. Then-President Clinton signed the Rome Statute in the final hours of his Presidency on December 31, 2000, but ratification was neither undertaken nor contemplated. In a perhaps unprecedented legal maneuver, his successor, President George W. Bush, revoked that signature in May, 2002, which set the stage for a range of controversial legal and diplomatic measures to shield U.S. nationals from the Court’s jurisdiction (see Jones, 2006: 237-242).

V. Expanding the Horizons of Multilateralism and Transnationalism

This chapter has focused upon how the ICC was finally negotiated and established. In conjunction with chapter 3, I have examined how those complex proceedings forged new ground in international law-making. The Rome negotiations built upon the substantive and normative foundations of the preparatory stages. Those earlier phases were characterized by incremental and deliberate processes of consensus-building and compromise, however, whereas the final proceedings were defined by their pace, intensity and dynamism (Benedetti and Washburn, 1999: 34):

Old patterns of agreement, outworn groupings, fears of the powerful, and inhibitions on leadership were weakened or cut down there. For the multilateral making of new global institutions in a new century, there are now new ways to negotiate and reach agreement. They were tested in Rome in the summer of 1998, and they worked.

As Pace and Schense stress, it was a decidedly mixed and concerted effort (2002: 106):

The Rome Statute does not serve as a testament to the power and political will of a single State or even a handful of influential States. Rather the opposite is true: the contributions to the creation of the ICC are almost innumerable. . . . The constructive evolution of coordination amongst governments, and between governments, civil society and international organizations, and the influence of their cumulative contributions to the Court signal a significant success for this new approach to international diplomacy.

Those dense transnational relationships, and their achievement of a major human security-related governance initiative, exemplify several of the most fundamentally changing properties of multilateralism as a whole.

Again, those novelties are particularly salient given the ICC project's substantive complexity, and in light of the historical impediments considered in chapter 2. Then-UN Secretary General Kofi Annan declared at the close of the Rome proceedings (UNDCP-Speeches, 1998: 18 July):

Participants in the Conference have overcome many legal and political problems which kept this question on the United Nations agenda almost throughout the Organization's history. . . . It is an achievement which, only a few years ago, nobody would have thought possible.

Thus Sadat refers to the Rome Conference as a “‘Grotian moment’ in international law – an opportunity to fulfill the normative potential of our time before the political winds change again” (2000: 32; also see Slaughter and Burke-White, 2001). As I stressed in chapter 3, the Court's novel governance properties are fundamentally rooted in its drafting and negotiation. Those experiences were themselves situated within a broader historical juncture for international law and governance. Chayes and Slaughter observe (2000: 245):

The international institutions of the 1990s reflect the new spirit and new problems of these times. These new institutions are often unwieldy and unsatisfying. They challenge common preconceptions and do not fit the analytical categories carried over from the Cold War period. They are born of a complex process in which states, individuals, and NGOs all participate. They are supranational as well as intergovernmental. They are universal and legislative rather than voluntary and contractual. They blur the line between international and domestic law.

As I consider in part II of this study, in juxtaposing itself with the individual and the state, the ICC exemplifies those distinct foundations and trends.

The Rome Statute was devised and negotiated amidst a range of both facilitative and restrictive circumstances – legal, political and practical. Its architects and supporters met the challenge of devising an independent and effective tribunal under enduring constraints. Thus, as Kirsch and Oosterveld argue, a judicious appraisal of its substantive provisions should be undertaken contextually rather than abstractly (2001: 1153):

Satisfactory as the statute is, critics contend that it could have been stronger, judging by its provisions alone. We believe this conclusion is correct but incomplete; it looks at the Rome Statute as an academic project, without taking into account either the current state of international relations or the current structure of the international community. Indeed, one cannot isolate the provisions of the Rome Statute from the realities of multilateral diplomacy.

In a qualitative sense, therefore, the Statute stands as a remarkable legal and diplomatic feat, and testifies to the process and substantive possibilities of emerging norms and modalities of multilateralism and transnational cooperation. Kirsch and Robinson stress: “It took perseverance, effort, and moral suasion by NGOs and like-minded states to alter the perceptions of the international community as to what was achievable and indeed, necessary” (2002a: 89). The depth of its support, moreover, has been demonstrated by its unexpectedly swift ratification. As Alvarez observes, international law is “strewn with the wreckage of package deals that fail to secure the rates of ratification within a reasonable time” (2003: 112). In contrast, and in exceeding prevailing expectations, the Rome Statute attained the requisite sixty States Parties by April, 2002, and thus entered into force on July 1, 2002. I now turn to part II of this study, then, which examines the Court’s novel governance properties as a going concern.

PART II

**THE NOVEL GOVERNANCE PROPERTIES
OF THE ICC PROJECT**

Chapter 5

VERTICAL INTEGRATION AND THE ICC: INDIVIDUALS AS SUBJECTS AND OBJECTS OF INTERNATIONAL LAW AND GOVERNANCE

Contents

- I. Vertical Integration and the ICC
 - II. Individuals as Direct Subjects of the ICC: The Nuremberg Legacy
 - III. Individuals as Ultimate Objects of the ICC: The Human Security Agenda
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 - V. Embryonic Global Citizenship: Legal and Normative Foundations
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I. Vertical Integration and the ICC

In developing this study's core proposition that the ICC is implicative of new directions and expanded possibilities for international law and governance, this chapter focuses upon the status of the individual as a distinct bearer of international legal responsibilities and protections under the Rome Statute. In those respective ways, individual persons are the ICC's principal 'subjects' and 'objects'. The penal orientation of international criminal justice is fundamentally premised upon the principle of 'individual criminal responsibility', as articulated by the International Military Tribunal at Nuremberg and enshrined in the Rome Statute (ILC, 1950: Principle 1; 1998: Art. 25). Individuals, then, are the ICC's direct 'subjects' of regulation. The protective orientation of international criminal justice, conversely, relates to fundamental human rights and humanitarian law safeguards that bypass sovereign states and attach to all persons individually. In a qualitative sense, therefore, individuals are also the ICC's ultimate 'objects' of concern. Those twin *vertical* dimensions together constitute a novel and significant directional exception within the decidedly *horizontal* character of international

law and governance as a whole. They recognize and affirm that persons, in their direct and individual capacities, exist and resonate in ways that fundamentally transcend or extend beyond the states-system. I now provide a brief overview in this introductory section before outlining how the specific propositions of this chapter are structured and developed.

As discussed in chapter 2, under conventional international law spanning the 17th century through the early 20th century, individual persons were essentially subsumed by states. They were at most indirect subjects and objects of international law (Cassese, 2005: 143):

If, in time, individuals acquired some relevance in international affairs, it was mostly as ‘beneficiaries’ of treaties of commerce and navigation, or of conventions on the treatment to be accorded to foreigners, etc. Or else they constituted the ‘reference point’ of States’ powers.

I examined how the post-Second World War trials of the International Military Tribunal at Nuremberg constituted a “paradigm shift”, which involved a fundamental and progressive re-thinking of individual worth, dignity and responsibility (see Clapham, 2003: 33; and Maogoto, 2004: 6). I described how those enlightened understandings were enshrined and developed within international human rights and humanitarian law in the succeeding decades. I observed, however, that during the Cold War, those *vertical* normative developments were not fully reflected within the actual workings of international law and politics. The international system as a whole, then, continued to privilege *horizontal* ordering principles, such as the sovereign equality of states, non-intervention and reciprocity. Though the discourse of individual legal protections increasingly permeated political and diplomatic practices at the rhetorical level, the East-West polarity reinforced the continued sanctity of the states-system and forestalled any

significant movement toward a consistent and effective administration of international criminal justice, much less the establishment of a permanent international criminal tribunal to address the most egregious breaches of those protections.

That normative disjuncture reflects Cassese's conception of a broader paradigmatic tension within international law between the traditional "Groatian" model, which is characterized by a horizontal and decentralized core of rules for the co-existence and relative autonomy of self-interested states, and the new "Kantian" model, which entails a more vertical, comprehensive and centralized regime of international and transnational rules to reflect the interests and values of a global community (2005: 21; also see Broomhall, 2003: 59 & 65). As Cassese describes, some Kantian features have gradually and in some cases awkwardly been "superimposed" onto the Grotian paradigm (Ibid). The disjointed and protracted development of international criminal justice uniquely illuminates the ambiguities and inconsistencies associated with those contending models. As a fundamentally Kantian-like conception, its contours and provinces are not easily reconciled with the prevailing orientation of public international law (Cassese, 2003: 20) [author's emphases]:

Two somewhat *conflicting philosophies* underlie each area of law. International criminal law aims at protecting society against the most harmful transgressions of legal standards of behaviour perpetrated by individuals . . . Public international law, on the other hand, pursues, in essence, the purposes of reconciling as much as possible the conflicting interests and concerns of sovereign states . . .

The protective and penal dimensions of international criminal justice, then, inherently challenge the dominant structural foundation of the states-system. International criminal justice purports to exist and operate above states as the ultimate guardian of individual legal protections, and to scrutinize within states to confront individual persons, including

state officials, as the essential violators of those safeguards. As a formal and permanent institution that transcends states in these fundamental respects, the ICC establishes and occupies a unique sphere within international law and governance. Its *vertical integration* of individuals as its principal subjects and objects is unprecedented and unparalleled within the contemporary architecture of global regulatory authority.

In developing these propositions, this chapter proceeds in four parts. First, I examine the status of individuals as the ICC's direct subjects pursuant to the principle of individual criminal responsibility. I analyze this principle's boundaries and implications, together with the correlative human rights protections accruing to all accused persons under the Rome Statute. Second, I examine the status of individuals as the Court's ultimate objects, given its core concern with international human rights and humanitarian law atrocities. I investigate how the ICC uniquely promotes the fundamental human security of individual persons by punishing and deterring these international crimes, and progressively addressing the involvement and protection of victims and witnesses in its attendant prosecutorial functions. Third, I examine how the Rome Statute uniquely addresses the distinct concerns of women and children in the administration of international criminal justice and in the substantive law itself. Within this context, I consider aspects of the Court's structure and composition, a range of provisions specifically concerning the prosecution of sexual and gender-based offences and offences against children, and the progressive definitions of crimes themselves. Fourth, I draw upon the concept of *global citizenship* to consider how the ICC's vertical dimensions may point to an emerging transnational order that directly binds individual persons with the global community as a whole.

II. Individuals as Direct Subjects of the ICC: The Nuremberg Legacy

As discussed in chapter 2, ‘individual criminal responsibility’ is a fundamental tenet within the Principles of Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (the ‘Nuremberg Principles’) (ILC, 1950: Principle 1). Its enshrinement within the Rome Statute establishes a seamless legal nexus between individual persons and the ICC (1998: Art. 25):

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of this Court shall be individually responsible . . .

Individuals, then, are the ICC’s most direct and consequential ‘subjects’: they are uniquely bound by the Court’s prosecutorial and punitive functions. That codification and institutionalization uniquely affirms that individuals’ discrete actions warrant oversight and sanction within international law and governance. The ICC has declared: “By punishing individuals who commit these crimes, the Court is intended to contribute to the deterrence of such crimes as well as to international peace and security and respect for international justice” (UN-ICC, 2005: Summary). Individuals are subject to criminal responsibility for the following modes of perpetration: committing a crime within the Court’s jurisdiction; ordering, soliciting or inducing the commission of such a crime; aiding, abetting or otherwise assisting in the commission or attempted commission of such a crime; in any other way contributing to the commission or attempted commission of such a crime by a group of persons acting with a common purpose; inciting others to commit genocide (only); and substantially attempting to commit such a crime (Rome Statute, 1998: Art. 25.3; see Cassese, 2003: 179-199; and Kittichaisaree, 2001: 233-257).

The Rome Statute also regulates states, but as vital intermediaries in administering international criminal justice under the complementary framework, as I examine in chapter 6. States are not themselves, in other words, subject to the ICC's essential penal functions. As I discuss in chapter 7, the ICC is the organizational and normative focal point of a broader emerging *program* of enforcement and supporting efforts, including national courts, ad hoc international tribunals, and internationalized or mixed (hybrid) tribunals. It is crucial to recognize in this chapter that the authoritative principle of individual criminal responsibility transcends those collective efforts. Apart from its moral foundations of moral culpability, it also reflects "the theory that personal accountability and punishment will serve as the best deterrent" (Ratner and Abrams, 2001: 17). Again, that rationale uniquely and fundamentally implies that persons, in their direct and individual capacities, are salient actors within international law and governance. Falk identifies this emerging "ethos of criminal accountability" as a major component within a potentially broader trend toward more "humane governance" (1999: 440-441). I consider deterrence issues in my broader prospective discussion in chapter 8.

In many instances, of course, individuals commit international crimes under the guise of the state apparatus, which prompts questions about collective (state) responsibility and how it relates to or coexists with individual criminal responsibility.

Cassese explains (2005: 245; also see Crawford, 2002a: 312-313):

International criminal law has developed as a separate branch from the international law on State responsibility, although overlaps may come about (particularly in the case of genocide and aggression) between individual criminal liability and State responsibility.

A 2007 decision of the International Court of Justice (ICJ) usefully illuminates the relationship and distinction between those respective bases of legal responsibility. The ICJ held, *inter alia*, that Serbia violated its obligation to *prevent* genocide under the Convention on the Prevention and Punishment of the Crime of Genocide in respect of the 1995 massacre of over 7,000 Bosnian Muslims at Srebrenica (ICJ Judgment, 2007: Para. 438).³⁷ In making that finding, the ICJ declared that state responsibility can arise under the Genocide Convention without an individual being convicted of the crime or an associated one (Ibid: Para. 182). It also ruled that Serbia violated its obligation to *punish* genocide by failing to arrest and transfer General Ratko Mladic to the International Criminal Tribunal for the former Yugoslavia (ICTY), which had indicted him for genocide and complicity in genocide (Ibid: Para. 450).

That ruling on state responsibility, then, is distinct from criminal trials held by the ICTY and national courts stemming from the Balkans conflict. As Crawford notes (2003: 16):

The idea that states as such can be subject to criminal process or punishment has gained very little acceptance, and it was deliberately rejected by the ILC [International Law Commission] in its Articles on Responsibility of States for Internationally Wrongful Acts (2001). What the Nuremberg Tribunal seems to have been saying is that the only way of enforcing international criminal law is by punishing the individuals who commit those crimes.

Thus state responsibility continues to exist and develop concurrently with international criminal law. The Rome Statute declares: “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under

³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*. Serbia, then the Federal Republic of Yugoslavia, was found to have been in a position of influence over the Bosnian Serbs who devised and implemented the genocide, and who had declared independence in 1992 as the Republic of Serb People of Bosnia and Herzegovina (later Republika Srpska). Serbia was found not to have itself committed genocide, either through its organs or through persons whose acts would be legally attributed to it [paras 377-415].

international law” (1998: Art. 25.4). Conversely, the ILC’s Articles on Responsibility of States for Internationally Wrongful Acts are “without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State” (2001: Art. 58; see Crawford, 2002a: 312-313). State responsibility, then, remains a component of international justice: “Just as individuals are unable to hide their guilt behind the state, the state should not be permitted to hide its guilt behind the punishment of individuals” (Jorgensen, 2000: 55). The Rome Statute also does not preclude other forms of collective responsibility: “As more and more states adopt legislation to enable co-operation with the new Court, it is quite possible that this legislation is adapted to allow for prosecutions of corporations or other organizations” (Clapham, 2003: 48-49).

The ICC will not necessarily concern itself directly with all persons associated with conduct impugned under the Rome Statute. A case is inadmissible, for example, where it is not of “sufficient gravity” to warrant the Court’s involvement (Rome Statute, 1998: Art. 17.1(d)). As Ratner and Abrams note, “the framers intended the ICC to be a forum for trying major offenders, rather than for pursuing perpetrators of isolated acts falling under the Court’s jurisdiction” (2001: 213; also see Schabas, 2001: 89). In 2006, for example, the ICC Prosecutor considered the possible commission of war crimes in Iraq by nationals of States Parties, but declared that the situation did not meet the gravity threshold, while also noting that national proceedings had been initiated in any event (see ICC-UN, 2006: Para. 31). Former ICTY and ICTR Prosecutor Carla Del Ponte offers two criteria for identifying individuals bearing the highest level of responsibility: the “functional responsibility” of political and military leaders in orchestrating atrocities or being culpably complicit in them; and other individuals who contribute to or encourage

atrocities by “setting the example” through their acts, speech and behaviour (2004: 517). Though the ad hoc tribunals have ‘primacy’ to assert jurisdiction over national courts, in contrast to the ICC’s ‘complementary’ jurisdiction, their experiences have surely informed the ICC Prosecutor’s “policy of targeted prosecution”, which was expressed in the Court’s 2005 annual report to the UN (UN-ICC, 2005: Para. 28). As Brubacher observes: “Selectivity in light of limited resources will be particularly pronounced in the ICC, as the Court has permanent jurisdiction over a wider area and, consequently, over a higher number of potential cases” (2004: 76; also see generally Sarooshi, 2004). Given those practical constraints, the ICC Office of the Prosecutor has contemplated situations involving simultaneous ICC and national proceedings (ICC-OTP, 2003: 3):

The Court is an institution with limited resources. The Office will function with a two-tiered approach to combating impunity. On the one hand, it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.

The principle of individual criminal responsibility also raises issues concerning the use of non-prosecutorial truth-seeking mechanisms, especially if they purport to grant amnesties or pardons (see generally Robinson, 2003; Stahn, 2005; and Hayner, 2002). I examine the legal status of those alternative approaches vis-à-vis the Rome Statute in chapter 7.

As discussed in chapter 2, the Nuremberg Principles include the maxim that states’ internal laws do not relieve individual responsibility for international crimes (ILC, 1950: Principle 2). Government and superior orders also do not relieve such responsibility, provided a “moral choice” is available (Ibid: Principle 4). Under the Rome Statute, then, a person will not be relieved of criminal responsibility unless all three of the following conditions are met (1998: Art. 33.1):

- (a) The person was under a legal obligation to obey orders of the Government or superior in question [under internal law];
- (b) The person did not know that the order was unlawful [under international law]; and
- (c) The order was not manifestly unlawful [under international law].

The Rome Statute further provides that “orders to commit genocide or crimes against humanity are manifestly unlawful” (Ibid: Art. 33.2). The operative effect is that the three conditions, if met, may only relieve individual responsibility for war crimes (see Kittichaisaree, 2001: 268). Those provisions underscore the super-ordinate ICC-individual relationship: the Rome Statute supersedes the internal competence of states as the ultimate basis for determining or relieving individual criminal responsibility.

Also consistent with the Nuremberg Principles, the Rome Statute provides that official capacity and/or immunity is irrelevant in determining individual criminal responsibility (1998: Art. 27; see ILC, 1950: Principle 3):

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

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

In an important respect, then, States Parties have effectively waived fundamental prerogatives associated with the independence and sovereign equality of states (Akande, 2006: 74-76). Here again, the ICC-individual nexus is direct and paramount. Those aspects are integral to the Court’s punishment and deterrence functions: “Since history suggests that international crimes are often the work of state agents, a strategy of prosecuting right to the top of the planning chain will entail attempts to prosecute senior state officials” (Ibid: 74; also see Broomhall, 2003: 21). Also noteworthy are the Rome

Statute's provisions for the responsibility of commanders and other superiors for failing to exercise control properly over forces or subordinates – a unique form of criminal liability for *omissions* (1998: Art. 28; see Cassese, 2003: 203-211; and Cryer, 2004: 236).

The severity and stigma associated with individual criminal responsibility require, as a corollary, that accused persons be provided the rights and protections of generally accepted human rights standards. Particularly given the critiques associated with prior eras of international criminal justice, those principles factored prominently within the Court's drafting and negotiation: "It would have to be seen as legitimate, to comply with standards for the rule of law which we have come to expect from national criminal justice systems" (Crawford, 2003: 125). The ICC has declared (UN-ICC, 2005: Para. 4):

As a judicial institution, the Court is designed to conduct fair, impartial and efficient investigations, prosecutions and trials. Its Statute, Rules of Procedure and Evidence and other supplementary texts include detailed safeguards to ensure the integrity of the Court's proceedings. At all stages of proceedings, the rights of the accused and other actors are guaranteed through both substantive law and procedural mechanisms.

It is noteworthy, however, that, whereas the Court may admit a case on the basis that national proceedings have been improperly conducted with the intent of shielding a person from criminal responsibility, it may not admit a case on the basis that national proceedings have been unfairly conducted to the prejudice of the accused person (see Rojo, 2005: 869). Thus the ICC is not an appellate forum for persons alleging a denial of due process at the national judicial level.

The post-Rome Preparatory Commission was tasked with drafting the Rules of Procedure and Evidence, which were adopted at the first Assembly of States Parties in September 2002 in accordance with the Rome Statute (1998: Art. 51.1). That framework

combines aspects of the Continental (inquisitorial) tradition and the Anglo-American (adversarial) doctrine (Safferling, 2001: vii; also see Cassese, 2003: 22-23; Ratner and Abrams, 2001: 217; and Knoops, 2003: 89). As a “compromise structure”, it leaves ICC judges with considerable discretion in developing the Court’s procedural order (Kress, 2003: 617). Thus international human rights law will continue to shape the criminal process, including the pre-trial inquiry, the indictment, and the trial itself (Safferling, 2001: 366).

Human rights principles have also infused the substantive law and its application. The Rome Statute directs the Court to apply the law as follows (1998: Art. 21.1):

- (a) In the first place, this Statute, Elements of Crimes, and its Rules of Procedure;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world . . .

In addition, the Court “may apply principles and rules of law as interpreted in its previous decisions” (Ibid: Art. 21.2). The following clause is particularly noteworthy for the purposes of this chapter (Ibid: Art. 21.3; see generally Philips, 1999):

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

Also enshrined in Part 2 of the Rome Statute – ‘Jurisdiction, Admissibility and Applicable Law’ – is the fundamental principle of *Ne bis in idem*, which safeguards an accused against being tried twice for the same conduct or offence (Ibid: Art. 20; see generally Van den Wyngaert and Ongena, 2002):

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

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

3. No person who has been tried by another court . . . shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purposes of shielding the person concerned from criminal responsibility from crimes within the jurisdiction of the Court; or

(b) Otherwise not conducted independently or impartially . . . and were conducted in a manner . . . inconsistent with the intent to bring the person concerned to justice.

That civil law concept subsumes the *double jeopardy* common law principle, which only averts repeated prosecutions in the same legal system (Kittichaisaree, 2001: 288-289).

Other noteworthy protections are located in Part 3 of the Rome Statute: ‘General Principles of Law’ (1998: Arts. 22-33). Those provisions reflect an evolutionary trend in the law from “substantive justice” toward “strict legality” (Cassese, 2003: 22; also see Kittichaisaree, 2001: 13-16 and 43). As Cassese explains (2003: 139-141):

Under the former doctrine the legal order must primarily aim at prohibiting and punishing any conduct that is socially harmful or causes danger to society, whether or not that conduct has already been criminalized at the moment it is taken. . . . In contrast, the doctrine of strict legality postulates that a person may only be held criminally liable and punished if at the moment when he performed a certain act, the act was regarded as a criminal offence . . .

The principle of legality includes *Nullum crimen sine lege* (‘no crime without law’), as reflected in the Rome Statute: “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court” (1998: Art. 22.1). The ICC may not, for example, prosecute a person for aggression unless and until the Assembly of States Parties adopts a definition of the crime in accordance with the Rome Statute’s amendment provisions, which I discuss in chapter 8 (Ibid: Art. 5.2). Only conduct subsequent to such adoption, moreover, would be subject to prosecution by the Court.

The principle of non-retroactivity, a logical corollary or extension of strict legality, provides that criminal rules may not address conduct prior to the adoption of such rules (Cassese, 2003: 147). As discussed in chapter 2, the Nuremberg proceedings were somewhat tainted by charges of *retrospective justice* (Overy, 2003: 21):

The most powerful legal objection was never properly confronted. The crimes of which the defendants stood accused were not regarded as crimes when they were committed, with the exception of war crimes as defined under international agreement.

In progressing beyond the Nuremberg model, therefore, the Rome Statute enshrines the principle of *Non-retroactivity ratione personae*: “No person shall be criminally responsible under this Statute for conduct prior to the entry into force of this Statute” [1 July 2002] (1998: Art. 24.1). As I discuss in chapter 7, however, a person may be prosecuted elsewhere for conduct pre-dating the Statute, including by international ad hoc tribunals, internationalized or mixed (hybrid) tribunals, and national courts (see Philips, 1999: 62-63). The crimes within the Court’s jurisdiction are not, moreover, subject to any statute of limitations (Rome Statute, 1998: Art. 29).³⁸

The Rome Statute also enshrines the principle of *Nulla poena sine lege* (“no punishment without law”): “A person convicted by the Court may be punished only in accordance with this Statute” (1998: Art. 23). The ICC may sentence a convicted person to imprisonment for a “specified number of years, which may not exceed a maximum of 30 years” or “a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person” (Ibid: Arts. 77.1(a)&(b)). Within those parameters, and absent a scale of sentences within the Rome

³⁸ See 1970 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity [including Genocide] (also see Kittichaisaree, 2001: 261).

Statute, the ICC is left with “a very broad margin of appreciation” in prescribing sentences (Cassese, 2003: 158; also see Henham, 2003: 85). The international jurisprudence recognizes a range of sentencing goals including retribution, protection of society, rehabilitation of victims and deterrence (Kittichaisaree, 2001: 314; Fife, 1999: 319-320). Though debates about the death penalty were contentious in the Court’s negotiation, Schabas states that its exclusion from the Rome Statute is “an important benchmark in an unquestionable trend towards universal abolition of capital punishment” (2001: 140-141). The Statute’s penalty provisions do not, however, prejudice the application of national laws and penalties (1998: Art. 80). As Kirsch and Robinson acknowledge, that provision is a concession to states concerned that the Statute’s omission of the death penalty might compromise the legitimacy of their national laws (2002a: 86; also see Fife, 1999: 336).

I conclude this section by highlighting other particularly noteworthy protections. Persons under the age of 18 at the time of the alleged criminal conduct are not subject to the Court’s jurisdiction (Ibid: Art. 26).³⁹ Persons have extensive rights during investigations, including the right against compelled self-incrimination, the right “not to be subjected to any form of coercion, duress or threat”, the right to assistance by an interpreter, and the right “not to be subjected to arbitrary arrest or detention” (Ibid: Art. 55.1((a)-(d))). Where there are “grounds to believe that a person has committed a crime”, that person must be informed accordingly prior to being questioned, and has the right to remain silent, to have legal assistance, and to be questioned in the presence of counsel

³⁹ This provision was advocated for by the Children’s Rights Caucus of the Coalition for an International Criminal Court, which I discuss in section IV (see Glasius, 2006: 28; and Saland, 1999: 201).

(Ibid: Art. 55.2(a)-(d)).⁴⁰ Accused persons have a right to trial without undue delay, to conduct the defence in person or through legal assistance, to cross-examine witnesses, to have the assistance of an interpreter, and not to be compelled to testify (Ibid: Art. 67.1(c)-(g)). The Prosecutor must disclose any evidence that might exculpate or mitigate the guilt of the accused, or might affect the credibility of prosecution evidence (Ibid: Art. 67.2). Accused persons are “presumed innocent” and the Prosecutor bears the onus of proving guilt “beyond reasonable doubt” in order to convict (Ibid: Art. 66.3). Grounds for excluding criminal responsibility include intoxication, mental disease or defect, self-defence and duress (Ibid: Arts. 31.1(a)-(d); see generally Bantekas, 2004).⁴¹ Trials will be held in public (Ibid: Art. 64.7). There will also be no trials held *in absentia* (Ibid: Art. 63.1).⁴² There are extensive provisions for appeal and revision (Ibid: Arts. 81-85).

III. Individuals as Ultimate Objects of the ICC: The Human Security Agenda

In 1994, the annual Human Development Report of the UN Development Program (UNDP) appealed for a fundamental re-casting of the concept of ‘security’ to emphasize the essential security of people, rather than of territorial states: “It is now time to make a transition from the narrow concept of national security to the all-encompassing concept of human security” (1994: 24). Behringer captures the essential implications of that expression (2005: 308; also see Fierke, 2002: 129):

⁴⁰ The Court has established a list of defence counsel, and an Office of Public Counsel for the Defence to assist defence teams (see UN-ICC, 2006: Para. 14).

⁴¹ A mistake of law or a mistake of fact may be a ground for excluding criminal responsibility if it negates the mental element required by the crime or, in the case of mistake of law, as provided for in article 33 (‘Superior orders and prescription of law’) which I discussed above (Rome Statute, 1998: Art. 32.1-2).

⁴² Where an accused “continues to disrupt the trial”, however, the Court may, in “exceptional circumstances”, remove the accused and provide measures for the accused to observe the trial and instruct counsel from outside of the courtroom (Rome Statute, 1998: Art. 63.2).

The UNDP's recommendations reflected the perspective of the 'widening' school of security studies. The widening school recognizes, first, that actors other than the state, such as individuals or nations, may also serve as referent objects of security; and second, that threats to security may appear in non-military as well as military forms.

The ICC uniquely embodies the expanded and re-oriented governance agenda implied by those enlightened propositions. It is concerned with an exceptional category of offences constituting "the most serious crimes of concern to the international community as a whole": genocide, crimes against humanity, and war crimes (Rome Statute, 1998: Art. 5.1). The Court seeks to denunciate, contain, prosecute – and most importantly deter – such egregious affronts to individual dignity, autonomy and well-being. At its most essential level, then, the ICC aims to safeguard the fundamental *human security* of individual persons. As discussed in chapter 1, those international (or global) crimes are characterized not by their contingent trans-boundary dimensions, but by the "directness and gravity of their assault upon the human person, both corporeal and spiritual" (Ratner and Abrams, 2001: 13; also see Broomhall, 2003: 23). Their global character or resonance, then, is normative rather than territorial in nature. They are also often committed by government authorities against their own populations. Individuals in their own capacities, then, and not as citizens or residents of states, are the Court's essential or ultimate objects of concern. As a formal and permanent institution with this transnational protective mandate, the ICC represents a novel and significant directional shift in the scope and priorities of international law and governance.

Human security-related considerations have infused the jurisprudential development of substantive international crimes, as progressively codified in the Rome Statute. The ad hoc tribunals have addressed some residual ambiguity from the Nuremberg proceedings by definitively establishing that crimes against humanity may

exist as self-standing offences without any nexus to armed conflict or war crimes (Clapham, 2003: 43; Cassese, 2003: 64; Kittchaisaree, 2001: 94-95; McCormack, 2004: 201). Under the Rome Statute, crimes against humanity encompass a range of acts such as murder, extermination, enslavement, deportation or forcible transfer of population, torture, persecution, apartheid, and various forms of sexual violence “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (1998: Art. 7.1). The Statute further clarifies (Ibid: Art. 7.2(a)) [my emphases]:

“Attack directed against any civilian population” means a course of conduct involving the multiple commission of [such] acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

Those crimes are typically committed by individuals in an official capacity, but may be authored by private actors with the implicit approval or encouragement of government policy (Cassese, 2003: 83; Robertson, 2002: 358). In collapsed state situations, an organization exercising “the highest de facto power and control” may fulfill the contextual policy element (Knoops, 2003: 37; also see Ratner and Abrams, 2001: 68). The term ‘attack’ does not necessarily imply military involvement (Knoops, 2003: 33). The phrase ‘with knowledge of the attack’ is, however, a requisite element of the offence: an offender must commit such acts with awareness that they form part of a broader large-scale or systematic context (Cassese, 2005: 442).

Victims of crimes against humanity may or not be nationals or residents of the very state “whose authorities order, approve, or condone” the attack (Cassese, 2003: 91). As characterized by Cassese, these are “*particularly odious offences* in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one

or more human beings” [author’s emphases] (Ibid: 64). The ICTY has similarly described them as “serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health or dignity” (cited in Ratner and Abrams, 2001: 77). Beyond the enumerated conduct, crimes against humanity may also encompass “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health” (Rome Statute, 1998: Art. 7.1(k)).

As mentioned in chapter 2, the ICTY has also declared that war crimes may occur not only within the context of inter-national armed conflict, but also in internal conflict situations (Kittichaisaree, 2001: 326; also see Cassese, 2003: 47; Cassese, 2005: 437; and Rowe, 2004: 203). The ICC drafters embraced that progressive development, notwithstanding the concerns of some delegations that including war crimes committed during internal armed conflicts unduly intrudes upon state sovereignty (see Kirsch and Robinson, 2002a: 79). The Rome Statute, then, enumerates and distinguishes respectively between war crimes committed in “international armed conflict” situations (1998: Art. 8.2(a)&(b)) and war crimes perpetrated within the context of “armed conflict not of an international character” (Ibid: Art. 8.2(c)&(e)). Those latter provisions do not, however, apply to mere “internal disturbances and tensions” (see paragraphs (d) & (f)). As a further concession to state authority, the Statute provides: “Nothing in paragraph 2(c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means” (1998: Art. 8.3; see Robertson, 2002: 364). In any event, the Statute’s progressive distinction and codification of war crimes in non-international armed conflict

situations reflects “the reality that most of the present-day atrocities are ethnic conflicts committed within the territory of a single State” (Kittichaisaree, 2001: 326).

In an important sense, the rationales diverge for those respective branches of war crimes: whereas the laws of international armed conflict are “rooted in notions of reciprocity” between states, laws governing internal armed conflict are more akin to crimes against humanity in reflecting global “community concerns” with protecting individuals *per se* (Cassese, 2003: 65; Cassese, 2005: 420). In either context, however, armed conflict poses marked human security threats (Ratner and Abrams, 2001: 80):

Although states at peace have shown themselves quite capable of committing gross abuses of human rights, the hatred, tension, and upheaval inherent in armed conflicts and, in particular, civil wars, creates a fertile ground for horrendous attacks on the dignity of the individual.

According to Axworthy, “the predominance of intrastate wars has altered traditional conceptions of security and international order” and called into question “the most rudimentary assumptions underlying international relations” (2004a: 248). The Rome Statute constitutes a progressive recognition and response within international law and governance: “By this measure, the ICC represents the first bona fide institutional expression of human security” (Ibid: 252).

The crime of genocide also exists independently of armed conflict, international or otherwise (Cassese, 2005: 443; Kittichaisaree, 2001: 71). As discussed in chapter 2, what is now recognized as *genocide* was prosecuted at Nuremberg under the broader rubric of *crimes against humanity*. It was subsequently established as a distinct atrocity under the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. As with crimes against humanity, genocide encompasses “very serious offences that

shock our sense of humanity in that they constitute attacks on the most fundamental aspects of human dignity” (Cassese, 2003: 106). What most fundamentally distinguishes genocide from crimes against humanity is its “special” or “aggravated” intent requirement (Ibid: 106; also see Kittichaisaree, 2001: 72; and Ratner and Abrams, 2001: 35-36). Genocide, then, means the (intentional) commission of acts such as killing members of a group, causing serious bodily or mental harm to members of a group, and imposing measures to prevent births within a group “with [additional and specific] intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” [my emphasis] (Rome Statute, 1998: Art. 6; see generally Triffterer, 2001; and Arnold, 2003). Thus genocide is distinct from other human rights atrocities: “The victim of the crime of genocide is the group itself and not the individual” (Kittichaisaree, 2001: 69; also see Cassese, 2003: 103). That collective dimension does not, however, detract from its fundamentally human security-related nature, and the vertical relationship between the ICC and victims or potential victims. Genocide may be committed within a limited geographical area or region (Kittichaisaree, 2001: 71; Cassese, 2003: 104). Though not an element of the offence per se, it is typically orchestrated by state agents and/or pursuant to government policy (Cassese, 2003: 106). The ICTY has characterized genocide as “the crime of crimes”, which underscores its fundamentally ‘global’ nature (Cassese, 2003: 100; and Byron, 2004: 144).

Taken together, those progressive definitions of crimes implicitly dislodge the concept of *security* from its conventionally tight association with matters of inter-national war and peace. They correspondingly reflect and address the more fundamental *human*

security of individual persons as the ICC’s principal beneficiaries. Thakur observes (2005: 118):

In the traditional framework, security is viewed in relation to wars between countries. . . . In contrast, human security puts the individual at the centre of the debate, analysis, and policy. He or she is paramount, and the state is a collective instrument to protect human life and enhance human welfare. The fundamental components of human security – the security of *people* against threats to personal safety and life – can be put at risk by external aggression, but also by factors within a country, including ‘security’ forces.

The Rome Statute’s Preamble appropriately recognizes that international atrocities “threaten the peace, security and well-being of the world” (1998: Para. 3). As discussed, however, the ICC is ultimately concerned with protecting individuals in their most immediate and essential capacities, including as members of vulnerable sub-state or trans-state constituencies. That progressive transnational guardianship fundamentally distinguishes the ICC from other formal governance institutions. As I further discuss in chapter 8, the ICC constitutes a vital component in developing and implementing a comprehensive and integrated human security agenda on a global scale.

Human security-like considerations are also reflected in the administration of justice under the Rome Statute, which includes a range of innovative provisions for the involvement and protection of victims and witnesses. Those progressive features constitute an additional human security-related dimension to the ICC: they aim to safeguard vulnerable persons against further trauma and threats in the actual investigation and prosecution of international crimes. As discussed in chapter 3, the Like-Minded Group of states’ ‘cornerstone positions’ for an effective court included the recognition of victims’ experiences, particularly of women and children. The Coalition for an International Criminal Court (CICC) also lobbied strenuously for strong victim and

witness provisions. At the Rome negotiations, Fiona McKay of the CICC's Victims

Rights Working Group declared (UNDCP-Speeches, 1998: 16 June):

The establishment of an international criminal court . . . is itself an important symbol for survivors of crimes. But punishing individuals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs. There is increasing recognition at both international and national levels of the need to ensure that criminal justice does take account of victims' rights.

Victims have a wide range of needs which must be met if the process of healing and reconciliation is to take place. They need to have the opportunity to speak the truth about what happened to them, however painful that might be. They also need to hear the truth: to receive answers, and official acknowledgement concerning the violations. They need to be protected from further harm. They need to be involved in the judicial process. And they need compensation, restitution and rehabilitation.

The following provisions within the Rome Statute testify to those distinct imperatives and reflect lessons learned from both international and national criminal justice settings.

In order to safeguard all witnesses and victims and facilitate their participation in ICC proceedings, the Rome Statute directs the Court to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” (1998: Art. 68.1). As I discuss in section IV, those accommodations have particular application to cases involving sexual or gender-based violence and/or crimes against children. The Prosecutor may also take special discretionary measures restricting the disclosure of evidence and information to the accused prior to trial if the Rome Statute's normal disclosure requirements “may lead to the grave endangerment of the security of a witness or his or her family” (Ibid: Art. 68.5). The Court may penalize the following conduct as an offence against the administration of justice: “Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness [and] retaliating against a witness for giving testimony” (Ibid: Art. 70.1(c)).

A Victims and Witness Protection Unit (the Unit) has also been established within the Registry, as mandated by the Rome Statute (1998: Art. 43.6):

This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.

Here the ICC expressly recognizes the encounters (and shortcomings) of the ad hoc tribunals: “Experience from [the ICTY and ICTR] has shown how crucial it is for any international criminal tribunal to arrange for the protection and assistance of victims and witnesses that appear before the Court so as to contribute to the establishment of truth” (ICC–VW, 2008; also see Jorda and de Hemptinne, 2002: 1389). The Unit may “advise the Prosecutor and the Court on appropriate protective measures, arrangements, counseling and assistance as referred to in article 43, paragraph 6” [above] (Rome Statute, 1998: Art. 68.4). In addition to providing direct protection and psychological support to victims and witnesses, the Unit provides advice, training and assistance to other parts of the ICC to ensure the safety and well-being of victims and witnesses (ICC–Fact Sheet, 2008b). States Parties are themselves required, as part of their broader international cooperation and judicial assistance obligations (which I discuss in chapter 6), to assist with facilitating the voluntary appearance of witnesses before the Court and with protecting victims and witnesses (Rome Statute, 1998: Art. 93.1(e) & (j)). The Unit is also tasked with negotiating agreements with states for the resettlement of vulnerable victims and witnesses (ICC–VW, 2008).

The Rome Statute also progressively affirms the distinct standing of victims: “Where the personal interests of the victims are affected, the Court shall permit their

views and concerns to be presented and considered” at appropriate stages of the proceedings (Ibid: Art. 68.3). The ICC has declared (ICC–VW, 2008):

One of the great innovations of the Statute of the International Criminal Court and its Rules of Procedure and Evidence is the series of rights granted to victims. For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court. Participation before the Court may occur at various stages of proceedings and may take different forms, although it will be up to the judges to give directions as to the timing and manner of participation.

Those provisions fundamentally acknowledge that “victims have their own distinct interest in international prosecution that cannot be satisfactorily represented by another party”, and are meant to remedy the shortcomings of the ad hoc tribunals which “took account of victims solely in their role as witnesses” (Haslam, 2004: 320). According to Gray, the infusion of victim’s rights and witness protections represents a “paradigmatic shift of the trial process”, such that fair trial considerations are no longer exclusively associated with the guarantee of due process to the accused (2004: 302).

The Rome Statute also directs the ICC to “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation” (1998: Art. 75.1). The Court may make an applicable order directly against a convicted person (Ibid: Art. 75.2). The ICC has declared: “For the first time in the history of humanity, an international criminal court has the power to order an individual to pay reparation to another individual” (ICC–VW, 2008). States Parties must cooperate with such orders by freezing and seizing assets within their respective jurisdictions (see Rome Statute, 1998: Art. 109). ICC prosecutions do not preclude corresponding civil litigation in national courts: “Nothing in [Article 75: Reparations to victims] shall be interpreted as prejudicing the rights of victims under national or international law (Ibid: Art. 75.6). U.S. courts have been particularly innovative in

drawing upon domestic statutes such as the Alien Tort Claims Act and the Torture Victim Protection Act to adjudicate civil claims stemming from human rights violations committed abroad (see Ratner and Abrams, 2001: 240-248; Murphy, 2004: 98-101; and Byers, 1999: 72-73). In fact, those courts have too often in the past provided the only avenues of justice and redress for victims: they have “acted on behalf of the international community at large to vindicate rights pertaining to human dignity [and proclaim] fundamental human values” (Cassese, 2005: 393). Ratner and Abrams note: “While civil suits do not lead to the same degree of accountability as a criminal process, they do offer a way of seeking justice and represent one form of authoritative adjudication of legal issues relating to human rights violations” (2001: 247; also see Cassese, 2003: 448-449). U.S. courts have based some recent decisions upon criminal law principles derived from the ad hoc tribunals’ jurisprudence, reflecting a progressive “osmosis between civil and criminal litigation” (Cassese, 2003: 448-449).

The Assembly of States Parties has also established a Trust Fund for the benefit of victims and their families, as mandated by the Rome Statute (1998: Art. 79.1). The ICC has declared: “Providing justice to these victims is important. But so too is providing them with help and compensation to enable them to rebuild lives often shattered by conflict” (ICC–Fact Sheet, 2008a). Funds are derived from fines, forfeiture and awards of reparation ordered by the Court against convicted persons, and from external sources such as governments, international organizations and individuals (Ibid). A Victims’ Participation and Reparation Section assists victims with applying for participation and representation before the Court and for reparations (ICC–VW, 2008).

The ICC has recognized the need for effective outreach strategies to further the objectives of those provisions: “The Court has developed a network of reliable intermediaries, as well as cooperation with the United Nations, in order to reach out to victims and to inform them of their rights” (UN-ICC, 2006: Para. 37). The Office of Public Counsel for Victims also provides assistance and support to victims and their legal representatives concerning participation and reparations (ICC–VW, 2008). The ICC has declared (Ibid):

The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is this balance between retributive and restorative justice that will enable the ICC not only to bring criminals to justice but also to help victims themselves obtain justice.

As Oosterveld observes, those features are particularly relevant to victims of gender-based crimes: “While these articles on victim participation and reparations do not deal explicitly with victims of gender-related crimes, they are particularly significant for these victims as they have traditionally been excluded from international criminal law and many common law processes, except when testifying as witnesses” (1999: 41). I now turn to section IV, then, which examines the Rome Statute’s specific provisions respecting women and children.

IV. Women, Children and the ICC: Inclusiveness and Sensitivity

The Rome Statute is uniquely progressive in addressing the distinct concerns of women and children in international criminal justice. Those features recognize that women and children have particular vulnerabilities within the administration of justice, as well as heightened exposure to certain types of international crimes. At the Rome negotiations, UNICEF Executive Director Stephen Lewis stressed the “very real and

pressing concern that the rights of children and of women, as victims, witnesses, and as manipulated and abused participants, are all recognized and appropriately handled by this legal mechanism” (UNDCP-Speeches, 1998: 18 June). Perhaps more so than any other dimension of the Rome Statute’s drafting and negotiation, these novel provisions were inspired and informed by the ad hoc tribunals’ jurisprudence and operational encounters, particularly their glaring epistemic revelations concerning rape and other sexually-based offences (see Arbour, 2003: 201; and Cassese, 2003: 78-79). As Oosterveld observes, those tribunals have addressed the “historical invisibility” of women in international criminal justice, and their decisions helped ensure that “past mistakes” were avoided in the drafting of the Rome Statute (1999: 38; also see Booth, 2003: 166; and Bedont and Martinez, 1999: 65). Former ICTY and ICTR prosecutor Lousie Arbour also stresses the influential role of domestic legal systems (2003: 202):

I believe that the prosecution of sexual violence on the international scene could not have happened without the immense progress that has been made throughout the Western World [in liberal democracies]. In developing and modernizing our rules of substantive law and evidence, we have developed a new method for denouncing sexual violence, prosecuting it and punishing it appropriately. I don’t think that it’s a coincidence that sexual violence was not prosecuted at Nuremberg, but is at the forefront of the international prosecution agenda.

The Rome Statute’s gender-sensitive features, then, perhaps constitute some consolation in the regrettably protracted road from Nuremberg to the ICC: they likely would not have been secured or perhaps even conceived of in prior eras of international criminal justice.

The Rome Statute’s inclusiveness and sensitivity also reflects and affirms broader inroads achieved by the human rights and women’s rights movements within international law and governance (Booth, 2003: 166; also see Kittichaisaree, 2001: 326). According to Bedont and Martinez, the momentum generated by the 1993 World Conference on Human Rights in Vienna and the 1995 Fourth World Conference on

Women in Beijing, together with the experiences of the ad hoc tribunals, provided “an opportune time to lobby for an ‘engendered’ statute for an international criminal tribunal” (1999: 66; also see Kirsch and Oosterveld, 2001: 1150; and Glasius, 2006: 32). Keck and Sikkink have more generally observed (1998: 169; also see Steans, 2002: 62-63):

International conferences did not create women’s networks, but they legitimized the issues and brought together unprecedented numbers of women from around the world. Such face-to-face encounters generate the trust, information sharing, and discovery of common concerns that gives impetus to network formation.

The ICC negotiations, then, exemplified the mobilization, coordination and influence of women’s networks on a global scale. In incorporating many of the broader aspirations contained in the declarations of those earlier conferences, as well as building upon the experiences of the ad hoc tribunals, the Rome Statute “marks a great advance in the gender sensitiveness of international law” (Glasius, 2006: 112).

As mentioned in chapters 3 and 4, women’s and children’s issues factored prominently within the policy platforms of the Like-Minded Group of states (LMG) and the Coalition for an International Criminal Court (CICC). Within the CICC, the Women’s Caucus for Gender Justice was formed during the Preparatory Commission proceedings in 1997, and was very visible and effective in the Rome proceedings (see Glasius, 2006: 80-82). By then, it represented approximately 200 women’s organizations from all regions of the world (Bedont and Martinez, 1999: 66). It was “able to exert pressure through its members’ presence as NGO observers during the treaty negotiations as well as through national-level supporters lobbying government officials at home” (Ibid: 79). According to Glasius, there was a “strong overlap in values and aspirations” between the Women’s Caucus and the LMG (2006: 82). Oosterveld similarly observes (1999: 39):

Sympathetic governments responded by introducing gender-sensitive articles into the draft Statute regarding the definition of crimes, protection of victims and witnesses and selection of judges and staff. This cooperative partnership . . . was successful, and by the time the draft Statute was sent to Rome, it contained important provisions relating to gender-sensitive justice, many without brackets, and received relatively few objections from unsympathetic states.

The CICC's Children's Rights Caucus was also particularly active and well-received in the Rome negotiations (see Glasius, 2006: 28 & 112). In the balance of this section, then, I examine the Rome Statute's unique provisions respecting the Court's composition, the protection of women and children as victims and witnesses in ICC proceedings, and the progressive definitions of crimes which aim to safeguard those vulnerable constituencies.

As for the Court's composition, the Rome Statute directs States Parties to take the following considerations into account in selecting judges (1998: Art. 36.8(a)):

- (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographic representation; and
- (iii) A fair representation of female and male judges.

According to Bedont and Martinez, the international community has acknowledged the critical need for the participation of women within the administration of justice, not only to achieve gender equality as a distinct end in itself, but also to ensure that gender-based crimes are duly investigated and prosecuted (1999: 76; also see Steains, 1999: 376):

The ICTY and ICTR are case studies on why it is so crucial to include women as well as men with appropriate expertise in international bodies charged with investigating war and conflict situations. The gradual shift toward taking rape and other sexual crimes seriously and investigating them zealously can be traced to the participation of women in the ICTY and ICTR as investigators, researchers, judges, legal advisors, and prosecutors.

As of 1 March, 2008, seven of the eighteen ICC judges were females (ICC-Chambers, 2008). The Rome Statute also directs States Parties to "take into account the need to

include judges with legal expertise on specific issues, including . . . violence against women and children” (1998: Art. 36.8(b)).⁴³

As discussed, the ICC is concerned with safeguarding all victims and witnesses in its proceedings. Within this context, the Rome Statute is particularly attentive to the distinct vulnerabilities of women and children (1998: Art. 68.1) [my emphases]:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In doing so, the Court shall have regard to all relevant factors, including *age, gender . . .* and health, and the nature of the crime, in particular . . . where the crime involves *sexual or gender violence or violence against children*. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

As an “exception to the principle of public hearings”, the Court may “conduct any part of the proceedings in camera and allow the presentation of evidence by electronic or other special measures” (Ibid: Art. 68.2). Those protective accommodations are presumptively applicable, moreover, in cases involving a victim of sexual violence or a child who is a victim or witness (Ibid).

The Prosecutor is also required to “appoint advisors with legal expertise on specific issues including . . . sexual and gender violence and violence against children” (Ibid: Art. 42.9). In conducting investigations and prosecutions, the Prosecutor must “respect the interests and personal circumstances of victims and witnesses [including age, gender and health] and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children” (Ibid: Art. 54.1(b)). The Victim and Witness Protection Unit, discussed above, must also include

⁴³ Three particularly noteworthy judges with such expertise are First-Vice President, Judge Akua Kuenyehia of Ghana, Judge Navanethem Pillay of South Africa, and Judge Fatoumata Dembele Diarra of Mali (ICC-Chambers, 2008).

“staff with expertise in trauma related to crimes of sexual violence” (Ibid: Art. 43.6).

Again, the ad hoc tribunals’ experiences have been instructive. Arbour recalls the “tremendous difficulties” involved with protecting victims, particularly in the field where social services and healthcare were lacking, especially in Rwanda (2003: 204).

Beyond the Court’s composition and the administration of proceedings, the Rome Statute also contains a range of progressive definitions and substantive penal provisions that recognize the distinct susceptibility of women and children to certain types of international crimes. As mentioned in chapter 4, the Rome negotiations were markedly contentious concerning the respective definitions of ‘gender’ and ‘forced pregnancy’. The Rome Statute constitutes the first time that ‘gender’ has been used and defined in an international criminal law treaty (Oosterveld, 2005: 55). It provides as follows (Rome Statute, 1998: Art. 7.3):

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

Oosterveld acknowledges that “this oddly worded and circular provision emerged from difficult and highly contentious negotiations in which the term *gender* served as a lightning rod for conservative concerns” with any language that might legitimize homosexuality (2005: 56; also see Bedont and Martinez, 1999: 74; and Robertson, 2002: 360). The second sentence reportedly “gave comfort to those opposed to ‘gender’ because they saw it as reaffirming the ‘two sexes, male and female’, while those supportive felt that it was harmless because it reaffirmed the valuable sociological reference to ‘context of society’” (Oosterveld, 2005: 65). According to Oosterveld, that provision does in fact draw a socially significant distinction (1999: 40):

The use of the word ‘gender’ rather than ‘sex’ throughout the Statute is important, as ‘sex’ refers strictly to biological differences between men and women. ‘Gender’, on the other hand, refers to the ‘context of society’, which reflects socially-constructed differences between men and women and is therefore more inclusive.

Thus Oosterveld anticipates that the Court will progressively distinguish ‘gender’ from ‘sex’: “The ICC will likely understand the ‘context of society’ as equal to ‘socially constructed’ and draw its list of indicators of ‘context of society’ from existing U.N. definitions of ‘gender’ which are broad, multifaceted and cross-cutting” (2005: 82). As I discuss below, that definition is particularly significant because ‘gender’ is amongst the grounds by which persecution may constitute crimes against humanity.

Due to strong resistance from socially conservative constituencies, which opposed any supposed legitimization of abortion, the crime of ‘forced pregnancy’ was almost dropped from the Rome Statute in the final negotiations (see Oosterveld, 1999: 39; and Steins, 1999: 365-369). Bosnia and Herzegovina in particular, however, lobbied strenuously and successfully for its codification as a distinct legal offence from rape and confinement (see Oosterveld, 1999: 39; and McCormack, 2004: 196). Bedont and Martinez stress: “It was important to separately identify other sexual and gender crimes in order to recognize the distinct characteristics of the different crimes [and] acknowledge the aggravating harm caused to the victim” (1999: 72). Thus the Rome Statute is the first international treaty that specifically lists the crime of ‘forced pregnancy’ (Ibid; also see Cassese, 2003: 94). It provides as follows (Rome Statute, 1998: Art. 7.2(f)):

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

Oosterveld also stresses the Rome Statute’s progressive recognition of ‘sexual slavery’ as a distinct offence: “It was not only an obvious codification of a specific kind of slavery

increasingly recognized as a major problem worldwide, but it was also a contemporary and more correct way to describe certain harms that might otherwise have been narrowly referred to as ‘enforced prostitution’ in an earlier era” (2004: 608).

Crimes against humanity, then, include the following sexually-based acts “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (Rome Statute, 1998: Art. 7.1):

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

Given the broader challenges associated with consolidating and codifying crimes against humanity under the Rome Statute, McCormack states that the “unprecedented and extensive list of specific sexual offences that may constitute crimes against humanity is arguably the single most significant development” (2004: 195).

Apart from those sexually-based offences, crimes against humanity also include the following acts (Rome Statute, 1998: Art. 7.1):

(c) Enslavement;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [as defined above], or other grounds universally recognized . . .;

‘Enslavement’ is progressively defined as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children” (Ibid: Art. 7.2(c)). ‘Persecution’ is defined as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity” (Ibid: Art. 7.2(f)). The Rome Statute provides the first codification of gender persecution as a crime against humanity (Oosterveld, 2006: 49; also see

Oosterveld, 1999: 40; Bedont and Martinez, 1999: 73; and Cassese, 2003: 94). Here Oosterveld observes the influence of international refugee law, which has recognized gender-related persecution since 1985 and should further guide the ICC in developing the jurisprudence within international criminal law (2006: 50).

The Rome Statute's war crimes provisions include the following acts when committed in international armed conflict (1998: Art. 8.2(b)):

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, . . . enforced sterilization, or any other form of sexual violence also constituting a breach of the Geneva Conventions.

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.⁴⁴

Those provisions are closely mirrored in the sections addressing war crimes in non-international conflict situations (Ibid: Art. 8.2(e)(vi)&(vii)). According to Bedont and Martinez, therefore, the Rome Statute reflects “a mainstreaming of women’s rights into the normative structures of international humanitarian law [which] had previously marginalized women’s rights” (1999: 79). The crime of child recruitment, moreover, is not listed in the ICTY and ICTR statutes, and thus represents a progressive codification of customary law (Smith, 2004: 1141; also see Glasius, 2006: 112). In May 2004, the Special Court for Sierra Leone, which I discuss in chapter 7, issued the first ever indictments by an international criminal tribunal for that offence (see Smith, 2004: 1140). Thomas Lubanga Dyilo of the Democratic Republic of Congo, the first person arrested by the ICC (March 2006), is also the first person to be charged with this crime by the Court.

⁴⁴ The Children’s Rights Caucus of the Coalition for an International Criminal Court had advocated for the age of 18 (see Glasius, 2006: 28).

It has been observed that crimes against children and gender-based violence in armed conflict are not only increasingly recognized, but have in fact become more prevalent. At the Rome negotiations, Eva Boenders of the CICC's Caucus for Children's Rights stated (UNDCP-Speeches, 1998: 15 June):

Evidence shows that in today's armed conflicts children are increasingly the victims of genocide, crimes against humanity and serious violations of the laws and customs of war. Children are often deliberately targeted as part of a campaign to terrorize, subjugate and destroy entire communities and peoples.

At a major 2004 conference on gender justice in post-conflict situations, UN Deputy Secretary-General Louise Fréchette similarly declared (UN-DSG, 2004):

We know from our experience of modern conflict that women and girls suffer its impact increasingly and disproportionately. They are usually neither the initiators of conflict nor the wagers of war, and yet they are specifically targeted, often as a way to humiliate the adversary and break the morale and resistance of whole societies.

The Rome Statute's war crimes provisions, then, are a progressive response to the distinct susceptibilities of women and children in conflict situations.

Finally, though the Rome Statute's genocide provisions do not explicitly include sexual violence, the ICTR has ruled that "rape and other forms of sexual violence constitute genocide as long as they were committed with intent to destroy a particular group" (see Oosterveld, 1999: 40; also see Bedont and Martinez, 1999: 76; Askin, 2003: 318-321; and Kittichaisaree, 2001: 83-84). Overall, the ICC is equipped to address a range of international crimes specifically affecting women and children, including some offences which may have evaded prosecution and/or appropriate legal characterization in the past. That substantive penal jurisdiction, together with the Rome Statute's other progressive features I have examined in this section, uniquely incorporate and affirm the distinct situation of women and children within international law and governance.

V. Embryonic Global Citizenship: Legal and Normative Foundations*

In this chapter I have examined the distinct legal relationships existing between the ICC and individual persons respectively. I have employed the term *vertical integration* in proposing that those linkages are novel and significant in fundamentally transcending the states-system. I now conclude by drawing upon the concept of *global citizenship* to examine how those dimensions may signify an embryonic transnational order that directly binds individuals with the global community as a whole. As discussed, the Rome Statute uniquely enshrines and embodies the distinct status of individuals as its principal subjects and objects: it reflects the “forceful emergence of the individual on the international scene” as the essential author and victim of international crimes (Cassese, 2003: 450). Individuals, then, are the principal bearers of legal responsibilities and protections. Taken together, those correlative vertical relationships contribute to the legal and normative foundations of global citizenship (Dower: 2003: 66):

If one way of thinking of citizenship is in terms of a citizen having certain legally established rights and duties, then what the establishment of the Court does is provide a formalization of the duties individuals have in relation to one another in the world qua members of the global legal community.

Thus the ICC project is a pioneering institutional feature within a broader globalization “narrative which seeks to reframe human activity and entrench it in law, rights and responsibilities” (Held, 2003: 185; also see Pianta, 2003: 236).

The Court’s progressive features respecting women and children may be viewed as contributing to the overall quality or integrity of that citizenship. It is similarly attentive to ensuring geographic inclusion and diversity. At the Rome negotiations,

* This section draws upon my involvement as a Graduate Research Fellow with the Institute on Globalization and the Human Condition (IGHC) at McMaster University in 2004-5.

Alhaji Abdullah Ibrahim of Nigeria referred to a “new chapter of international law” in stressing the need for developing countries to “become part of the international legal system and not victims of it” and appealing for a “balanced ICC with equitable geographical character” (UNDCP-Speeches, 1998: 18 June). As mentioned, in selecting ICC judges, States Parties must consider the need for “equitable geographic representation” (Rome Statute, 1998: Art. 36.8(a)(ii)).⁴⁵ The Rome Statute also mandates that the Bureau, as a representative body within the Assembly of States Parties (ASP), shall have an “equitable geographical distribution [and an] adequate representation of the principal legal systems of the world” (Ibid: Art. 112.3(b)).⁴⁶ Recall from chapter 1 that the ASP is the Court’s oversight management and legislative body. In all respects, then, the ICC aims to reflect and advance the interests and values of the global community as a whole. As I discuss in chapter 8, moreover, the ICC is not, and must not become, a Northern project for conveniently disposing of (or neglecting) underlying and fundamental redevelopment and security challenges in the developing world.

The ICC project’s global ethic and scope is expressed in the Rome Statute’s Preamble (1998: Para.1-3) [original emphases]:

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

⁴⁵ As of 1 February 2008, seven of the eighteen judges were from the Western European and Others Group of States, four were from the Latin American and Caribbean Group, three were from the Asian Group, three were from the African Group, and one was from the Group of Eastern Europe (ICC-Chambers, 2008).

⁴⁶ The Bureau consists of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms. The current Bureau assumed its functions at the beginning of the fourth session of the Assembly of States Parties in November 2005. The President is Bruno Stagno Ugarte of Costa Rica, and the Vice-Presidents are Erwin Kubesch of Austria and Hlengiwe Mkhize of South Africa. The other 18 members are as follows: Belize, Bolivia, Croatia, Cyprus, Democratic Republic of Congo, Denmark, Estonia, France, Gambia, Kenya, Netherlands, New Zealand, Niger, Peru, Republic of Korea, Romania, Samoa and Serbia (ICC–ASP, 2008).

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

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

Those passages embody a cosmopolitan or universal morality, and an expansive conception of shared fate that transcends or exists beyond states. Benjamin Ferencz of the Pace Peace Center declared in Rome (UNDCP-Speeches, 1998: 16 June):

Outmoded traditions of state sovereignty must not derail the forward movement. National power and privilege must take account of international needs. We all share one interdependent planet, linked by new networks of communication. No nation, no person can feel secure until all are secure.

Recall the Court's mandate to address "the most serious crimes of concern to the international community as a whole" (Rome Statute, 1998: Art. 5.1). As I proposed in chapter 1 and again in this chapter, it is instructive to conceive of those select offences as *global crimes*: egregious wrongdoings that grossly offend global standards of conduct, irrespective of their locale and territorial dimensions. In global citizenship terms, all persons have a duty to refrain from such conduct, and a right to protection from such crimes or, failing that, to have those offences duly prosecuted and punished. In transcending the inter-national law of states and superseding the application of municipal law within states, those dimensions contribute to the beginnings of a "universal constitutional order" (Held, 2003: 189; also see Held at el, 1999: 74).

In formal juridical terms, *citizenship* remains essentially rooted in the states-system: "Citizenship and nationhood continue to be virtually synonymous in many states and certainly so in international law" (Heater, 2002: 56; also see Heater, 1999: 95). Its descriptive usage has been similarly constrained: "Several influential strands of political thought over the past two centuries have fused citizenship with sovereignty, nationality

and territoriality, and they have been quick to observe that citizenship, properly so-called, loses all meaning when detached from the nation-state” (Linklater, 1998: 180; also see Heater, 1999: 115; and Scholte, 2000: 166). The conventional view is that international law cannot bestow or accommodate global citizenship (Heater, 2002: 84):

Despite disagreements among students of jurisprudence regarding the precise relationship between international and municipal law, the established basic distinction is quite clear: municipal law is concerned with individuals; international law is concerned with states who, in the eyes of international law, are legal ‘persons’. Thus, it would seem to follow, municipal law provides state citizenship; but international law cannot provide world citizenship to individuals since such a concept is beyond its state-centric remit.

Again, though, the Court’s penal and protective dimensions reflect an exceptional *vertical* plane within the overall *horizontal* ordering of international law: they establish or affirm the distinct legal status of the individual. Those properties evidence a “cosmopolitan law” that “transcends the particular claims of nations and states and extends to all in the ‘universal community’” (Held, 1995: 228; also see Held et al, 1999: 70; and Held, 2002: 310). Sassen similarly refers to an emerging “global law” that diverges from the inter-national law of states (2006: 265). Notwithstanding the absence of a global sovereign proper, therefore, the ICC embodies a super-ordinate or universal social repository for citizenship-like allegiance and affiliation (see Booth, 2003: 186).

This metaphorical conception of *global citizenship* does not imply primacy, much less exclusivity, in relation to traditional and other emerging conceptions of community. It more modestly suggests that cosmopolitan morality has achieved a noteworthy formal expression within international law and governance, which reflects and may further reinforce the widening and deepening of transnational communal sentiments. As Falk observes, citizenship “can refer to the formal linkages established by law”, but also “the psycho-political linkages arising from patterns of aspiration and belief” (2002: 21; also

see Dower, 2003: 36). In terms of citizenship-as-identity, then, individuals may simultaneously hold or subscribe to multiple and variant forms of citizenship.

Citizenship may be conceived of as the identities, rights, and loyalties held by individuals toward their political communities, together with the corresponding responsibilities they hold in relation to other members and to the community itself. Those components may be formally prescribed by the community and/or subjectively understood by individuals. Globalization has stretched and diversified the normative dimensions of social and political community: “Societies and states are no longer viewed as homogenous; citizenship consequently must be understood and studied as a mosaic of identities, duties and rights rather than a unitary concept” (Heater, 1999: 114). Thus Scholte observes the “growth of hybrid identities and overlapping communities” (2000: 160; also see Held, 1995: 124). Those trends include an “incipient cultural cosmopolitanism” (Held et al, 1999: 374; also see Scholte, 2000: 160; and Dower, 2003: 127). As discussed in chapter 2, human rights provide a major context for such ideas and expressions (Ignatieff, 2000: 36; also see Dower, 2003: 53-55):

Human rights create extraterritorial relationships between people who can't protect themselves and people who have the resources to assist them. The rights revolution since 1945 has widened the bounds of community so that our obligations no longer cease at our own frontiers.

Those sentiments were reflected in the UN General Assembly's 1999 Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UNGA, 1999). The ICC uniquely institutionalizes and affirms those transnational ideals.

Those global citizenship-like dimensions do not imply that traditional state-based citizenship is correspondingly diminished or undermined. Indeed, states possess the unique capacity to provide institutional expression to this global citizenship by joining and cooperating with the ICC, preventing and prosecuting international crimes, and adopting domestic legal reforms and other implementation measures to permit all of the foregoing components. In practical terms, therefore, states are vital intermediaries in the ICC-individual relationship: they are the front-line brokers and guardians of global citizenship. Krause more generally stresses (2004: 35):

[The] emphasis on ‘good governance’, ‘human security’, ‘security sector reform’, and ‘democratization’ all underscore the fundamentally *internal* or domestic orientation of many multilateral initiatives, which while they may be framed or promoted at the global or multilateral level, rest crucially on a specific (liberal!) understanding of state-society relations.

As I further examine in chapter 6, the Court uniquely illustrates both the evolution and resilience of the state’s *raison d’être* under globalizing conditions: the state remains indispensable in the development and implementation of progressive governance initiatives, including, somewhat paradoxically, measures like the ICC project that establish external sites of authority. According to Dower, therefore: “One of the best hopes for cosmopolitanism is actually through re-orienting national priorities from within [which] presupposes a strong and resilient state but one open to cosmopolitan influences” (2003: 45). Given the Court’s distinct supranational properties, but also the state’s centrality in enforcing justice under the complementary framework, the ICC exemplifies the notion of “cosmopolitan governance”, involving the “multiple lodging of the rights and obligations of democratic law” (Held, 1995: 277; also see Archibugi, 2003: 10). Held et al. refer to a secular “new medievalism” to characterize the “overlapping

authority and multiple loyalties” associated with the cosmopolitan dimensions of human rights and international criminal justice (1999: 85; also see Falk, 2002: 20).

Within this emerging reconstitution of legal and political authority, states themselves have acquired normative citizenship-like rights and responsibilities, beyond or separate from the minimalist rules for co-existence and regulated intercourse under conventional inter-national law. According to Williams, the practice of “good international citizenship” by states encompasses the simultaneous pursuit of national security, international order and human rights (2002: 43). The external dimensions of that progressively evolving normative context are reflected in reinvigorated scholarly examinations of foreign policy ethics (see generally Smith and Lights, eds. 2001). Internally, states are bound by human rights standards in their treatment of citizens and residents, and are increasingly viewed as trustees for the betterment of those populations. The Responsibility to Protect report, which I further discuss in chapters 6 and 8, declares: “Sovereignty as responsibility has become the minimum content of good international citizenship” (ICISS, 2001: Para. 1.35). Broomhall similarly suggests: “The idea that sovereignty does not arise in a vacuum, but is constituted by the recognition of the international community, which makes its recognition conditional on certain standards, has become increasingly accepted in the fields of international law and international relations” (2003: 43; also see Taylor, 1999: 143). Cassese credits the UN’s advocacy with cultivating this “new ethos” (2005: 333):

It has gradually brought about a sort of Copernican revolution: while previously the whole international system hinged on State sovereignty, at present individuals make up the linchpin of that community. To be sure, States still play a crucial role in international dealings. However, they are no longer looked upon as perfect and self-centered entities. They are now viewed as structures primarily geared to the furtherance of interests and concerns of individuals.

That normative progression implies that state sovereignty is a means to a more fundamental end – “sovereign people” (Held, 1995: 147). As then-UN Secretary-General Kofi Annan prominently declared: “States are now widely understood to be instruments at the service of their peoples and not vice versa” (Annan, 1999). Thus Devetak refers to states as “active agents” in their own transformation, involving a “new accommodation of ‘domestic’ and ‘international’ pressures” (2002: 169; also see Lawler, 2005: 446; Clark, 1999: 131; and Held, 2003: 313).

The ICC constitutes the most advanced institutional expression of individual citizenship-like rights and responsibilities thus far within international law and governance. Such bonds admittedly constitute a mere sub-set of what formal juridical *global citizenship* would entail – a condition that does not and may never exist. As I discuss in chapter 8, however, those vertical properties are implicative of new directions and expanded possibilities for conceptualizing and developing governance initiatives in human security-related and other transnational policy domains. In acknowledging the inherent and practical limits to international criminal justice, I propose that it is properly viewed as complementing more fundamental development, prevention and intervention measures. Progress in those overlapping governance spheres may then contribute to a more comprehensive and mutually supportive template of global rights and responsibilities toward what Held describes as a “deep-rooted structure of cosmopolitan accountability and regulation” (2003: 172). Meanwhile, the ICC stands as an exceptional institution for the transnational regulation and protection of individual persons.

Chapter 6

THE ICC, COMPLEMENTARITY AND THE RECONSTITUTED STATE NOVEL DIMENSIONS OF LAYERED AND NETWORKED GOVERNANCE *

Contents

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I. Complementarity and the Properties of Layered and Networked Governance

In developing this study’s core proposition that the ICC is implicative of new directions and expanded possibilities for international law and governance, this chapter considers the Court’s ‘complementary’ relationship to national justice systems as its defining governance property in the actual administration of international criminal justice. In complementing national systems, the Court will generally only exercise jurisdiction over a situation when an affected state is demonstrably ‘unwilling or unable’ to conduct genuine investigations and prosecutions. That uniquely layered arrangement combines the Court’s oversight and intervention properties with the principal authority and practical capacity of sovereign states to implement and enforce legally binding rules within their borders and over their populations. In linking the Court’s prosecutorial and judicial functions to their corresponding operations at the national level, complementarity highlights ‘government networks’ as an increasingly prominent and promising feature

* The foundations of this chapter and chapter 7 were developed for a paper presented at the 2006 Canadian International Law Students Conference (CILSC) – *Contested Boundaries: International Law vs. National Realities*; Professional Development Center, Law Society of Upper Canada; Toronto; 4 February 2006; Panel: International Courts and Tribunals; Paper: “Global Governance, Complementarity and the Administration of International Criminal Justice”.

within emerging forms of global governance (see generally Slaughter, 2004). This context reveals a *reconstituted state* that is both deeply enmeshed within the operations of international law and governance arrangements and also subject to their super-ordinate purview and authority. I now provide a brief overview in this introductory section before outlining how the specific propositions of this chapter are structured and developed.

As discussed in chapters 3 and 4, the complementarity principle factored prominently within the Court’s preparatory drafting and negotiation (Broomhall, 2003: 86). As Sands stresses, then, this design “is not an accidental one, but the product of deliberation and negotiations carried on over many years” (2003: 75; also see generally Tallgren, 1998). Complementarity implies some deference to sovereign states, and was indeed fundamental to states’ willingness to accept the ICC at all (Cameron, 2004: 83). It would be injudicious, however, to consider it solely in terms of political pragmatism and expediency. The Court itself possesses the distinct supranational authority to evaluate the *bona fides* of national proceedings under the complementary framework, and thus to determine its own competence to directly address a given situation. There are also compelling policy reasons for privileging national courts as “the forum of first resort” (Ratner and Abrams, 2001: 160; also see Cassese, 2003: 351):

National tribunals have the principal responsibility for such trials, as part of a state’s duty to uphold the rule of law. Moreover, because such tribunals are closest to the scene, the perpetrators, and the victims of the atrocities, they represent the starting point for considering accountability options.

The presumptive national priority that complementarity embodies and mandates, then, is a profoundly coherent and practical arrangement for administering international criminal justice. As a court-of-last-resort, the ICC exists primarily to facilitate and monitor effective national proceedings and, only failing that, to directly administer justice itself.

That varied supranational competence represents a targeted governance response to past inadequacies of international criminal justice in a manner that is duly cognizant of legal, political and practical continuities in the states-system.

Given its practical and potentially mutually-reinforcing ICC-State Party juxtaposition, Slaughter recognizes the Rome Statute's complementary design as a "milestone not only for international law but also for a disaggregated world order" (2004: 149).⁴⁷ A 'disaggregated' system would encompass a denser array of interrelationships linking components within state authorities to their functional counterparts in other states (horizontally) and, less commonly, to supranational entities (vertically) (Ibid: 13). States would remain the most crucial actors, but they would function in a less unitary fashion; hence the "disaggregated state" (Ibid: 12). As Slaughter describes (Ibid: 15-16):

A disaggregated world order would be a world latticed by countless government networks. These would include horizontal networks and vertical networks; networks for collecting and sharing information of all kinds, for policy coordination, for enforcement cooperation, for technical assistance and training, perhaps ultimately for rule making. They would be bilateral, plurilateral, regional, or global. Taken together, they would provide the skeleton or infrastructure for global governance.

Slaughter defines a 'network' as "a pattern of regular and purposive relations among the like government units working across the borders that divide countries from one another and that demarcate the 'domestic' from the 'international' sphere" (Ibid: 14). Slaughter identifies the ICC-State Party relationship as a novel "vertical judicial network" (Ibid: 21). As characterized by Slaughter (Ibid: 13):

The prerequisite for a vertical government network is the relatively rare decision by states to delegate their sovereignty to an institution above them with real power – a court or a regulatory

⁴⁷ Slaughter defines 'world order' as follows: "A system of global governance that institutionalizes cooperation and sufficiently contains conflict such that all nations and their peoples may achieve greater peace and prosperity, improve their stewardship of the earth, and reach new minimum standards of human dignity" (2004: 15).

commission. That institution can then be the genuine counterpart existence of a national government institution.

As I examine in this chapter, then, complementarity constitutes and mediates the ICC project's vertical authority structure.

The ICC project, and the broader emerging *program* of international criminal justice that I conceptualize in chapter 7, also encompass more common 'horizontal networks' – "links between counterpart national officials across borders" (Slaughter, 2004: 13). Applicable functional types include information, enforcement and harmonization networks (Ibid: 19-24). Those formal and informal governance interrelationships – linking judges, prosecutors and legislators – are vital to furthering ratification and implementation of the Rome Statute, and rationalizing states' efforts and coercive powers to promote effective investigations and prosecutions, whether by national courts or the ICC under the Rome Statute, or via other mechanisms and rules. These horizontal arrangements are situated within a broader arena of transnational cooperation, marked by the increasing salience of non-state and institutional actors in the processes of international law-making and implementation, norm-setting and signaling, and monitoring and publicizing compliance and transgressions.

Within this increasingly nebulous governance terrain, the Rome Statute's complementary design constitutes a novel reconstitution of formal authority within international law and governance. Responsibilities and prerogatives are both shared and apportioned between the ICC and States Parties. Those governance properties situate the ICC project prominently within "a rich variety of different institutional architectures of transnational political deliberation, rule-making and rule enforcement" (see Grande and

Pauly, 2005: 287). In sponsoring and submitting to this arrangement, states are as much an agent of change in their own transformation, as they are subject to it (see Clark, 1999: 32). By their own collective actions, they have been substantially re-affirmed as *regulating* authorities, but also distinctly re-cast as *regulated* subjects. In both transcending and utilizing the states-system, therefore, complementarity may represent the future of international law and governance in other transnational policy domains.

In developing these propositions, this chapter proceeds in four parts. First, I consider the preferred role of national justice systems under the complementary framework. I examine the ‘unwillingness’ and ‘inability’ criteria that define and limit such priority, aspects of judicial and prosecutorial discretion that will reflect and shape the Court’s appraisal and deference toward national efforts under these provisions, and the centrality of implementation measures to permit effective national proceedings and thereby pre-empt direct ICC involvement. Second, I consider the role and mechanics of ICC proceedings when States Parties are ‘unwilling or unable’ to discharge their primary functions under the complementary framework. I examine the three distinct mechanisms that may trigger direct ICC proceedings, and related provisions that govern the Court’s competence to directly administer justice. Third, I consider the vital role of states in supporting ICC proceedings with cooperation and judicial assistance. The Court’s exceptional supranational authority is practically mediated by its reliance upon a more conventional, horizontal state-cooperation arrangement. Fourth, I consider the broader implications of the complementary framework for the evolving role, capacity and disposition of the state within international law and governance.

II. National Proceedings: The Preferred Forum of Adjudication

The Rome Statute's Preamble acknowledges the principal authority and responsibility of states to prosecute international crimes, and the complementary nature of the ICC's attendant role (1998: Para. 4, 6 & 10) [original emphases]:

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

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

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

The complementarity principle is reiterated in Article 1 ('The Court'), as among the ICC's core properties and features (Ibid) [my emphases]:

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

The core provisions constituting this complementary design are contained in Article 17 ('Issues of admissibility'), which effectively codify the legal presumption that duly conducted national proceedings will pre-empt or foreclose direct ICC involvement (Ibid). A case is inadmissible to the ICC, then, where it is "being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution", or where it "has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute" (Ibid: Art. 17.1(a)&(b)) [my emphases].⁴⁸ The drafters attached

⁴⁸ I discussed two additional admissibility provisions in chapter 5. First, a case is inadmissible to the ICC where the person concerned has already been tried for the conduct and a trial by the Court is not permitted

the word ‘genuinely’ to both ‘unwillingness’ and ‘inability’ in order to identify essential defects in proceedings that would invariably yield injustices (Holmes, 2002: 674).

The Rome Statute provides further interpretive guidance to help ensure that national systems function earnestly and effectively, and to guide the ICC in assessing those national efforts and determining its own competence over a given situation. As Holmes recalls, broad support for complementarity in general was matched by demands for criteria, which were themselves markedly contentious, especially respecting ‘unwillingness’ and its inherent subjectivities (1999: 44-51). ‘Unwillingness’ refers to proceedings or decisions not to be proceed which have been taken for the purpose of “shielding the person concerned from criminal responsibility” (Rome Statute, 1998: Art. 17.2(a)), where there has been an “unjustified delay [which is] inconsistent with an intent to bring the person concerned to justice” (Ibid: Art. 17.2(b)), or where proceedings are not “conducted independently or impartially, and . . . conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice” (Ibid: Art. 17.2(c)). ‘Inability’ refers to cases where, “due to a total or substantial collapse or unavailability to its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings” (Ibid: Art. 17.3).

Those complementarity provisions establish the operative delineation between the respective ICC-State Party competences over a given situation. They govern the ‘admissibility’ of a case to the ICC rather than the Court’s ‘jurisdiction’ per se: they

under Art. 20.3 (*Ne bis in idem*) (Rome Statute, 1998: Art. 17.1(c)). Second, a case is inadmissible to the ICC where it is not of ‘sufficient gravity’ to justify the Court’s action (Ibid: Art. 17.1(d)).

prescribe when the ICC is empowered to address a case provided it actually has jurisdiction over the conduct in question (see Holmes, 1999: 47; Knoops, 2003: 9; and Schabas, 2001: 55). Holmes stresses: “The solutions developed were both complex and politically sensitive, reflecting the concerns of States over national sovereignty and the potentially intrusive powers of an international institution” (2002: 668). The ICC Prosecutor bears the onus of rebutting the presumptive competence and priority of national proceedings, and thereby establishing admissibility to the Court (Holmes, 2002: 684-685; Nsereko, 1999: 17). Broomhall predicts, moreover, that the ICC will articulate a doctrine of “margin of appreciation” in its early complementary jurisprudence that will tend to defer to the good faith efforts of national judicial systems in recognizing their variable legal, political, and cultural environments, as well as the Court’s own resource limitations (2003: 92-3). As Cameron stresses, however, the deference threshold will be particularly tested when the ICC is required to appraise national decisions not to prosecute a given case and national proceedings resulting in acquittal (2004: 86):

Will the ICC see its role as a sort of appellate court, allowing it to take up a case where it thinks the national prosecutor has made an error on the facts, or the national court has, on the evidence, reached a mistaken verdict? Will it see itself as entitled to take up what it regards as a mistake of law? . . . Or will the ICC grant a ‘margin of appreciation’ as regards the law and facts and only intervene where a decision not to prosecute is totally unwarranted, or a trial verdict is manifestly unsupported by the evidence?

In any event, when addressing admissibility issues in a given case, the Court will be simultaneously engaged in a broader dialogue and signaling exercise with all national justice systems (Burke-White, 2005: 586):

Recognition that the ICC is part of a system of multi-level global governance highlights the importance of more fully articulating the standards for genuine prosecutions by national governments. As states seek to meet the complementarity criteria, they will look to the Court for clarification on the specific requirements for an effective judiciary. As part of a global governance system, the ICC has an opportunity to offer invaluable guidance to national governments on where to channel available resources and attention to meet the test of effectiveness.

As Slaughter observes, this vertical arrangement directly links national justice systems to the ICC as their functional supranational counterpart (2004: 150):

The ICC itself will benefit from an institutional design that would penetrate the surface of the fictional unitary state, giving it a direct interlocutor within domestic government. It will never face the situation of the ICJ [International Court of Justice], in which it issues decisions binding on states, conglomerates of politicians, diplomats, and bureaucrats, and hopes that they see fit to comply.

As distinct from the Anglo-American common law tradition, the ICC is not strictly bound by its prior jurisprudence: “The Court may apply principles and rules of law as interpreted in its previous decisions” (Rome Statute, 1998: Art. 21.2). It will be crucial, however, for the Court to develop clear and consistent guidelines regarding admissibility.

The exercise of prosecutorial discretion will also contribute to further defining the parameters of complementarity in practice (see Sarooshi, 2004a: 941). As I discuss in section III, the scope of the ICC Prosecutor’s discretion in investigations and prosecutions varies according to the specific mechanism triggering those proceedings. In all circumstances, however, the Prosecutor must consider admissibility issues in determining whether to proceed. In September, 2003, the Office of the Prosecutor released an instructive policy paper, which contemplates significant prosecutorial deference and restraint in evaluating national efforts under the complementary framework (the ‘OTP Policy Paper’) (ICC-OTP, 2003: 5) [my emphases]:

Given the many implications of the principle of complementarity and the lack of court rulings, detailed and exhaustive guidelines for its operation will probably be developed over the years. As a general rule, however, the policy of the Office of the Prosecutor in the initial phase of its operations will be to take action only where there is a clear *case of failure to take national action*.

A major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes. *In any assessment of these efforts, the Office will take into consideration the need to respect the diversity of legal systems, traditions, and cultures.* The Office will develop formal and informal networks of contacts to encourage States to undertake State actions, using means appropriate in the particular circumstances of a given case.

Within the Office of the Prosecutor, a distinct Jurisdiction, Complementarity and Cooperation Division advises the Prosecutor on jurisdiction and admissibility issues.⁴⁹

A major residual question for the ICC Prosecutor and Judges is whether cases may be admissible to the Court if amnesty laws bar national prosecution. As Broomhall notes (2003: 93):

Amnesties, whether negotiated in political agreements, enshrined in treaties, or granted by national statutory or constitutional law, aim to prevent prosecution for acts otherwise criminal, typically in the name of promoting peaceful relations between those crafting the agreement. Frequently, even routinely, endorsed during transition from one regime to another, or as part of a peace settlement, amnesties ensure impunity against the ordinary process of the criminal law as a trade-off for the surrender of power or the cessation of a conflict

As I further discuss in chapter 7, that admissibility question is amongst the principal legal and policy issues raised by non-prosecutorial truth-seeking mechanisms utilized by states in whole or partial substitution for criminal adjudication. The Rome Statute does not expressly address that issue, which may constitute a deliberate omission, given its contentious nature in the ICC negotiations (see Cameron, 2004: 90). The OTP Policy Paper is, likewise, silent on this specific question (see Sarooshi, 2004a: 943).⁵⁰

Amnesties would perhaps be respected under Article 17.1(b) – the case being inadmissible to the Court because the state has elected not to prosecute, not because of its unwillingness or inability to prosecute, but rather due to policy considerations (see Dugard, 2002: 702). According to Broomhall, however, because cases are admissible to the ICC unless rendered inadmissible by the article 17 criteria, all of which contemplate that national criminal proceedings have to some extent occurred, cases barred from

⁴⁹ The OTP is organized into 3 divisions: (1) Prosecution Division, (2) Investigation Division, (3) Jurisdiction, Complementarity and Cooperation Division (see OTP Policy Paper, 2003: Annex, Part II).

⁵⁰ The Policy Paper does, however, acknowledge the Prosecutor's power "not to investigate or not to prosecute when such an investigation or prosecution would not serve the interests of justice", which I will discuss in chapter 7 (ICC-OTP, 2003: 7).

national prosecution under an amnesty law would be admissible to the ICC (2003: 100). By that account, post-conviction measures such as pardons or commutations of sentences would not render cases admissible to the ICC unless they stemmed from proceedings that were not themselves genuine and/or effective (Ibid: 101; also see Holmes, 2002: 678; and Van den Wyngaert and Ongena, 2002: 705).⁵¹

A central governance dimension within the ICC project involves legal capacity-building, implementing legislation and even constitutional reform within national justice systems to ensure that effective national proceedings may be conducted in compliance with the complementary framework and its related provisions. In that fundamental respect, the ICC forms the basis of a “harmonization network” that seeks to ensure policy consistency – or at least core minimum standards and requirements – in national investigations and prosecutions of international crimes (see generally Slaughter, 2004: 59-61; also see Turns, 2004: 340). This arrangement actually empowers states to ensure compliance by taking the requisite measures within their own control, which has reassured more states to become States Parties (Sands, 2003: 75-76). Again, there is nothing possessive about the ICC’s authority under the Rome Statute. Indeed, the Rome Statute’s complementary format fundamentally invites states to develop and apply national justice systems to avoid the Court’s assertion of jurisdiction.

⁵¹ According to Broomhall, a patently inadequate sentence may render a case admissible under the ‘unwillingness’ criterion, but normally some additional measure of bad faith in the process would be required (2003: 90). Kleffner seems to disagree, albeit on slightly different grounds: an inadequate sentence stemming from prosecution for an ‘ordinary crime’ would not render a case admissible to the ICC, provided the prosecution itself was conducted legitimately (2003: 97).

The Rome Statute does not expressly oblige States Parties to implement its substantive law per se (see Kleffner, 2003: 91; and Turns, 2004: 338). As Kleffner stresses, however, national implementation measures are inherent and vital to states' fulfillment of their primary obligations under the complementary framework (2003: 93-94; also see Robinson, 2002: 1860) [author's emphases]:

The ICC can only be an effective component . . . if States Parties implement the Statute's substantive law to the extent that this is required for national prosecution. If they were free to decide not to do so, resulting legislative gaps that prevent perpetrators from being brought to justice would make a huge number of cases admissible to the ICC. In actual fact, it would make the ICC a court of first (and only) instance rather than a permanent *reserve* court as envisaged by the principle of complementarity. In other words, in order for the ICC to effectively perform its complementary function, comprehensive implementation is *indispensable*.

Effective implementation by States Parties includes ensuring that they have the legal capacity and jurisdiction to fully prosecute the three crimes defined within the Rome Statute (Turns, 2004: 338). Two potential complications may render a case admissible to the ICC if a prosecuting state relies upon so-called 'ordinary crimes' under national law. First, there may not actually be a corresponding offence within that state's national law (Robinson, 2002: 1861). As Broomhall notes, for example, "criminal or especially military codes may not be sufficiently detailed to encompass the full range of sexual offences prohibited as crimes against humanity and war crimes" that I considered in chapter 5 (2003: 91).

Second, a case may be admissible to the ICC if a state exercises jurisdiction over the conduct, but on narrower substantive grounds than as characterized in the Rome Statute's penal provisions, such that the stigma and penalties associated with the offence under national law are not commensurate with the severity of the crime under international law (see Robinson, 2002: 1861; Broomhall, 2003: 91; and Kleffner, 2003:

95-100). The ‘ordinary crimes’ issue was considered in the Preparatory Committee, but ultimately not expressly addressed within the Rome Statute (see Holmes, 1999: 57-58). In any event, due to these potential complications, it is prudent for States Parties to directly and comprehensively implement the Rome Statute’s three defined crimes into their national law. Canada’s Crimes Against Humanity and War Crimes Act, as a progressive example, incorporates those substantive offences directly into Canadian law, and empowers Canadian judges to consider and apply emerging or developing rules under customary international law (DOJ, 2008a: ss.4-7; see Turns, 2004: 358-359).⁵²

Apart from substantive law, States Parties must also ensure adequate jurisdictional competence to actually prosecute the offences. As I discuss in section III, and with two exceptions that I will examine there, provided the situation or case is ‘admissible’ to the ICC and the Court has temporal and subject-matter ‘jurisdiction’, it may exercise that jurisdiction over crimes committed on the territories of States Parties or by nationals of States Parties (Rome Statute, 1998: Art. 12.2) (‘Preconditions to the exercise of jurisdiction’). By those parameters, States Parties have the incentive to ensure their ability to prosecute crimes on the bases of ‘territorial’ and ‘active nationality’ jurisdiction respectively (Broomhall 2003: 81; Robinson, 2002: 1862-1863). As I discuss in chapter 7, however, states are not themselves limited to those jurisdictional bases in prosecuting international crimes. Canada’s Crimes Against Humanity and War Crimes Act, for example, also includes ‘passive nationality’ jurisdiction (based on the nationality

⁵² The Act recognizes that the Rome Statute’s definitions of crimes reflect customary international law as of 17 July 1998, but declares: “This does not limit or prejudice in any way the application of existing or developing rules of international law” (s. 4.4). That Act entered into force on 23 October 2000.

of the victim) and a form of ‘universal’ jurisdiction (based solely on the extreme nature of the international crime itself) (DOJ, 2008a: s.8; see Turns, 2004: 358).

The Court’s own ratification and national implementation outreach efforts are being coordinated through the Secretariat and by a special working group established by the Bureau within the Assembly of States Parties (ICC-ASP, 2008). Those activities are complemented by the universal ratification and implementation campaign of the non-governmental Coalition for an International Criminal Court (CICC, 2008a). Major actors within the CICC have also formulated global initiatives (e.g. Amnesty International, 2007). Other groups have focused upon national or regional targets and objectives (e.g. FIDH, 2006). Those varied contributions further reveal emerging norms and modalities of multilateralism and transnational cooperation within the ongoing ICC project, which I discussed in chapters 3 and 4. As Cullen and Morrow more generally observe (2001: 13):

It is in the area of implementation of international law, specifically multilateral treaties and soft law documents, that the increasing involvement of international civil society, as represented by NGOs, is being established most clearly. They become part of the day-to-day operation of international law, rather than simply international political processes. While NGOs have shown themselves to be capable of exercising a real influence on both how international law is made and its content, what is more interesting is their impact on how the law is implemented and how it operates in practice.

Global civil society efforts have, in turn, been bolstered by the education, training and awareness-building activities of Parliamentarians for Global Action, which I also discussed in chapter 4 (see PGA, 2008). Regional intergovernmental programs include the European Union Council’s Common Position and Action Plan (EU, 2008). Specific state initiatives include Canada’s ICC and Accountability Campaign, which provides resources and technical assistance, particularly in underdeveloped states (DFAIT, 2008a). In furtherance of those efforts, the Canadian government also sponsored the drafting of

the Manual for the Ratification and Implementation of the Rome Statute of the International Criminal Court, which has been translated into all six official UN languages (ICCLR and Rights & Democracy, 2003).

In addition to facilitating broad implementation measures, the complementary framework may also positively influence specific discretionary determinations and elections within national justice systems. As Slaughter notes, “the *potential* for an ICC move to take over a particular case may expand a domestic court or prosecutor’s room for maneuver in a difficult and incendiary domestic political climate” [author’s emphasis] (2004: 150; also see Slaughter and Burke-White, 2006: 343; Burke-White, 2002: 92; and Wippman, 2004: 181). According to Burke-White, this intangible dynamic highlights the “multi-level global governance” properties of the complementary arrangement, rather than a mere “substitution model” by which the Court would simply step in where national systems failed to act or function properly (2005: 557-558). By that more textured account, “international and domestic governance structures (such as courts) are engaged in deeply interconnected governance efforts whereby each level of authority continuously cross-influences, reshapes, and, ideally, reinforces activities at other levels of governance” (Ibid: 558; also see Tallgren, 1998: 120). Beyond governing the division of powers and responsibilities, then, complementarity entails an indeterminate process of interaction and adjustment between the ICC and national authorities as its legal and operational aspects are shaped and refined through both jurisprudence and practice. In an optimistic scenario, that iterative process will both elevate and equalize national standards in the administration of international criminal justice, thereby strengthening its attendant normative properties.

The presumptive priority and competence of national justice systems under the complementary framework reflects Slaughter’s generic conception of ‘subsidiarity’ as an overarching maxim for more effective and decentralized global governance (2004: 30):

It is a principle of locating governance at the lowest possible level – that closest to the individuals and groups affected by the rules and decisions adopted and enforced. Whether this level is local, regional, national, or supranational is an empirical question, dictated by considerations of practicability rather than a preordained distribution of power.

The complementary framework is particularly innovative and flexible, however: the Court’s oversight role is constant, but its direct administration of proceedings is subject to the application of defined rules in widely variable circumstances. Rather than rigidly demarcating between sites of authority, then, it constitutes a uniquely dynamic governance arrangement. As Crawford notes, the term ‘subsidiarity’ was considered in the Rome Statute’s preparatory drafting (2003: 139; also see Crawford, 2002b: 26):

Central to the ILC’s text was the idea of complementarity, a term intended to express the relationship between the ICC and national courts. There was much talk at the time of ‘subsidiarity’ . . . It was not appropriate to describe an international criminal court as ‘subsidiary’ to national courts, but its role was certainly intended to be secondary. Anyhow, the term ‘subsidiarity’ was already taken, so ‘complementarity’ was used.

Complementarity is in fact a more appropriate and instructive term to characterize the Court’s affirmative and constructive role in facilitating and monitoring national proceedings. Though its direct administration of justice is contingent, and intended (or hoped) to be limited, the ICC will seek to leverage this broader and constant oversight authority to both catalyze and guide a broader stream of national prosecutions – what Robinson refers to as the envisaged “multiplier effect” (2003: 482; and 2006: 210; also see Burke-White, 2005: 590).

As I have proposed, the ICC constitutes a targeted supranational initiative aimed principally – and precisely – at facilitating effective national proceedings that may not have been conducted in the past and may not otherwise be undertaken now, whether due to a state’s unwillingness or inability. As Slaughter stresses (2004: 26-27):

Vertical networks can . . . strengthen, encourage, backstop, and trigger the better functioning of their counterpart domestic institutions. . . . The purpose of a supranational global court [the ICC] is to create an entire range of incentives that maximize the likelihood of . . . domestic trials taking place, from strengthening the hand of domestic groups who would favor such a course to reminding the domestic courts in question that the international community is monitoring their performance.

The directional emphasis, then, slants outward from the Court toward the state: the ICC is complementary to national justice systems, not vice versa. In that fundamental respect, the Court’s establishment as a supranational judicial institution actually contributes to a relatively decentralized governance arrangement, at least compared to the ‘primacy’ model of the ICTY and ICTR which requires national authorities to defer to the tribunals’ competence over any given case, as I discuss in chapter 7. The ICC-State Party juxtaposition under the complementary framework is not inherently antagonistic; indeed, it only implies conflict when national justice systems are demonstrably ‘unwilling or unable’ to fulfill their primary responsibilities. Chayes and Slaughter stress (2000: 242):

Although the most obvious implication of this arrangement is that supranational judges must evaluate the quality and sincerity of their national counterparts, the relationship need not be and is unlikely to be primarily confrontational. Instead of the supranational tribunal seeking to encroach on national jurisdiction by carving out specific issues or doctrinal areas for its own, this arrangement instead assumes that national courts have primary jurisdiction and indeed presumes that national courts will be up to the task of doing justice. It is only in exceptional circumstances where this assumption does not hold that jurisdiction will devolve to the supranational level.

Equally important, as a court-of-last-resort, the intent is for the ICC to become *less* active (or interventionist) over time in directly administering justice. If the ICC project is effective, then national courts will become increasingly vigilant and effective. Thus

complementarity constitutes a markedly *decentralized* arrangement of fixed legal powers and responsibilities, and also reflects a fundamentally *decentralizing* functionalist logic.

As stated in the introductory section, national proceedings are preferred as a matter of both law and policy. National prosecutions, particularly within the state where the alleged offences occurred, offer the following potential benefits: access to crime sites, evidence, witnesses and victims; availability of victims and witnesses at trial; cultivating legal expertise and capacity, particularly within developing states and/or post-conflict societies; fewer restrictions in terms of subject-matter and temporal jurisdiction (which I discuss in chapter 7); overall cost, efficiency and expediency; and greater local visibility and media attention, possibly fostering a stronger sense of denunciation, deterrence, legitimacy and a broader respect for the rule of law (Ratner and Abrams, 2001: 182; also see Broomhall, 2003: 84; and Burke-White, 2002: 87-89).⁵³ Such relative benefits, however, presuppose a fair and effective judicial system (Ratner and Abrams, 2001: 183):

[This] requires four fundamental conditions: a workable legal framework through well-crafted statutes of criminal law and procedure; a trained cadre of judges, prosecutors, defenders, and investigators; adequate infrastructure, such as courtroom facilities, investigative offices, record-keeping capabilities, and detention and prison facilities; and, most important, a culture of respect for the fairness and impartiality of the process and the rights of the accused.

Those factors relate principally to a state's *ability* to duly administer proceedings. If a national system is deficient in one or more of these respects, a case may be admissible to the ICC under the complementary framework. If that state is otherwise *willing* to administer justice, however, then an internationalized or mixed (hybrid) tribunal – a national judicial organ that is augmented by international resources and expertise – might serve as an appropriate mechanism to dispense justice in compliance with the Rome

⁵³ As I mentioned in chapter 5, moreover, the Rome Statute does not affect the applicability of national laws respecting penalties (1998: Art. 80).

Statute without straining the Court's limited resources (Cassese, 2003: 456; Broomhall, 2003: 103-104). In chapter 7, I examine those bodies as an intriguing trend and component within a broader emerging *program* of enforcement and supporting efforts.

It is premature to qualitatively assess the actual exercise and effectiveness of national proceedings under the complementary framework. The most visible and promising development was the United Kingdom's prosecution of three British soldiers under its International Criminal Court Act, 2001 for war crimes related to the alleged 'inhuman treatment' of Iraqi detainees in 2003, including the death of one detainee. British military and justice officials have stressed that the offences were recognized within pre-existing law (Waugaman, 2006: 81-82). As Robertson crucially observes, however, the use of the new statute demonstrates that "the British Army is not likely to send any of its soldiers to [the ICC] because the Army is fully equipped and totally determined to investigate the allegations of misconduct" (cited in Waugaman, 2006: 82). That development provides evidence that the Court does not threaten to recklessly stampede or intrude upon the bona fide workings of national justice systems. The British case is particularly significant in involving the military justice system. As Broomhall stresses (2003: 90):

The risk of improper standards or of proceedings too flexible to ensure independence or impartiality will be particularly great where police, security forces, or the military are subject to their own courts or to special disciplinary procedures. Given a sufficiently rigorous admissibility jurisprudence, the Statute could therefore contribute to an upward levelling of standards between military and civilian jurisdictions, although the Statute takes no position on the use of military proceedings as such.

In the Democratic Republic of Congo, moreover, which has made a 'self-referral' to the Court, as I discuss in section III, national military courts have reportedly made some progress, aided by the presence of the ICC and non-governmental organizations (Petit,

2006: 86-89). In contrast, a special court established in Sudan in June 2005 – one week after the ICC Prosecutor announced a formal investigation into Darfur, which I also discuss in section III – has been widely viewed as a failure, having tried only a small fraction of its intended suspects and mostly for ordinary offences (Ibid: 89).

As discussed in chapter 4, the Rome Statute proscribes reservations purporting to limit or otherwise modify a States Party's obligations thereto (1998: Art. 120). Rather, as I discussed above, States Parties must take appropriate legislative and constitutional measures to ensure their ability to conduct effective national proceedings in compliance with the complementary framework (and to permit cooperation and judicial assistance to the ICC, which I discuss in section IV). Many States Parties have registered political declarations, however, which are not necessarily intended to have legal consequence, but may simply indicate the declaring state's general policy vis-à-vis the Rome Statute as a treaty (see Aust, 2000: 103) Australia, for example, declared the following upon ratifying the Rome Statute (Australia – P.M. Howard, 2002):

Australia reaffirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the Court. To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute.

That statement does not offend the Rome Statute's core object and purpose – facilitating genuine and effective national prosecutions. It merely affirms Australia's presumptive competence and priority to administer justice under the complementary framework, and expresses its political commitment to fulfilling (and therefore retaining) that primary role. Again, when vigilant national justice systems constructively pre-empt ICC proceedings, the coherence and effectiveness of the complementary framework will be validated. As Charney states (2001: 123; also see Broomhall, 2003: 93):

While many supporters of the international criminal court consider that an active ICC docket would constitute a major step toward the suppression of international crimes, . . . the real and more effective success will reside in the active dockets of many domestic courts around the world, the ICC having served first as a catalyst, and then as a monitoring and supporting institution.

The OTP Policy Paper itself declares (ICC-OTP, 2003: 4):

The effectiveness of the International Criminal Court should not be measured by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.

ICC Prosecutor Luis Moreno-Ocampo has more recently reiterated: “The most important developments are not happening in The Hague, but in the [member] states. This is how we will succeed in getting this tiny court to make a difference in the world” (cited in Waugaman, 2006: 82-83).

III. ICC Proceedings: When States are ‘Unwilling or Unable’

When ICC proceedings are necessary or appropriate, the Court will operate more directly and visibly as a supranational judicial institution. Though the Rome Statute recognizes states’ presumptive competence to investigate and prosecute international crimes, it also affirms that the ICC itself will determine whether they have sufficiently discharged these primary functions in a given situation, and thus whether it may directly administer justice: “The Court shall satisfy itself that it has jurisdiction in any case brought before it [and] may, on its own motion, determine the admissibility of a case in accordance with article 17” (1998: Art. 20.1; see Sands, 2003: 80). That supranational authority is fundamental to the Court’s *raison d’être*: transcending the legal and political rigidities of the conventional states-system to express and vindicate the fundamental individual rights and responsibilities that I examined in chapter 5. Otherwise, states would be “judges in their own cause” (Nsereko, 1999: 118). States have too often in the past been ‘unwilling or unable’ to administer international criminal justice; hence the

infamous notion of a ‘culture of impunity’ that has inspired the ICC project. The Overview to the Rome Statute observes: “Governments often lack the political will to prosecute their own citizens, or even high-ranking officials, as was the case in the former Yugoslavia. Or national prosecutions may have collapsed, as in Rwanda” (1998). The Court’s contingent role in directly administering proceedings under the complementary framework aims to address justice gaps stemming from those respective scenarios. Its collective functions, then, reflect a sliding scale of supranational competence and activism: to deter international crimes in the first place, to facilitate and monitor national proceedings when such offences do occur, and to directly administer justice only if necessary. That varied role is tailored to address past shortcomings of international criminal justice without unduly usurping the state’s principal authority or sacrificing the practical economies and other benefits associated with national proceedings. As Slaughter stresses, the key to designing effective vertical networks is “to strike the right balance between national and supranational functions and responsibilities” (2004: 133).

As mentioned above, in order for the ICC to directly administer proceedings, the case must meet certain ‘pre-conditions’ to the exercise of jurisdiction, apart from the ‘admissibility’ (complementarity) requirements of article 17, and provided it actually has subject-matter and temporal ‘jurisdiction’ over the conduct in question. Apart from UN Security Council referrals, which are not subject to territorial restrictions as I discuss below, the ICC may exercise jurisdiction if one or more of the following States are States Parties or have otherwise accepted its jurisdiction (Ibid: Art. 12.2):

- (a) The State on the territory of which the conduct in question occurred . . . ;
- (b) The State of which the person accused of the crime is a national.

Recalling my discussion of admissibility in section II, then, if an affected State Party (or other state, as discussed here) is ‘unwilling or unable’ to address the situation, the ICC may exercise jurisdiction (Ibid: Art. 17.1(a)&(b)). A non-State Party may accept the Court’s jurisdiction over a situation by lodging a declaration with the Registrar (Ibid: Art. 12.3).⁵⁴ That provision, together with Article 11.2, also permits States Parties to accept the Court’s jurisdiction for crimes pre-dating their becoming States Parties.⁵⁵

Those pre-conditions reflect ‘territorial’ and ‘active nationality’ respectively as the two most established bases of states’ criminal law adjudicative jurisdiction (McColdrick, 2004a: 404; Kirsch, 2000: 257; Broomhall, 2003: 80-81). In essence, States Parties have agreed to share with the ICC their competence to prosecute international crimes on those bases.⁵⁶ A majority of negotiating delegations reportedly supported a broader scope for the ICC, but such preferences were compromised to accommodate a minority of states advocating more restrictive conceptions, including the U.S. (Kirsch and Robinson, 2002a: 83-84; Nsereko, 1999: 107; Glasius, 2006: 75;

⁵⁴ As of 1 March 2008, one state (Cote d’Ivoire) had done so. In October 2003, the Ivorian President transmitted a document to the ICC Prosecutor acknowledging the Court’s jurisdiction over offences occurring within Cote d’Ivoire since September 2002. As of 1 March 2008, the Prosecutor continued to analyze the situation to assess whether crimes had been committed, and whether jurisdictional and admissibility considerations, as well as the interests of justice, warranted commencing an official investigation (ICC-Situations and Cases, 2008).

⁵⁵ Recall from chapter 5, however, that the Court may not address conduct pre-dating the Rome Statute’s entry into force – 1 July 2002 (Rome Statute, 1998: Art. 24.1).

⁵⁶ This aspect is arguably a straightforward and permissible issue of *delegation*: States Parties have ‘indirectly’ (and collectively) delegated to the ICC what their sovereign prerogatives permit them to do ‘directly’ (and individually) – prosecute crimes on these jurisdictional bases (Nsereko, 1999: 101). Ratner and Abrams argue more broadly that the crimes within the Court’s jurisdiction are all subject to universal jurisdiction, and thus its prosecution of such crimes is consistent with the ICTY’s prosecution of nationals of states that did not consent to its establishment (2001: 217; also see Kaul, 2002: 591). Cameron acknowledges, however, that the issue is perhaps more complex than mere delegation: “it is one thing for States to exercise jurisdiction themselves, it is another thing to create an international court with the power to exercise jurisdiction” (2004: 72). Morris argues that this aspect of the Court’s scope cannot be sustained by a legal theory of delegation (2001: 52).

Cameron, 2004: 72). By some accounts, this final arrangement unduly constrains the Court – what Glasius refers to as “the defeat” in the otherwise positive result for global civil society in the negotiations (2006: 61). The U.S. has criticized the Rome Statute, conversely, for its potential application to nationals of non-States Parties (Department of State, 2008c). If a national of a non-State Party (e.g. an American service-member) commits an offence on the territory of a State Party or another state accepting the Court’s jurisdiction on an ad hoc basis (as discussed above), that national may be subject to ICC prosecution without the state of nationality’s consent.⁵⁷ For that reason, therefore, and as I mentioned in chapter 4, the U.S. has taken a range of legal, diplomatic and economic measures to shield its nationals from the Court. For that same reason, however, the ICC may also positively influence national prosecutions by non-States Parties (Charney, 2001: 123; Broomhall, 2003: 83). As with State Party proceedings, complementarity will preempt direct ICC involvement when such national proceedings are conducted genuinely and effectively (Cassese, 2003: 352).

This framework of pre-conditions also reveals the potential for parallel national prosecutions when the territorial state is different from the state of nationality. This scenario raises complex questions regarding, for example, competing requests for extradition by such states, as well as the Court’s own relationship to such proceedings under the complementary framework. As I discuss in chapter 7, those potential complexities are compounded by the principle of ‘universal jurisdiction’ by which states may prosecute serious international crimes “based solely on the nature of the crime”,

⁵⁷ By some U.S. accounts, this aspect contravenes the 1969 Vienna Convention on the Law of Treaties by purporting to bind or impose obligations on non-party states without their consent (see Danilenko, 2002: 1875). Others argue that the Statute would only be addressing the responsibility of individuals, and thus would not be imposing obligations on States as such (Broomhall, 2003: 81; McColdrick, 2004b: 404).

without any other jurisdictional nexus to the conduct (see Princeton Project, 2001: 28). Even with the Rome Statute, there is still no overarching authority or hierarchy of rules for determining relative priority between multiple national proceedings (Ferdinanusse, 2004: 1050). The OTP Policy Paper declares (2003: 2):

Close co-operation between the Office of the Prosecutor and all parties concerned will be needed to determine which forum may be the most appropriate to take jurisdiction in certain cases, in particular where there are many states with concurrent jurisdiction, and where the Prosecutor is already investigating certain cases in a given situation. The Office is already developing formal and informal networks of contacts, including with national prosecutors, for this purpose.

In chapter 7, I consider the generally-recognized criteria under international law for determining such priority, and investigate the prospects for achieving greater rule-cohesion and consensus across all levels and modalities of international criminal justice.

In any event, provided those preconditions and admissibility requirements are satisfied, the Court may exercise its jurisdiction pursuant to three so-called *trigger mechanisms*, which I mentioned in chapters 3 and 4 (Rome Statute, 1998: Art. 13).⁵⁸ First, a situation may be referred to the Prosecutor by a State Party (Ibid: Arts. 13(a) & 14). In contrast to negotiating proposals that would have limited such referrals to ‘interested states’, this mechanism permits referral by any State Party, which reflects the overarching concern with international crimes (Kirsch and Robinson, 2002b: 623). As with Security Council referrals, which I discuss below, the Prosecutor is then obliged to initiate an investigation “unless he or she determines that there is no reasonable basis to proceed under this Statute” (Ibid: Art. 53.1). In deciding whether to initiate an investigation, then, the Prosecutor must consider whether (Ibid)⁵⁹:

⁵⁸ Conceptually, it is instructive to think first of ‘preconditions to the exercise of jurisdiction’ (Art 12); then ‘admissibility’ (Art 100); and then actual trigger mechanisms for the ‘exercise of jurisdiction’ (Art 13).

⁵⁹ The referring State Party or the Security Council may request the Pre-Trial Chamber to review the Prosecutor’s decision not to proceed with an investigation, or the decision not to proceed with a prosecution

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.⁶⁰

As of 1 March 2008, there had been three confirmed State Party referrals, each resulting in ongoing formal investigation: Uganda in January 2004, the Democratic Republic of Congo (DRC) in April 2004, and the Central African Republic (CAR) in January 2005. In Uganda, the Prosecutor opened an investigation in July 2004. Arrest warrants issued in October 2005 for five commanders of the Lord's Resistance Army (LRA) were still outstanding, while peace negotiations between the Ugandan government and the LRA continued (ICC-Situations and Cases, 2008). In the DRC, after the Prosecutor launched an investigation in June 2004, the ICC announced its first arrest in March 2006: Thomas Lubanga Dyilo, the leader of the Union of Congolese Patriots, who was apprehended and transferred to The Hague by Congolese authorities (Ibid). Arrests and surrenders of two additional individuals were made in October, 2007 and February, 2008 respectively (Ibid). In the CAR, the Prosecutor commenced an official investigation in May 2007 into grave crimes particularly marked by large-scale sexually-based offences (Ibid).

In each of those situations, the referring state has requested the Prosecutor to investigate alleged crimes by rebel or insurgent groups within that state. This practice of so-called 'self-referrals' is an unanticipated trend thus far within the Court's operation.

after having conducted an investigation (Rome Statute, 1998: Art. 53.3(a)). The Pre-Trial Chamber may, on its own initiative, though only on 'interests of justice' grounds, review a decision not to proceed with an investigation or prosecution (Ibid: Art. 53.3(b)). The Prosecutor "may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information" (Ibid: Art. 53.4).

⁶⁰ As I will discuss in chapter 7, Art. 53.1(c) is one of three mechanisms by which the ICC might defer to national proceedings of a non-prosecutorial nature.

Most commentators expected that the State Party referral mechanism would be utilized by third-party states (see Burke-White, 2005: 564). It was also expected that State Party referrals in general would be the least commonly utilized of the three trigger mechanisms (Cameron, 2004: 82; Kress, 2004: 944; Schabas, 2001: 99). According to Kress, such referrals amount to “waivers of complementarity” – deliberate refrain from initiating national proceedings, thereby effectively (and voluntarily) accepting the Court’s involvement under the admissibility provisions (2004: 946). Kress proposes that self-referrals are broadly acceptable as a matter of policy, being consistent with ensuring that justice is properly administered (2004: 946). A “consensual burden-sharing” would, likewise, satisfy this policy rationale (Ibid). The Rome Statute does not address this specific issue of waiver, though it was raised in the preparatory negotiations (see Holmes, 1999: 77-78). The OTP Policy Paper recognizes that circumstances may support a state deferring or sharing responsibilities with the Court, but stresses states’ primary obligations under the complementary framework (ICC-OTP, 2003: 5) [my emphases]:

[The] system of complementarity is principally based on the recognition that the exercise of national criminal jurisdictions is not only a *right* but also a *duty* of States. Indeed, the principle underlying the concept of complementarity is that States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdictions and that national justice systems are expected to maintain and enforce adherence to international standards.

Those passages recognize that the ICC must guard against complacency of its member-states, and maintain its exceptional role as the court of last resort.

According to Burke-White, the benefits of such “cooperative complementarity” are that the ICC may count on receiving cooperation and judicial assistance from the referring state, and will not have to contend with an admissibility challenge (2005: 567).

Self-referrals may also, however, risk the ICC becoming a political weapon (Burke-White, 2005: 567; also see Cassese, 2006: 11; and Gaeta, 2004: 952):

While there are benefits, co-operative complementarity also carries with it significant difficulties, namely that the ICC may alter a delicate domestic political balance. The ICC must recognize that it is part of a system of global governance in international law enforcement, that its policies will alter the incentives at the national level, and that in responding to actions by national governments it may be engaging in a potentially dangerous political game.

Given that potential hazard, Kress cautions against “selective or asymmetrical self-referral, where the de jure government is itself party to an internal armed conflict” (2004: 946). Indeed, the use of the word ‘situation’ rather than ‘case’ in this referral mechanism, and in the Security Council referral mechanism which I discuss below, reflects the framers’ intent to avoid politicized referrals to the Court, as well as to foster efficient ICC proceedings (Kirsch and Robinson, 2002b: 623; also see Wilmshurst, 1999: 131; Kirsch et al., 2004: 288; and Yee, 1999: 147). The Prosecutor has demonstrated in the DRC proceedings, moreover, that investigations into conflict situations will consider and address crimes committed by all parties (Gaeta, 2004: 951-952; Cassese, 2006: 11).

Kress also warns that self-referrals may foster a “quasi-consensual” norm that would detract from the legitimacy of the Prosecutor’s discretionary investigative powers, which I discuss below, and otherwise compromise the appearance of independent and impartial ICC proceedings (2004: 948). In maintaining relations with referring states, the Prosecutor must “strike an indubitably delicate balance between constructive communication and necessary distance” (Ibid). As the OTP Policy Paper stresses, however, communications are vital to fulfilling the objectives of complementarity and ensuring effective ICC operations (ICC-OTP, 2003: Annex, Part I.D):

In light of the conditions for the exercise of jurisdiction by the ICC, the Prosecutor is in a different position from a national prosecutor, who may be seen to prejudice his or her independence if

contacts are made with the political authorities of the State. In carrying out his duties, the Prosecutor must enter into dialogue with heads of State and Government and with other agencies of a State. He may have to have such meetings in order to receive referrals of situations, in order to discuss the modalities of cooperation with the Court . . . and in order to discuss prospects for a State's own authorities taking proceedings themselves. The Prosecutor will carry out his responsibilities in this way without jeopardizing his independence and impartiality.

In those and other fundamental respects, therefore, including aspects I consider in section IV, the ICC seeks to function within a legal, political and practical context that is fundamentally distinct from national justice settings.

Second, a situation may be referred to the Prosecutor by the UN Security Council, acting under Chapter VII of the UN Charter (Rome Statute, 1998: Art. 13(b)).⁶¹ Chapter VII is titled: 'Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression' (1945: Arts. 39-51). Those provisions establish and define the Council's competence to determine such threats, breaches and acts, and to make recommendations or decide what measures shall be taken to maintain or restore international peace and security.⁶² As I mentioned in chapter 2 and further examine in chapter 7, the Council established the ad hoc tribunals pursuant to a progressively expansive interpretation of those prerogatives. As of 1 July 2007, this referral mechanism to the ICC had been utilized once: the Council's March 2005 referral of the Darfur, Sudan situation. The Sudan is not a State Party to the Rome Statute, and a referral (and ad hoc acceptance of the Court's jurisdiction) by the Sudanese government itself was not forthcoming. A Security Council referral, then, was the only mechanism by which the ICC could exercise jurisdiction over the situation. In this way, the Security Council extended the Court's

⁶¹ As I mentioned in chapters 3 and 4, the Council may also pre-empt or suspend ICC proceedings for a renewable period of 12 months (Rome Statute, 1998: Art. 16). As I will discuss in chapter 7, that is one of three mechanisms by which the ICC might defer to national proceedings of a non-prosecutorial nature.

⁶² Recall from chapter 4 that the U.S. is particularly concerned with the fourth listed crime of aggression within the Rome Statute because its definition and operation would purportedly conflict with the Security Council's competence under the UN Charter to determine and address acts of aggression.

territorial scope.⁶³ The Prosecutor launched an official investigation in June 2005. Two arrest warrants issued in April 2007 were outstanding as of 1 March 2008, as I further discuss in section IV and chapter 8 (ICC-Situations and Cases, 2008).

Even though acting pursuant to the Council’s referral, the Prosecutor has approached the situation with cautious sensitivity to complementarity. In his fifth semi-annual briefing and report to the Security Council on 7 June 2007 under the terms of the Council’s resolution and referral, Mr. Moreno-Ocampo reiterated that “the admissibility assessment is not a judgment on the Sudanese legal system as a whole, but an assessment as to whether or not the Government of Sudan has investigated or prosecuted, or is investigating or prosecuting in a genuine manner *the case* selected by the Prosecution” [original emphases] (ICC-OTP, 2007a). The Prosecutor is not obliged to accord preferred treatment to Security Council referrals, and must still make an independent ‘reasonable basis to proceed’ assessment, as discussed above, including with respect to admissibility (see Sarooshi, 2004b: 98-99; also see Cameron, 2004: 82; and Kirsch et al., 2004: 289). As Condorelli and Villalpando stress, the “principle of complementarity and the criteria of admissibility are to be considered intrinsic characteristics of the Court” (2002b: 637). Recall from chapter 1 that the ICC is a distinct legal entity from the UN, though a Negotiated Relationship Agreement provides for regularized institutional relations, and cooperation and judicial assistance between them (ICC-UN, 2004: Parts II & III). Just as the ICC may not commit the UN to transgress its own Charter, the UN

⁶³ The Security Council cannot, however, extend the Court’s ‘jurisdiction’ to address crimes not defined within the Rome Statute or crimes committed prior to the Rome Statute’s entry into force – 1 July 2002 (see Condorelli and Villalpando, 2002a: 580). The Rome Statute provides: “The jurisdiction and functioning of this Court shall be governed by the provisions of this Statute” (1998: Art. 1).

may not oblige the ICC to violate the Rome Statute (see Gallant, 2003: 569). Also recall that the OTP itself constitutes a separate organ within the Court itself.⁶⁴

The Council's referral may evidence softening attitudes among some permanent Security Council members toward the Court, particularly the U.S. (see Hazan, 2006: 100). In January 2005, an International Commission of Inquiry reported continuing mass atrocities in the Darfur and "strongly recommended" a Security Council referral to the ICC (UN-Darfur Report, 2005). The U.S. had been highly vocal about the Darfur crisis, but seemingly risked legitimizing the Court by agreeing to such a referral. The U.S. ultimately abstained from the March 31, 2005 Security Council resolution referring the Darfur situation to the ICC (UNSC, 2005). In not vetoing the resolution, it was apparently satisfied with the provision that nationals of non-States Parties would be subject to the "exclusive jurisdiction" of the contributing state for "all alleged acts or omissions" related to the operations (Ibid: Para. 6). The advantage of the Security Council referral mechanism is that it binds all states and imports the Council's enforcement machinery, including sanctions (Broomhall, 2003: 160). The UN Charter commits all member-states to carry out the Council's decisions, and provide mutual assistance in carrying out measures decided upon by the Council (1945: Arts. 24 & 49). As I discuss in section IV, however, the Darfur case illustrates fundamental operational challenges confronting the ICC, even when bolstered by the Council. It also demonstrates the inherent limitations of international criminal justice as a governance response to ongoing conflict situations, as I consider in chapter 8.

⁶⁴ The Rome Statute provides: "The [OTP] shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantial information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source" (1998: Art 41.1).

Third, the Prosecutor may initiate investigations *proprio motu* (on his or her authority) on the basis of information received concerning crimes within the Court's jurisdiction (Ibid: Arts. 13(c) & 15.1). As discussed in chapters 3 and 4, this mechanism was absent from the International Law Commission's 1994 draft statute and was very contentious in the Court's drafting and negotiation. It continued to amass state and non-governmental support throughout the preparatory negotiations, however, and became one of the Like-Minded Group of States' 'cornerstone objectives' for the ICC (Kirsch and Robinson, 2002a: 659; de Gurmendi, 1999: 177). In authorizing the Prosecutor to independently launch "preliminary examinations", without State Party or Security Council action or consent, it constitutes a defining supranational component of the ICC.⁶⁵ Its proponents stressed that political factors might dissuade the Security Council or States Parties from making referrals in certain circumstances, and that non-governmental access and input to the Prosecutor was vital to the Court's integrity (Brown, 2000: 73). Having strenuously resisted this mechanism in the negotiations, the U.S. cites the risk of politically-motivated prosecutions as amongst its fundamental concerns with the ICC, as mentioned in chapter 4. Its negotiating position nonetheless contributed to a significant conditioning of its details from more robust proposals (Broomhall, 2003: 87; Cameron, 2004: 82). Due to such concerns with checks and balances, this mechanism is narrowed and circumscribed in several respects (Broomhall, 2003: 79; also see Kirsch and Robinson, 2002a: 660-661):

The *proprio motu* power became acceptable only in the light of the rest of the Statute. It was a combination of limited and express jurisdiction, of strict preconditions to that jurisdiction, of

⁶⁵ The phrase "preliminary examination" is used in paragraph 6 to refer back to what paragraphs 1 and 2 of Article 15 prescribe. The OTP Policy Paper refers to the "pre-investigative phase" (2003: Annex, Part I.C). In any event, this stage is legally distinct and prior to investigations proper.

stringent admissibility requirements, and much else that made possible the incorporation of this power. The power is also subject to significant safeguards.

In analyzing the seriousness of information received, the Prosecutor may seek additional information from states, organs of the UN, inter-governmental or non-governmental organizations, or “other reliable sources he or she deems appropriate” (Art. 15.2). At this stage, however, the Prosecutor cannot actually conduct investigations proper to independently verify the accuracy of such information (see Nsereko, 1999: 114).

Upon concluding from a preliminary examination of a situation that there is a “reasonable basis to proceed”, the Prosecutor must seek authorization for a full-blown investigation by a Pre-Trial Chamber of the Court (Ibid: Art. 15.3).⁶⁶ In contrast to State Party or Security Council referral situations, then, which oblige the Prosecutor to investigate unless she or he determines that there is no reasonable basis to proceed, a full-blown investigation triggered under the *proprio motu* provisions requires a prior, judicially-affirmed determination that there is in fact a reasonable basis to proceed (see Gaeta, 2004: 950; also see ICC-OTP Policy Paper, 2003: Annex). The Chamber’s authorization to commence an investigation is also “without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case” (Rome Statute, 1998: Art. 15.4). Thus the Court’s role in curtailing this discretionary power is further compounded by the notification and deferral provisions which, as I discuss below, sustain the preferred status of national proceedings under the complementary framework even when the ICC has become directly involved in a situation (Kirsch and Robinson, 2002a: 82). The *proprio motu* power, then, is intended to

⁶⁶ This provision reflects a compromise proposal advanced by Germany and Argentina in the last session of the Preparatory Committee in April 1998 (see de Gurmendi, 1999: 183).

provide a fail-safe or last resort mechanism – not to pre-empt genuine national proceedings.

According to Sarooshi, the Prosecutor confronts a delicate balancing exercise in the Court's early years: assuaging concerns with the potential for politically-motivated or over-zealous proceedings, while also demonstrating the ICC's independent and effective functioning (2004a: 940). As of 1 October 2007, this trigger mechanism had not yet been utilized. The DRC's self-referral, however, was reportedly prompted by the prospect of an investigation *proprio motu* (Gaeta, 2004: 949). By that account, the Prosecutor preferred not to exercise this power due to its political sensitivities, and the expectation that a self-referral would engender more support and cooperation from the Congolese authorities (Ibid: 950). In February 2006, the OTP publicly confirmed having received communications from various sources regarding Iraq and Venezuela, but indicated that formal investigations had not been pursued since the alleged crimes within the Court's jurisdiction did not meet the gravity threshold for admissibility (ICC-OTP, 2006).

The centrality of complementarity in mediating the ICC-State Party relationship is reflected in two broad sets of procedural mechanisms that apply to different stages of ICC proceedings and further underscore the presumptive priority of national proceedings: 'Preliminary rulings regarding admissibility' (Rome Statute, 1998: Art. 18) and 'Challenges to the jurisdiction of the Court or admissibility of a case' (Ibid: Art. 19). In the first instance, when a Prosecutor receives a State Party referral and determines that there is a reasonable basis to proceed, or when the Prosecutor initially launches a preliminary investigation *proprio motu*, the Prosecutor must also notify all States Parties,

and other states that would normally have jurisdiction over the situation (Ibid: Art. 18.1). Within one month of receiving such notification, a State Party or other state having jurisdiction may respond that it has or is conducting its own investigations to which the Prosecutor must defer if those national proceedings have been or are being duly conducted (Ibid: Art. 18.2).⁶⁷ When making such a deferral, the Prosecutor may request the State Party or state to periodically inform the Prosecutor of the progress of investigations and any subsequent prosecutions (Ibid: Art. 18.5). As Holmes notes: “This provision has the advantage of demonstrating to the State that the Prosecutor remains interested in the situation and may reactivate his or her investigation should doubts emerge as to the genuineness of the State’s actions” (2002: 683). The Prosecutor may review such a deferral after six months or at “any time when there has been a significant change of circumstances based on the State’s unwillingness or inability genuinely to carry out the investigation” (Rome Statute, 1998: Art. 18.3). A State Party or other state that has unsuccessfully contested a preliminary admissibility ruling may, conversely, challenge a case again under article 19 [below] “on the grounds of additional significant facts or significant change of circumstances” (Ibid: Art. 18.7).

In the second instance, respecting cases actually before the Court, a State Party or other state having jurisdiction over a case may challenge its admissibility to the ICC in accordance with article 17 on the basis that it has or is investigating or prosecuting the case, and/or may challenge the Court’s jurisdiction over the case (Ibid: Art. 19.2(b)). An

⁶⁷ Pending a Pre-Trial Chamber’s ruling, or when the Prosecutor has deferred to a national investigation, the Prosecutor “may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purposes of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available” (Rome Statute, 1998: Art. 18.6).

accused person, or a person for whom an arrest warrant or summons to appear has been issued, may also challenge the Court's involvement on these bases (Ibid: Art. 19.2(a)). Such challenges may only be made once, and must generally occur prior to trial (Ibid: Art. 19.4). The Prosecutor may also seek a ruling on a question of jurisdiction or admissibility (Ibid: Art. 19.3). If a case is determined to be inadmissible under this article, the Prosecutor may seek review of the decision "when fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17" (Ibid: Art. 19.10). Again, those provisions sustain the preferred status of national proceedings under the complementary framework, even when direct ICC proceedings have commenced. They may also, however, permit disingenuous states to thwart or delay ICC proceedings (Robertson, 2002: 374; Turone, 2002: 1178).

In section II, I examined the potential benefits of national proceedings. International proceedings, however, may also offer distinct advantages that are relevant for evaluating the ICC's role under the complementary framework: national courts remain disinclined to proceed over crimes lacking any territorial or national link with the state (notwithstanding the principle of 'universal jurisdiction', which I discuss in chapter 7); international courts may provide a more authoritative and consistent jurisprudence (which I also discuss in chapter 7); international judges may act, or be perceived to act, more impartially and independently; international courts may be better equipped to investigate crimes with trans-border ramifications; and international trials may generate greater visibility and signal broader international resolve to render justice, thereby more potently stigmatizing the criminal conduct and perhaps achieving a more diffuse deterrence effect (Cassese, 2003: 441-442; also see Cassese, 2005: 460; Cassese, 1998: 6-

8; and Ratner and Abrams, 2003: 219-220). Those relative benefits will likely be most pertinent when an affected state is ‘unwilling or unable’ to itself administer international criminal justice. The actual need for direct ICC involvement in a particular situation, then, will tend to correlate positively with the potential advantages that international proceedings offer. I now turn to section IV, where I examine the practical operational challenges confronting the Court when it does exercise jurisdiction over a situation.

IV. International Cooperation and Judicial Assistance in ICC Proceedings

Having outlined the legal bases and mechanisms by which direct ICC proceedings may occur, it is important to recognize that this supranational legal competence is not matched by equivalent or corresponding coercive enforcement authority. As mentioned in section III, the ICC exists and operates within a unique limiting regulatory environment. Crawford stresses (2003: 113) [my emphases]:

National criminal justice systems have evolved over many years and have the advantage of a territorial base, a police force, prosecution services with executive power, goals etc. By contrast, the ICC would be a *territorially disembodied criminal court* lacking independent executive powers.

The Court is not entrenched within a broader centralization and institutionalization of legal and political authority at the supranational level. Indeed, as I stressed in chapter 5, the ICC is defined by its distinct *vertical* properties that transcend the *horizontal* ordering of international law and governance as a whole. Within this context, dispersed networks of authority are vital to enlisting and rationalizing states’ coercive powers to serve those transcending interests. Cassese observes (2003: 355):

For international criminal tribunals, State co-operation is crucial . . . Only other bodies or entities, that is, national authorities or international organizations, can enforce the decisions, orders and requests of such criminal tribunals. Unlike domestic criminal courts, international tribunals have no enforcement agencies at their disposal: without the intermediary of national authorities,

they cannot seize evidentiary material, compel witnesses to give testimony, search the scenes where crimes have allegedly been committed, or execute arrest warrants.

The ICC project's entire *vertical* authority structure, then, is mediated by (or subject to) a fundamentally *horizontal* state-cooperation arrangement – the Rome Statute's "Achilles' heel" (Sadat, 2000: 40).

Sovereign statehood includes the power of central state authorities to exercise public functions over individuals within a territory (Cassese, 2005: 49). That 'jurisdiction' takes three principle forms: the jurisdiction to *prescribe* law, the jurisdiction to *adjudicate* legal disputes or interpret the law with binding force, and the jurisdiction to *enforce* compliance through coercive means (Ibid; also see Kittichaisaree, 2001: 38-39; Broomhall, 2003: 52; and Byers, 1999: 54). Those components constitute the three main functions of a developed and centralized legal system (Cassese, 2005: 5). Whereas national systems are typically capable of performing those functions, the international system is defined by the fragmentation and dispersal of power (Ibid: 5-6; also see Krisch, 2003: 53; and Simpson, 1999: 37). Again, the ICC's exceptional supranational authority does not substantially alter or overcome those prevailing inter-national attributes. Its reliance upon national coercive power, then, is characteristic of vertical government networks (Slaughter, 2004: 20-21; also see Slaughter and Burke-White, 2006: 336-337):

Absent a world government, it is impossible to grant supranational officials genuine coercive power: judges on supranational tribunals cannot call in the global equivalent of federal marshals if their judgments are not obeyed; global regulators cannot impose fines and enforce them through global courts. Their only hope of being able to marshal such authority is to harness the cooperation of their domestic counterparts – to effectively 'borrow' the coercive power of domestic government officials to implement supranational rules and decisions.

The very features that distinguish national justice systems as the preferred forums for adjudication under the complementary framework, therefore, also present the foremost practical obstacles for effective ICC proceedings.

When the Court asserts jurisdiction, States Parties must comply with broad “international cooperation and judicial assistance” responsibilities (see generally Rome Statute, 1998: Part 9, Arts. 86-102).⁶⁸ Article 86 establishes the general obligation to cooperate: “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court” (Ibid). Thus the ICC has the authority to make compulsory ‘requests’ to States Parties (Ibid: Art. 87.1). Non-State Parties that have voluntarily accepted its jurisdiction over a particular situation, as discussed in section III, must also comply with requests (Ibid: Art. 87.5(b)).⁶⁹ Those obligations may include, *inter alia*:

- Arresting and surrendering persons to the Court (Ibid: Art. 89);
- Identifying the whereabouts of persons or the location of items (Ibid: Art. 93.1(a));
- Taking evidence, including testimony under oath (Ibid: Art. 93.1(b));
- Questioning persons being investigated or prosecuted (Ibid: Art. 93.1(c));
- Facilitating the voluntary appearance of persons as witnesses or experts before the Court [mentioned in chapter 5] (Ibid: Art. 93.1(e));
- Executing searches and seizures (Ibid: Art. 93.1(h));
- Providing records and documents (Ibid: 93.1(i))⁷⁰;
- Protecting victims and witnesses and preserving evidence [mentioned in chapter 5] (Ibid: Art. 93.1(j)); and
- Identifying, tracing and freezing proceeds, property and assets of crimes [mentioned in

⁶⁸ Two other significant forms of cooperation are prescribed outside of Part 9 (see Broomhall, 2003: 159). First, States Parties are obliged to prosecute “offences against the administration of justice” (e.g. corruptly influencing a witness, intimidating a Court official) when committed on their territories or by their nationals (Rome Statute, 1998: Art. 70.4(a)). Second, as discussed in chapter 5 within the context of victim compensation, they must enforce fines and forfeiture measures ordered by the Court (Ibid: Art. 109).

⁶⁹ Otherwise, the ICC may ‘invite’ non-States Parties to provide assistance (Rome Statute, 1998: Art. 87.5(a)). The Court may also ‘ask’ intergovernmental organizations to provide information or documents, and other forms of cooperation and assistance (Ibid: Art. 87.6).

⁷⁰ States Parties also have duties to disclose information and documents under Part 6, Arts 62-76 (‘The Trial’) (Rome Statute, 1998). The Rome Statute provides rules and procedures to govern situations “where the disclosure of information or documents of a State would, in the opinion of that State, prejudice its national security interests” (Ibid: Art. 72.1; see Gray, 2004: 298; and Piragoff, 1999: 270).

chapter 5] (Ibid: Art. 93.1(k)).

Such cooperation and assistance may be required even if the requested State Party or state is not the site of the conduct being investigated or prosecuted, and is not otherwise obliged under the Rome Statute (as the state of nationality of the alleged offender) to itself investigate or prosecute the situation. Victims, witnesses, evidence and accused persons themselves, for example, may be physically present within a third-party or custodial state other than where the situation occurred or is occurring.

In contrast to its substantive penal provisions, which I discussed in section II, here the Rome Statute expressly obliges States Parties to take necessary legal implementation and reform measures: “States Parties shall ensure that there are procedures available under their national law for all forms of cooperation which are specified in this part” (1998: Art. 88). States Parties may not, therefore, invoke national provisions, or absence of provisions, to avoid these obligations (Ciampi, 2002b: 1621-1622; Robinson, 2002: 1851). Cassese emphasizes these features of the Statute in observing a broader trend toward treaties “which, in addition to laying down a set of obligations, also explicitly impose upon contracting states the duty to enact legislation for implementing the various provisions (or at least some of the provisions) of the treaties” (2005: 218). The nature and extent of requisite implementation measures depends, however, upon the pre-existing legal and constitutional order within a given state (see Broomhall, 2003: 155). Canada’s Crimes against Humanity and War Crimes Act, for example, amended several other statutes to permit or ensure such assistance and cooperation, including the Extradition Act and the Mutual Legal Assistance in Criminal Matters Act (DOJ, 2008a: ss.33-75).

The ICC has itself acknowledged its reliance and dependence on cooperation from states and other actors (UN-ICC, 2005: Para. 5):

To be effective, the International Criminal Court must work closely with a number of critical partners, including States and international, regional and nongovernmental organizations. The Court does not have its own police force capable of implementing its decisions or orders. Instead, the Court requires the cooperation of States in many areas, including evidence collection, the arrest and surrender of persons and the enforcement of sentences.

This dimension (or limitation) raises fundamental questions for effective ICC operations. States that are ‘unwilling or unable’ to administer effective proceedings themselves may be correspondingly unwilling or unable to furnish the Court with the very cooperation and assistance that it will require to conduct its own investigations and prosecutions. Considered within the context of complementarity, then, Hunt refers to the “paradox of creating an institution in the hope that it will not have to function, by ensuring that, when it does have to function, it may be unable to do so efficiently” (2004, 63; also see Cameron, 2004: 92). The viability of this arrangement will depend upon not just the adequacy of the legal architecture in place, but also the depth of political consensus and commitment to the fundamental norms and values underpinning the ICC project, which I prospectively consider in chapter 8. If the Court does not receive adequate assistance and cooperation, it will be unable to conduct effective investigations and prosecutions. If its direct proceedings are hampered in this way, moreover, its impact on national proceedings under the complementary framework, as well as its broader normative objectives (e.g. deterrence and fostering respect for the rule of law), may be correspondingly undermined or compromised. The integrity of the entire ICC project, therefore, is fundamentally subject to factors resting outside of its legal architecture.

The ICC may determine and refer instances of non-compliance to the Assembly of States Parties, or to the Security Council if the Court's involvement in a situation stems from a referral by the Council (Ibid: Art. 87.7). According to Ratner and Abrams, "resolutions or statements by these two bodies are unlikely to sway recalcitrant states absent pressure from influential actors" (2003: 263; also see Schabas, 2001: 107). As Broomhall notes, this arrangement reflects the political delicacies of the ICC negotiations (2003: 156):

Many States were reluctant to grant to the Court the authority to make findings of non-cooperation, and it is an important assurance of the Court's credibility. At the same time, the omission of the consequences of non-cooperation from the Statute is a sign of the sensitivity of the issue, and of the wish of the Statute's drafters not to delay or endanger the adoption of the Statute by examining it too closely. What is clear is that the Assembly will be limited in the range of responses available to it by the international law to which its members are subject.

Non-compliance situations will test the Court's normative underpinnings and institutional leverage within the broader realms of international law and politics. The ICC will rely upon the name-and-shame campaigns of global civil society actors, the effectiveness of political opposition within non-compliant states, and the incentive and pressure tactics of multilateral diplomacy. Broomhall observes: "Enforcement power in international criminal law remains in State hands and subject to extralegal calculations, creating a deep divide between the formal rationale of international criminal law and its effective realization" (2003: 43). This enforcement deficit, then, is the primary vulnerability of the overall ICC project: "A tribunal unable to enforce its orders and judgments becomes at best an academic exercise and at worst a cynical set-back for international law and justice" (Ratner and Abrams, 2001: 223; also see Charney, 1999a: 463).

It is premature to assess this operational dimension. As I discuss in chapter 7, however, the ad hoc tribunals have been significantly hampered by their reliance upon

cooperation from interested parties. Those challenges are most strikingly illustrated by the fact that Bosnian Serb leader Radovan Karadzic and general Ratko Mladic remain at large several years after their indictments by the ICTY. Those experiences imply further weakness for the ICC, given that the ad hoc tribunals have a more robust state-cooperation design. As subsidiary organs of the Security Council, and established under Chapter VII of the UN Charter, their orders bind all states, as reflected in their respective statutes (UNSC, 1994: Art. 29; UNSC, 1993b: Art. 28; see Knoops, 2003: 181; Sarooshi, 2004b: 103; Cassese, 2003: 357; Swart, 2002b: 1592; and Ciampi, 2002b: 1608). Sarooshi suggests that the Council might bolster the ICC's state-cooperation framework by developing a practice of declaring all non-compliance situations as threats to peace and security, thereby enabling Chapter VII enforcement measures as a matter of course (Ibid; also see Ciampi, 2002b: 1611; and Kirsch et al., 2004: 291).

The Court's experiences thus far in Sudan, however, have brightly illuminated its operational weaknesses, even though acting pursuant to a Security Council referral. Its two outstanding arrest warrants are for Ahmad Harun, former Minister of State for the Interior and current Minister of State for Humanitarian Affairs, and Ali Kushyab, a leader of the Janjaweed militia (ICC-OTP, 2007a). The ICC Prosecutor has broadly appealed for support (Ibid):

The Court relies on the UN Security Council, on the Member States of the United Nations, on the States Parties to the Rome Statute, and on its key partners – the UN, the African Union and the League of Arab states – to take the necessary steps and call on the Sudan to arrest the two individuals and ensure they are brought to justice before the ICC.

The Prosecutor has also reported ongoing attacks against United Nations, African Union and humanitarian personnel, as well as indiscriminate and disproportionate government air strikes causing civilian casualties and displacement (Ibid). If the Darfur case is any

indication, therefore, the ICC project must still make considerable political and normative progress in order for its legal architecture to have the intended effects of punishing, deterring and denouncing international crimes on a global scale.

V. Complementarity and the Reconstituted State *

In this chapter, I have examined the Court's unique 'complementary' relationship to – or interrelationship with – national justice systems. This arrangement favours national justice systems as a matter of law and policy (ICC-OTP, 2003: 4):

The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognizing the primary responsibility of States themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses. Moreover, there are limits on the number of prosecutions the ICC can bring.

In prioritizing national proceedings, but also subjecting them to ICC scrutiny, this scheme constitutes a novel juxtaposition of authority within international law and governance: it marries the Court's distinct supranational properties with the primary role and capacity of states to prosecute international crimes within their borders and over their populations.

Cassese observes (2003: 353):

Its chief merits lie both in its respect for national courts, and in the indirect but powerful incentive to their becoming more operational and effective, inherent in the power of the ICC to substitute for national judges, whenever they are not in a position to dispense justice or they deliberately fail to do so.

Complementarity is an innovative legal framework that reflects progressive transnational norms and values, but it is also attentive to matters of practical economy and to legal and political continuities in the states-system. Rather than overriding national efforts, it aims to encourage states to bolster their own capacity to conduct proceedings, and to instill

* This section draws upon research and analysis from an earlier publication: Adrian L. Jones, "Continental Divide and the Politics of Complex Sovereignty: Canada, the United States and the International Criminal Court," 39(2) *Canadian Journal of Political Science* (June 2006): 227-248.

within national systems a sense of moral urgency and specific legal duty to actually administer justice when necessary. Thus, while the ICC institutionalizes individual rights and responsibilities, as discussed in chapter 5, it also reaffirms the state's centrality in enforcing justice, as discussed in this chapter.

The complementary design may have broader implications for how policy and institutional initiatives are conceptualized within international law and governance. As Slaughter observes (2004: 149-150):

[The Rome Statute] recognizes national government institutions as a first choice to exercise power and responsibility even in the design of an international system of governance. This acceptance, however grudging, is a radical departure for most international lawyers and diplomats, who are accustomed to operating on the international plane as something apart from and presumably superior to the particularities and prejudices of domestic institutions. In addition to signaling a major psychological shift, it also has considerable implications for the [more efficient] allocation of resources.

The ICC project, then, suggests that expanding the horizons of international law and governance is not necessarily tantamount to or synonymous with the one-directional ascendancy and centralization of legal *authority* – and especially of specific legal *functions* – at the supranational level. In this and perhaps many other transnational policy domains, progress may also be achieved by embracing the state's evolving normative context, and utilizing its continued and exceptional sovereign capacities to implement more diffuse governance arrangements that more practically juxtapose its respective role and competence vis-à-vis super-ordinate rules and institutional authorities.

As I discuss in chapter 8, for example, the ICC project's acceleration in the post-Cold War era reflects similar human security-related concerns fuelling proposals for a more consistent and coherent framework for international humanitarian intervention in conflict-related or naturally-occurring crisis situations. Beyond those shared normative

bases, the actual governance orientation of the Court’s complementary design is reflected in the influential report, *The Responsibility to Protect* (the ‘R2P Report’) (ICISS, 2001). As I further examine in that chapter, the R2P Report appeals for a re-characterization of state authority from ‘sovereignty as control’ to ‘sovereignty as responsibility’, involving internal and external dimensions (Ibid: Para 2.14). In an intriguing parallel to complementarity, it proposes that if a state is “unwilling or unable” to fulfill its primary internal responsibilities, then ultimate external responsibility rests with the international community (Ibid: Para 2.29). Like the ICC project, then, that proposal reflects the interrelated notions that states exist in a broader social context, that states carry both prerogatives and duties, and that breach of the latter may trigger a broader governance obligation and response from the global community. The logics of complementarity, then, may lend themselves to policy diffusion or transplantation beyond the administration of international criminal justice.

The ICC project uniquely illustrates both the resilience and transformation of the state under globalizing conditions. States have voluntarily created and ceded some authority to the Court as a supranational governance entity, though they have retained their principal sovereign prerogatives and duties under the complementary framework. As Holmes emphasizes, therefore, achieving consensus for the specific complementarity provisions and criteria was fundamental to the entire ICC negotiating process (1999: 74):

The success in Rome is due in no small measure to the delicate balance developed for the complementarity regime. States which were concerned primarily with ensuring respect for national sovereignty and the primacy of national proceedings were able to accept the complementarity provisions because they recognized and dealt with these concerns. Where the Court was given authority to intervene, the criteria on which such interventions would be based were clearly defined in as objective a manner as possible.

The ICC project, then, may provide broader guidance in developing effective and politically feasible initiatives within international law and governance. It suggests that states may be more inclined to accede to supranational governance formats when the oversight and intervention properties of such arrangements are directly linked and contingent upon their own compliance with pre-established, principally coherent, and sufficiently precise and predictable legal rules. In prescribing distinct supranational authority for the ICC, and negotiating its attendant juxtaposition, the state affirms itself as the central “broker of globalization” (see Clark, 1999: 67).

States Parties also enjoy distinct benefits and privileges under the Rome Statute: participation within the Assembly of States Parties, including electing Judges and the Prosecutor, and proposing and voting on amendments; the right to refer situations to the Court; and the right to receive notice from the Prosecutor concerning new investigations (see Robinson, 2002: 1866-1867). In this sense, States Parties have effectively utilized their sovereign capacities as a “bargaining tool” for involvement and input into the ICC project as a going concern (see Keohane, 2002a: 35; also see Taylor, 1999: 138; Krasner, 2001a: 5; and Heller and Sofaer, 2001: 32). The ICC project also demonstrates that progressively evolving understandings of state sovereignty have become less tightly fused with rigid assumptions concerning state autonomy and capacity. Participation within transnational cooperative enterprises, including delegating authority and specific functions to formal governance institutions like the ICC, may be viewed and undertaken as a progressive utilization of sovereignty, rather than as a derogation of sovereignty (see Broomhall, 2003: 59; and Heller and Sofaer, 2001: 32). If one accepts that sovereignty is ultimately “rooted in the authority and expectations of the people”, then engagement with

the ICC actually promotes sovereignty (Nagan and Hammer, 2004: 167). Indeed, in expressing states' own collective freewill and direction, "the ICC is as much a domestic as an international institution" (Mayerfeld, 2004: 155).

As states establish formal institutions like the ICC, moreover, they may undertake parallel initiatives to bolster the authority and independence of their own counterpart authorities to more effectively interact with those institutions – additional features of the "disaggregated state" which I mentioned in section I (see Slaughter, 2004: 266; also see Sassen, 2004: 1155). The ICC example, then, transcends often-skewed scholarly debates between theories that deterministically observe, predict and/or champion the state's decline or obsolescence, and equally assertive counter-perspectives that witness, forecast and/or applaud the robust, autonomous sovereign state. The ICC experience, rather, yields a more nuanced outlook: it evidences a *reconstituted state* that is deeply enmeshed in the development and functioning of cooperative governance enterprises, but also subject to their super-ordinate purview and authority. Its "complementary sovereignty" or "functional sovereignty" arrangement simultaneously affirms and qualifies the prerogatives of the state (Leonard, 2005: 102). Within this context, "state sovereignty is not obsolete; it is, however, being reconstituted" (see Pauly and Grande, 2005: 6). Those novel complexities reflect Wendt's broader proposition that "the sovereign state is an ongoing accomplishment of practice, not a once-and-for-all creation of norms that somehow exist apart from practice" (1992: 413).

That equivocal appraisal is reflected in the varying subjective positions states have taken in relation to the ICC project's complementary framework and its implications

for state sovereignty. Canada and the U.S., for example, have articulated strikingly divergent interpretations or assessments. The official Canadian position is as follows (DFAIT, 2008c) [original emphases]:

Will the ICC threaten the sovereignty of a democratic country like Canada?

The ICC will not supplant Canadian courts. Canadian authorities will have the first opportunity to carry out investigations and prosecutions, and the ICC cannot intervene when genuine proceedings have been undertaken . . . The ICC Statute contains numerous checks and balances applicable at every stage of proceedings to ensure that the ICC operates in a credible and responsible manner. In addition, the jurisdiction of the ICC is carefully limited to the most serious crimes.

Expressed or emphasized in this way, the ICC will not qualitatively impact or undermine Canadian sovereignty. The official U.S. position, in contrast, stresses the state sovereignty implications of complementarity as amongst its core concerns with the Court (Department of State, 2008c):

The ICC is required to defer to the national prosecution unless the court finds that the state is unwilling or unable to carry out the investigation or prosecution (Article 17). By leaving this decision ultimately to the ICC, the Treaty would allow the ICC to review and possibly reject a sovereign State's decisions not to prosecute, or a sovereign State's court decisions of not guilty or dismissal with prejudice in specific cases.

In fact, given the Court's ultimate authority to determine admissibility in a given case, "states take a significant step in accepting the ICC's right to judge actions or motivations regarding national prosecutions [by agreeing] to be bound by a process with defined rules but no guarantees" (Sewall et al., 2000: 3-4). The U.S. position, then, reveals not a dismissive view of international law, but rather an acute appreciation of its "direct and consequential" implications (Stephan, 2004: 12).

The ICC project is particularly striking given that criminal justice matters rest at the core of sovereign states' conventional prerogatives (Badinter, 2002: 1932; Broomhall, 2003: 68; Tallgren, 1998: 111). States have also traditionally been very reluctant to submit to binding dispute settlement mechanisms under international law, preferring the

relative discretion and predictability afforded by diplomatic means (Murphy, 2004: 42-43; Morris, 2001: 15). An additional feature perhaps bearing upon varying perceptions of the Court's state sovereignty implications is the open-ended provision for withdrawal from the Rome Statute, subject to a one-year effective date delay (1998: Art. 127.1; see Heller and Sofaer, 2001: 37; and Krasner, 1999: 26-27). In any event, the ICC's distinct supranational authority is truly novel and significant, however much it is legally circumscribed under the complementarity provisions and practically mediated by its reliance upon state-cooperation. As author and subject of this innovative arrangement, the *reconstituted state* has revealed its pivotal role and capacity in expanding the horizons of international law and governance.

Chapter 7

THE ICC IN BROADER CONTEXT: AN EMERGING PROGRAM OF COMPLEX ADJUDICATION

Contents

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I. The ICC in Broader Context

In developing this study's core proposition that the ICC is implicative of new directions and expanded possibilities for international law and governance, this chapter considers the Court's situation within a broader, multifaceted framework of governance measures for prosecuting, deterring and denouncing international crimes. The ICC has declared: "The Court is the centerpiece of an emerging system of international criminal justice which includes national courts, international courts and hybrid tribunals with both national and international components" [my emphasis] (UN-ICC, 2005: Para 3). The word 'system' may actually be misleading insofar as it implies intra-structural mechanization or synchronization. There are two main complicating factors. First, apart from the Court's specific supranational competence to scrutinize national justice systems and possibly substitute its own proceedings under the complementary framework, the ICC is neither formally linked nor hierarchically superior to national courts or those other types of tribunals. Second, the Court's jurisprudence on substantive points of law will not bind national courts or other judicial bodies. The governance

scheme that I seek to conceptualize in this chapter, however, encompasses overarching normative understandings and ideals that constitute and provide broad coherence to those legal and infrastructural components. What in fact seems to be emerging, then, is a more loose-knit program of semi-autonomous modes for administering justice, which vary by their potential scope, contributions and implications under the Rome Statute. That collectivity reveals a unique situation of *complex adjudication* by which the Statute, beyond the complementary framework I analyzed in chapter 6, may intersect with (rather than fully govern or supersede) other rules and norms for determining essential issues of judicial forum and applicable law in a given situation. For those reasons, rather than an omnipresent fixture atop a hierarchical judicial pyramid, the ICC is equally novel and significant as more of a permanent site of organizational and normative authority. In that capacity, it reflects, inspires and guides the broader development of international criminal law and judicial institutions. I now provide a brief theoretical overview before outlining how the specific propositions of this chapter are structured and developed.

As discussed in chapter 6, the term ‘complementary’ conveys the Court’s fundamentally supportive role relative to national justice systems. In this chapter, I seek to locate conceptually that core ICC-State Party juxtaposition in relation and conjunction with the mutually-supportive functions performed by other legal and institutional components for administering justice. The Rome Statute’s jurisdictional and related lacunae define the existing and potential role for those other enforcement efforts. As I further discuss in section II, there are two broad categories of situations that exceed the Statute’s scope and application (i.e. situations not subject to ICC proceedings). First, there are offences that precede its initial temporal jurisdiction or entry into force [1 July

2002] (1998: Art. 24.1). Second, there are offences beyond the Court’s effective territorial reach under the ‘pre-conditions to the exercise of jurisdiction’ that I examined in chapter 6, together with the exceptions (Ibid: Art. 12.2). Here the Statute is noteworthy for what it does not proscribe or foreclose: “Nothing in this Part [Part 2: ‘Jurisdiction, Admissibility and Applicable Law’] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute” (Ibid: Art. 10). Thus the ICC invites and informs principled contributions toward the enforcement of justice on a truly global scale – without limitation by time or space.

That broader emerging program is *rational*, then, even though not fully *rationalized*. As Ratner and Abrams note, “the lack of a centralized process or product should not be equated with the absence of norms, and indeed these norms have their own logic” (2003: 332; also see White, 2002: 197). Though I structure my analysis in this chapter in accordance with the formal components mentioned above, it is crucial to remain mindful of the fundamental norms of international criminal justice considered previously in this study. Those include the principle of individual criminal responsibility, and the primary authority (and duty) of states to prosecute individual offenders. Where offences have actual trans-boundary dimensions – for example, the nationality of an alleged offender diverges from that of the victim(s) and/or the territorial state of the alleged conduct – then subsidiary or operating norms assist in determining the appropriate forum for adjudication. Stemming from that essential determination, states are obliged – as a function of their primary enforcement role – to provide cooperation and judicial assistance to the prosecuting state or tribunal. Multilateralism itself, then, may be

regarded as a fundamental principle of international criminal justice. Hence government networks may perform a very significant role in coordinating state enforcement measures, as discussed in chapter 6. The overall regulatory effectiveness or feasibility of this evolving framework is inextricably tied to the individual-level conduct with which it is ultimately concerned. ICC President Philippe Kirsch has stressed: “The ICC must be part of a framework of measures to sustain a culture of accountability, including increased domestic prosecution of such crimes, greater use of universal jurisdiction, and greater international cooperation in suppressing international crimes” (2001: 4-5). In my prospective and concluding discussion in chapter 8, then, I consider the deterrence properties and potential of the Court and those broader governance efforts.

The Nuremberg legacy has for decades demanded more consistent and effective administration of international criminal justice. Those imperatives stem not merely from the concerns of victims or potential victims of serious international (or global) crimes; more broadly and fundamentally they reflect the interests and values of the global community as a whole. As I demonstrate in this chapter, however, those dictates do not presuppose or mandate a specific or uniform mode of dispensing justice, nor does the Rome Statute as their foremost institutional expression. In fact, just as those normative pressures have intensified, the range of mutually supportive channels and mechanisms has expanded and diversified. As Cassese observes (2003: 457-458):

Clearly, given the magnitude of the task, there is no single response to the multifarious aspects of international criminality. One must perforce resort to a whole gamut of responses, each most suited to a specific condition, effectively to stem international crimes.

The ICC, then, rests prominently within this continued progressive development of international norms, rules and judicial institutions toward what may be understood as a

broader governance *program* of enforcement efforts, if not a fully integrated *system*.

Even within that extended governance context, however, the sovereign state remains the primary administrator and enforcer of justice over individual transgressors. The ICC is thus further distinguished as a permanent international organization that both reflects and spurs those broader cross-cutting trends in governance and authority.

In developing these propositions, this chapter proceeds in five parts. First, I examine the principle of ‘universal jurisdiction’ as a broader basis for national prosecutions under international law than what the Rome Statute prescribes. Realizing its potential contribution will require heightened national commitment to prosecuting international crimes, including offences (and offenders) within no direct or conventional nexus to the prosecuting state. Such proceedings may also require principled inter-state coordination, particularly in determining priority amongst multiple (competing) national proceedings and providing attendant cooperation and judicial assistance. Second, I consider the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), which are approaching the closure of their mandates, likely signaling an end to international ad hoc tribunals proper, given their restricted scope and relative costs. I survey their structure and mechanics, and appraise their jurisprudence and operational experiences that have inspired and guided the ICC project and broader enforcement and supporting measures. Third, I consider a more recent trend toward so-called ‘internationalized’ or hybrid (mixed) tribunals. In possibly combining the respective advantages of national and international proceedings, permitting prosecutions beyond what the Rome Statute prescribes, or perhaps just enabling States Parties to prosecute offences under its complementary framework, those mechanisms constitute a

particularly intriguing supporting component. Fourth, I consider the principal legal and policy issues raised by non-prosecutorial truth-seeking commissions in relation to the Rome Statute and international criminal justice more generally. Though these alternative approaches pursue distinct peace, justice and reconciliation objectives in transitional societies, they should supplement rather than preclude or substitute for criminal adjudication. Fifth, I draw upon the phrase *complex adjudication* to conceptualize the collective nature and novelty of this emerging governance program, and further examine its two principal complicating factors mentioned above.

II. National Prosecutions beyond the Rome Statute: Universal Jurisdiction

In this section, I consider ‘universal jurisdiction’ as a basis by which national courts may prosecute international crimes that pre-date or are perpetrated beyond the Rome Statute’s penal scope: offences which States Parties are not required to prosecute and the ICC is not permitted to prosecute under the Rome Statute. I focus my analysis upon the Princeton Principles of Universal Jurisdiction, which were formulated by a globally diverse assembly of scholars and jurists, representing a range of viewpoints and a variety of legal systems, though acting in their personal capacities (Princeton Project, 2001: 25). The Princeton Principles constitute an authoritative and progressive re-statement of the status of universal jurisdiction under international law, combined with an appeal for its greater recognition and application within national justice systems: “The Principles contain elements of both *lex lata* (the law as it is) and *de lege ferenda* (the law as it ought to be), but they should not be understood to limit the future evolution of

universal jurisdiction” (Ibid: 39).⁷¹ The authors seek to address judges applying domestic law, law-makers concerned with enacting implementing legislation, national authorities determining whether to prosecute, extradite or otherwise assist in a given situation, and civil society actors aiming to facilitate justice (Ibid). They recognize the Rome Statute as a “signal achievement”, but aim to provide clarity and coherence to the law of universal jurisdiction to facilitate broader national enforcement, and to prevent political abuse and otherwise inappropriate and/or untimely prosecutions (Ibid: 24-25):

Universal jurisdiction holds out the promise of greater justice, but the jurisprudence of universal jurisdiction is disparate, disjointed, and poorly understood. So long as this is so, this weapon against impunity is potentially beset by incoherence, confusion, and, at times, uneven justice.

Those challenges notwithstanding, universal jurisdiction potentially offers a very significant contribution to international criminal justice as its most expansive component.

As discussed in chapter 5, the Rome Statute conforms with strict *legality* – the maxim that persons may only be held criminally responsible for conduct that was criminalized at the time of commission (see Cassese, 2003: 139-141). By some accounts, the Statute is unduly restrictive since the three defined crimes within the Court’s jurisdiction were already well-recognized within customary international law (e.g. Robertson, 2002: 389; also see Schabas, 2001: 57). As it stands, the Court’s temporal jurisdiction stems from the Statute’s entry into force (1 July 2002) or subsequently in respect of a state becoming a State Party after that date, unless that state makes a declaration accepting the Court’s earlier jurisdiction, as discussed in chapter 6 (1998:

⁷¹ The Princeton Principles may be regarded as an example of ‘soft law’ (Stahn, 2005: 701). Soft law consists of standards, commitments, joint statements etc. from bodies generally recognized as having political legitimacy and/or epistemic credentials (Cassese, 2005: 196). It reflects modern or emerging international legal trends addressing new concerns of the international community which, for political, economic or other reasons, have not yet been addressed by legally binding commitments. As a consequence, soft law does “not impose legally binding obligations”, but rather “may be regarded as declaratory, or indicative, of a customary rule, or instead help crystallize such a rule” (Ibid: 196-197).

Arts. 11.1-2). In no circumstances may the ICC prosecute conduct pre-dating the Statute's entry into force (Ibid: Art. 24.1). Under the principle of 'universal jurisdiction', however, states themselves may prosecute serious international crimes without those or any temporal restraints.

Also recall from chapter 6 that, as 'preconditions to the exercise of jurisdiction', apart from Security Council referrals and non-States Parties' ad hoc acceptance of the Court's jurisdiction over a given situation, the ICC may only address acts committed on the territories of States Parties or by their nationals (Ibid: Art. 12.2(a) & (b)). Those respective parameters reflect 'territorial' and 'active nationality' as the two most established bases of states' criminal law adjudicative jurisdiction. Two other recognized bases of jurisdiction are 'passive nationality' (crimes committed against a state's nationals) and the 'protective principle' (crimes committed against a state's national interests) (Cassese, 2003: 277; Kittichaisaree, 2001: 39; Ratner and Abrams, 2001: 160-162). State and civil society efforts to incorporate universal jurisdiction within the Rome Statute were hampered by confusion and misunderstandings amongst the negotiating parties (Glasius, 2006: 74). Germany was a particularly forceful proponent of universal jurisdiction for the ICC (Kirsch and Holmes, 1999: 8-9; Glasius, 2006: 69; Weschler, 2000: 97). That proposal enjoyed significant support amongst states and civil society actors, while a more modest though also more complicated South Korean proposal attracted a range of responses and criticisms (Kirsch and Holmes, 1999: 9; Glasius, 2006: 75; Wilmshurst, 1999: 132-133; Nolte, 2003: 75-76). In any event, the overall majority preference for a broader scope of ICC competence ultimately yielded to a more vocal minority of states espousing more restrictive conceptions (Nsereko, 1999: 107; Glasius,

2006: 75; and Schabas, 2001: 61). As with the temporal restrictions, however, those parameters do not correspondingly restrict national prosecutions. According to the Princeton Principles, where crimes are of “such exceptional gravity that they affect the fundamental interests of the international community as a whole”, then states themselves may exercise (universal) jurisdiction and prosecute “based solely upon the nature of the crime” (2003: 201; also see Cassese, 2003: 285). In such cases, a custodial state should either prosecute the person or extradite that person for prosecution elsewhere: the duty *aut dedere aut judicare* (‘either to extradite or prosecute’) (Princeton Project, 2001: 55).⁷²

As a governance principle, universal jurisdiction exemplifies the ‘global’ nature of international crimes (Princeton Project, 2001: 23-24; also see Burke-White, 2002: 16):

When national courts exercise universal jurisdiction appropriately, in accordance with internationally recognized standards of due process, they act to vindicate not merely their own interests and values but the basic interests and values common to the international community.

The following passages form the substantive core of the authors’ declaration and appeal (Principle 1: ‘Fundamentals of Universal Jurisdiction’) (Ibid: 28-29) [my emphases]:

1. [Universal jurisdiction] is criminal jurisdiction based solely upon the *nature of the crime*, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.
2. Universal jurisdiction may be exercised by a *competent and ordinary judicial body of the state* in order to try a person duly accused of serious international crimes . . .
3. A state may rely on universal jurisdiction as a basis for seeking the *extradition* of a person or accused or convicted . . .
4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, a state and its judicial organs shall observe *international due process norms* . . .
5. A state shall rely upon universal jurisdiction in *good faith* and in accordance with its *rights and obligations under international law*.

⁷² Broomhall distinguishes between the *permissive* form of universal jurisdiction that exists under customary international law, and the *mandatory* form, which is not actually universal because it reflects commitments by parties to multilateral conventions (2003: 13 & 106; also see Tallgren, 1998: 112).

I now briefly survey the balance of the fourteen Princeton Principles, including their accompanying commentary, as a supporting component of international criminal justice.

The authors cite the following non-exhaustive list of offences subject to universal jurisdiction: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture (Ibid: Principle 2.1: 29). This list is “without prejudice to the application of universal jurisdiction to other crimes in international law” (Ibid: Principle 2.2: 29). Recall that the ICC’s jurisdiction is presently restricted to three defined crimes: genocide, war crimes, and crimes against humanity (Rome Statute, 1998: Art 5). In addition to expanding the temporal and territorial scope of national prosecutions, then, universal jurisdiction may also permit states to prosecute a broader range of substantive offences. Consistent with the Rome Statute’s provisions that I examined in chapter 5, “the official capacity of any accused person, whether as head of state or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment” (Princeton Project, 2001: Principle 1: 31). Statutes of limitation, likewise, should not bar criminal prosecution for the listed offences (Ibid: Principle 6: 31).⁷³

Also consistent with the Rome Statute’s provisions I examined in chapter 5, persons should not be “exposed to multiple prosecutions or punishment for the same criminal conduct” (Ibid: Principle 9.1: 33). Likewise, however, “sham proceedings” will not bar subsequent prosecution (Ibid: Principle 9.2: 33). Recall that though the Rome Statute does not prescribe the death penalty, its provisions do not prejudice the

⁷³ Recall from chapter 2 the 1970 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity – the latter which includes the Genocide, as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (see Kittichaisaree, 2001: 261).

application of national laws and penalties (1998: Art. 80). According to the Princeton Principles, however, the death penalty, torture “or any other cruel, degrading or inhumane punishment or treatment” constitute grounds for refusing extradition (Princeton Project, Principle 10.1: 34). States refusing to extradite to a state on such grounds should prosecute or extradite to another state, as appropriate (Ibid: Principle 10.2: 34).

As I discussed in chapter 6 and further examine in section V, the issue of amnesty laws barring national prosecutions raises admissibility issues for the ICC under the complementary framework. It also raises questions concerning third-party states that may seek to prosecute offences using universal jurisdiction. According to the authors, amnesties are “generally inconsistent with the obligation of states to provide accountability” (Ibid: Principle 7.1: 31). Also, the exercise of universal jurisdiction “shall not be precluded by amnesties which are incompatible with the international obligations of the granting state” (Ibid: Principle 7.2: 31). Neither the Princeton Principles nor the Rome Statute specifies, however, when (if ever) national amnesties should be respected so as to bar criminal prosecutions outside of the granting state. As I discuss in section V, the prevailing view is that broad national amnesties will or should not pre-empt ICC proceedings. That same reasoning may also guide third-party states in considering whether to exercise universal jurisdiction in such circumstances.

The very conception of universal jurisdiction necessarily implies the potential for multiple (competing) proceedings: if any state may prosecute a case based solely upon the nature of the crime, then multiple states may potentially seek to prosecute, perhaps including the territorial state and/or the state of nationality under the Rome Statute.

Cassese distinguishes between the more widely-held view of “conditional universal jurisdiction” by which only the custodial state may prosecute, and the more expansive conception of “absolute universal jurisdiction” by which states may initiate proceedings absent custody (2003: 285-291). Because many legal systems do not permit trials in absentia, however, the physical presence of the accused person is a practical precondition for conducting actual trial proceedings (Ibid: 286). Whether relying upon universal jurisdiction or any other basis for prosecution, moreover, states may not physically apprehend individuals extraterritorially without the consent of the state of refuge.⁷⁴

Thus the effective utilization of universal jurisdiction requires state authorities to subscribe to a common normative commitment to ensuring justice, as well as a shared understanding of the applicable rules and their respective roles and responsibilities in a given set of circumstances. The nationality or residency of an offender may diverge from that of the victim(s) and/or the territorial state where the crime was perpetrated. In such cases, effective prosecutions, whether by states, the ICC or other tribunals, require coordinated national efforts in matters such as executing searches and seizures, securing crime sites and preserving evidence, and arresting individuals and extraditing or surrendering them for trial. The authors declare that states should comply with all international obligations respecting prosecution, extradition, and administrative and judicial assistance (Princeton Project, 2001, Principle 4: 30). Those would include such responsibilities under the Rome Statute, which I discussed in chapter 6.

⁷⁴ According to Ratner and Abrams, however: “Once a defendant is physically present before a court, the means by which he was brought before the court, even if extra-judicial, have generally been regarded by domestic courts as irrelevant for challenging the court’s jurisdiction” (2001: 259; also see Nsereko, 1999: 99). Those authors refer to the case of Adolf Eichmann, who was kidnapped for trial from Argentina by Israel in 1960 without Argentina’s consent (Ibid).

According to the authors, if a custodial state has no basis for prosecution other than universality, then it should determine whether to prosecute or extradite based upon an aggregate balance of the following criteria (Ibid: Principle 8: 32):

- (a) Multilateral or bilateral treaty obligations;
- (b) The place of commission of the crime;
- (c) The nationality connection of the alleged perpetrator to the requesting state;
- (d) The nationality connection of the victim to the requesting state;
- (e) Any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
- (f) The likelihood, good faith, and effectiveness of the prosecution in the requesting state;
- (g) The fairness and impartiality of the proceedings in the requesting state;
- (h) Convenience to the parties and witnesses, as well as the availability of evidence in the requesting state;
- (i) The interests of justice.

These criteria for determining jurisdictional priority reflect the relative interests implied by the traditional bases of states' jurisdiction that I outlined above, together with the overriding objectives of administering justice fairly and effectively.⁷⁵ The authors stress that “effective legal processes require the active cooperation of different government agencies, including courts and prosecutors” (Ibid: Principle 8: 44).

As mentioned in chapter 6, however, there is still no decisive authority to determine priority amongst multiple (competing) states' prosecutions (Ferdinanusse,

⁷⁵ These criteria are broadly consistent with the framework of principles guiding decisions and procedures under Canada's Crimes against Humanity and War Crimes Program (DOJ, 2008b). Burke-White draws upon expansive (or generic) conceptions of 'complementarity' and subsidiarity" to guide and conceptualize such decisions and relationships: "Complementarity and subsidiarity fit together neatly. Both emphasize keeping prosecution local where possible. Complementarity governs the [vertical] allocation of jurisdiction between the supranational and the national level [between the ICC and states], while subsidiarity determines the [horizontal] location of prosecution within the national level [between states]" (2002: 91).

2004: 1048). The prevailing view is that territoriality provides the strongest jurisdictional foundation for prosecution (Cassese, 2003: 277 & 452; Kittichaisaree, 2001: 6; Ratner and Abrams, 2001: 161; and Ferdinandusse, 2004: 1048). Universal jurisdiction, in contrast, provides the weakest foundation (Ferdinandusse, 2004: 1048). Though I characterized the ICC as a ‘court of last resort’ in chapter 6, ICC proceedings may be more authoritative than national prosecutions based solely upon universal jurisdiction (see Kleffner, 2003: 108). By that rationale, rather than enacting sweeping universal jurisdiction provisions, states should take targeted measures to permit the exercise of universal jurisdiction only in lieu of proceedings by states with stronger jurisdictional nexuses or by the ICC (Ibid: 109). In the concluding section, I further consider these jurisdictional issues and their attendant implications for extradition and surrender.

The authors contemplate the role of the International Court of Justice (ICJ) in resolving disputes (Princeton Project, 2001, Principle 14: 36). Under the Rome Statute, disputes between States Parties “relating to the interpretation or application” of the Statute not settled within three months will be referred to the Assembly of States Parties, which may seek to resolve the dispute itself or may make recommendations on further means of settlement, including referral to the ICJ (1998: Art. 119.2). As mentioned in chapter 6, however, the ICC itself will resolve disputes regarding its own “judicial functions”, including admissibility determinations under the complementary framework (Ibid: Art. 119.1; see Pellet, 2002b: 1841).

The authors propose that these core principles are sufficiently established within international law to be directly invoked and relied upon within national justice systems,

without the adoption of specific implementing legislation (Princeton Project, 2001: Principle 3: 30). They recognize, however, that national courts have been generally reluctant to accept universal jurisdiction as the sole basis for prosecution. National jurists have tended to require one or more of the traditional jurisdictional nexuses that somehow bind or make the crime or the accused person or the victim(s) of interest to the prosecuting state (Cassese, 2003: 296-297; and Ferdinandusse, 2004: 1048-1049). More generally or fundamentally, they seek legislative mandates in recognizing and applying customary international law (Cassese, 2003: 303) [author's emphases]:

Normally national courts do not undertake proceedings for international crimes only on the basis of international *customary law* . . . They instead tend to require either a national *statute* defining the crime and granting national courts jurisdiction over it, or, if a treaty has been ratified on the matter by the State, the passing of *implementing legislation* enabling courts to fully apply the relevant treaty provisions.⁷⁶

Thus the authors appeal for national legislation “where necessary” to enable the exercise of universal jurisdiction (Princeton Project, 2001: Principle 11: 34). Here the Rome Statute’s national implementation may facilitate broader progressive legislative measures (Robinson, 2002: 1861):

Implementation of the Rome Statute . . . provides an excellent opportunity for States to affirm their abhorrence of these crimes and to establish universal jurisdiction.

Indeed, one of the promising benefits of the ratification process is that so many States will seize the opportunity to update and strengthen their laws and jurisdictional reach . . . Once a critical mass of States have such legislation, the world will become a more inhospitable place for those who would consider launching campaigns of genocide or other atrocities. In this way, the Rome Statute will have a major impact before the ICC even takes a case.

⁷⁶ This aspect raises complex issues respecting the implementation and relative status of international law within national (or municipal) justice systems. In terms of its relative status, there are three broad conceptions, each reflecting underlying political and theoretical underpinnings (see Cassese, 2005: 213-216). Two of these are so-called *monistic views*, essentially entailing the relative integration and supremacy of municipal law and of international law respectively. The third view, the so-called *dualistic doctrine*, posits two distinct legal orders, such that international law must be “transformed” into national law through deliberate mechanisms (Ibid: 214). In practical terms, regardless of which conception prevails in a given national system, most international law must be implemented to become operative (Ibid: 217). The two principal modalities of such implementation are automatic standing incorporation, and legislative and ad hoc incorporation (Ibid: 220-222).

As mentioned in chapter 6, for example, Canada's Crimes Against Humanity and War Crimes Act extends beyond the Rome Statute's parameters to include 'passive nationality' jurisdiction (based on the nationality of the victim) and a form of universal jurisdiction (DOJ, 2008a: s.8(a)).⁷⁷ The authors also appeal for the inclusion of universal jurisdiction "in all future treaties, and in protocols to existing treaties, concerned with serious crimes under international law" (Princeton Project, 2001, Principle 12: 35).

III. The Declining Role of International Ad Hoc Tribunals

As discussed in chapters 2 and 3, the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were established by the UN Security Council pursuant to its international peace and security mandate and authority under Chapter VII of the UN Charter. In October, 1992, the Council established a Commission of Experts to examine serious violations of international law in the former Yugoslavia (UNSC, 1992). Following the Commission's report in February, 1993, the Council determined that such violations constituted a threat to international peace and security, and directed the UN Secretary-General to prepare a draft statute for an international tribunal (UNSC, 1993a). The Council unanimously adopted the statute and created the ICTY as a subsidiary organ under Chapter VII (UNSC, 1993b). The ICTR's establishment in November, 1994 stemmed from a similar process (UNSC, 1994). The Council was particularly progressive in interpreting its own competence in relation to the Rwandan conflict, which was primarily of a 'non-international' character by conventional criteria (Knoops, 2003: 3; also see Cassese, 2003: 337; White, 2002: 207; and Kirsch et

⁷⁷ The Act also amended several other statutes, including the Criminal Code, Extradition Act, and Mutual Legal Assistance in Criminal Matters Act (ss.33-75), which will assist Canadian authorities with complying with the Rome Statute's international cooperation and judicial assistance provisions and more broadly.

al., 2004: 281). The legality or lawful establishment of the ICTY was upheld by the ICTY Appeals Chamber itself (Kittichaisaree, 2001: 24; also see McColdrick, 2004: 34). The Appeals Chamber held that the Security Council is not limited to the measures specifically listed in Article 41 of the UN Charter (measures not involving the use of armed force) (Klabbers, 2002: 183-185; Kirsch et al., 2004: 285). The ICTR likewise upheld its own competence (Kittichaisaree, 2001: 24-25; McColdrick, 2004a: 36). Though having requested the tribunal, the Rwandan government ultimately dissented from its creation because of its temporal jurisdictional limitations, the unavailability of the death penalty, and because it would neither use Rwandan judges nor hold trials in Rwanda (Knoops, 2003: 6; also see Kittichaisaree, 2001: 25). At the Council's direction, the tribunals formulate bi-annual completion strategies. Investigations officially ended on December 31, 2004. No indictments have been issued since that date, and their mandates are expected to end by 2010. They are completing existing proceedings and transferring other cases to national courts. At this juncture, it is instructive to appraise the enduring contributions their establishment, operations and jurisprudence have made to the ICC and the broader international criminal justice program.

Rather than establishing the ICTR as a discrete entity, the Council essentially appended it to the ICTY, and modeled its Statute accordingly (see Ratner and Abrams, 2001: 202). The tribunals also share a common appellate chamber and Prosecutor (Ibid). Whereas the ICTY sits in The Hague, Netherlands, the ICTR operates in several locations: the Prosecutor and appellate chamber are based in The Hague, the investigatory and prosecutorial unit operates from Kigali, Rwanda, and the trial chambers sit in Arusha, Tanzania (Ibid: 203). A chronic difficulty for the ICTR is its "geographical

and related psychological distance from the victims of the crimes it is examining”, though enhanced outreach efforts have ameliorated this condition to some degree (Ibid: 206; also see Zacklin, 2004: 544). Those are typical challenges for international criminal justice, particularly when administered other than by national courts of the territorial state. Here their experiences may inform internationalized or mixed (hybrid) tribunal initiatives, which retain the physical and psychological benefits of national proceedings, as I discuss in section IV. They may also influence ICC practice, which may conduct proceedings outside of its permanent seat in The Hague (Rome Statute, 1998: Art. 3.3). Its first trial – of Thomas Lubanga Dyilo of the Democratic Republic of Congo (DRC), which I discussed in chapter 6 – was scheduled to begin on 31 March, 2008. In a public hearing held in Ituri (eastern DRC) on 4 September, 2007, ICC judges announced the possibility of conducting *in situ* hearings in Ituri, if not a full *in situ* trial (see Muchaba, 2007: 12). More generally, the Court’s comprehensive Strategic Plan for Outreach “draws upon the achievements and lessons learned from the ad hoc tribunals” (ICC-ASP, 2006b: Para 6).

The ICTY has jurisdiction over war crimes, genocide and crimes against humanity (UNSC, 1993b: Arts. 2-6). It may prosecute crimes “committed in the territory of the former Socialist Federal Republic of Yugoslavia” since 1 January 1991 (Ibid: Arts. 1 & 8). The Council set no time limit on that jurisdiction (Ratner and Abrams, 2001: 193).⁷⁸ The ICTR has jurisdiction over the same crimes (UNSC, 1994: Arts. 2-4). Its jurisdiction stems only from 1 January, 1994 to 1 December, 1994, though includes bordering states where Rwandans committed offences (Ibid: Arts. 7 & 1). The

⁷⁸ In a hypothetical case of concurrent jurisdiction between the ICTY and ICC, the ICTY, as a subsidiary organ of the Security Council, would supersede the ICC’s treaty-based authority (Bohlander, 2002: 688).

fundamental tenet of individual criminal responsibility is prominently enshrined in the tribunals' respective statutes (UNSC, 1993b: Art. 7; UNSC, 1994: Art. 6).

The 'primacy' format of the ad hoc tribunals, vis-à-vis affected states, is distinct from the Rome Statute's more decentralized or deferential 'complementary' framework. Though the tribunals have 'concurrent' jurisdiction with national courts, such that either level may prosecute a given case, their respective statutes provide that "at any stage of the procedure", the ICTY or ICTR "may formally request national courts to defer to the competence of the International Tribunal" (UNSC, 1993b: Art. 9.2; UNSC, 1994: Art. 8.2; see Cassese, 2003: 348; Kittichaisaree, 2001: 25; Sands, 2003: 77-78; and Ratner and Abrams, 2001: 209-210). According to Ratner and Abrams, "the concurrent jurisdiction between the ICTR and national authorities has led to more friction between them than in the case of the former Yugoslavia, where no court able and willing to prosecute offenders was likely to obtain custody over a substantial number of defendants" (2001: 206). The tribunals have increasingly deferred to national courts, which are now better equipped and less prone to bias (Cassese, 2003: 351). According to Claude Jorda, former ICTY President and former ICC Judge, the ICTY has pursued a "strategy of delocalization" by focusing upon senior political and military leaders, while lower-level defendants are tried by competent national courts, thereby contributing to reconciliation, peace-building and re-establishing the rule of law (2004: 575). The ICTR has similarly focused upon "those most responsible" for serious, large-scale offences (Ratner and Abrams, 2001: 205). As I discuss in section IV, those arrangements may guide mutually supportive ICC and national proceedings in future transitional situations when national systems cannot fully or promptly administer justice on their own.

As Chapter VII measures under the UN Charter, states must render cooperation and assistance to these tribunals in priority to other international commitments, as reflected in their respective statutes (UNSC, 1993b: Art. 29; UNSC, 1994: Art. 28; see Knoops, 2003: 181; Sarooshi, 2004b: 103; Cassese, 2003: 357; Ciampi, 2002b: 1608). As mentioned in chapter 6, especially with this more robust design, the ad hoc tribunals have foreshadowed operational challenges for the ICC. Particularly in the ICTY experiences, “the alleged crimes were often conducted by (or under instructions from) state actors and the evidence of these crimes remains within the jurisdiction of interested parties” (Cogan, 2000: 411; also see Ratner and Abrams, 2001: 223). More fundamentally, Bosnian Serb leader Radovan Karadzic and general Ratko Mladic, among other significant figures, remain at large several years after having been indicted.

In the May, 2007 Completion Strategy Report to the Security Council, ICTY President and Judge Fausto Pocar stressed: “The Security Council must make clear that the trial of these fugitives by the international community does not hinge upon the International Tribunal’s proposed Completion Strategy dates” (UNSC, 2007a: Annex I, Para 33). Prosecutor Carla Del Ponte emphatically declared (Ibid: Annex II, Para 42):

After the landmark judgment of the International Court of Justice in February of this year [2007], when Serbia was the first State to be found in violation of the Genocide Convention and ordered to deliver Ratko Mladic to The Hague, it would be inconceivable to end the Tribunal’s mandate without Radovan Karadzic and Ratko Mladic, both accused of genocide in Srebrenica, being brought to justice before the Tribunal. The Council may wish to consider further action to encourage Serbia and other relevant countries to finally fulfil their international obligations under Chapter VII of the Charter.

As discussed in chapter 6, the ICC’s own vulnerabilities in relying upon state-cooperation for the arrest and surrender of individuals for trial in the Darfur, Sudan situation have mirrored those chronic ICTY challenges. As Cassese observes (2005: 461):

This is the major stumbling block of these courts and tribunals. They lack an autonomous *police judicare* overriding national authorities. They are like giants without arms and legs, who therefore need artificial limbs to walk and work. These artificial limbs are the State authorities. If the co-operation of States is not forthcoming, these tribunals are paralyzed.

Thus the viability of the ICC project and broader efforts to enforce justice hinge critically upon the political will of affected states to take supportive enforcement measures, as well as those states best positioned to exert influence over such states, whether bilaterally or in multilateral forums. I consider those central prospective challenges in chapter 8.

The commissions of inquiry leading to the ad hoc tribunals' establishment have broader and enduring significance. As mentioned in chapter 6, the Security Council's referral of the Darfur, Sudan situation to the ICC in March, 2005 stemmed from the January, 2005 report of an International Commission of Inquiry. Building upon those and other prior commissions, the Darfur Commission was tasked not only with fact-finding and documentation, but also with making a formal determination as to whether genocide had been or was being committed, as well as identifying the perpetrators and clarifying the applicable legal principles (see Alston, 2005: 604). The compelling and public details of its findings may have decisively influenced the U.S. and China to abstain from, rather than veto, the Council's subsequent referral to the ICC (Ibid: 606). By some critical accounts, however, the ad hoc tribunals "were established more as acts of political contrition, because of consistent failures to swiftly confront the situations in the former Yugoslavia and Rwanda, than as part of a deliberate policy, promoting international criminal justice" (Zacklin, 2004: 542; also see Maogoto, 2004: 144). Indeed, that same charge could perhaps be levied against the Council's overall handling of the Darfur crisis.

The ad hoc tribunals' experiences have also revealed the fundamental limitations of international criminal justice in seeking to deter offences and reaffirm the rule of law in ongoing conflict situations. In acknowledging cooperation shortfalls and the fact that the Srebrenica massacre occurred subsequent to the ICTY's establishment, former Prosecutor Louise Arbour has stressed the need for a "partnership" between international criminal justice and military peacekeeping operations by which peacekeepers would act as both "enforcers" and "witnesses" (2000: 198). Elsewhere, Arbour emphasizes the ICTY's challenges in seeking to react as a "real time" law enforcement agency" in the midst of the explosive 1999 crisis in Kosovo (2004: 398). In fact, that exceptional ICTY encounter will be more typical for the ICC, as President Kirsch observes (2007: 545):

This illustrates a major difference between the ICC and other international tribunals, which by and large were dealing with crimes that had been committed in the past in the course of conflicts that were over. The ICC deals with crimes that continue to be committed in the course of conflicts that are ongoing. As a result, the ICC faces many challenges in particular in relation to its field activities and security.

The ad hoc tribunals have also demonstrated that the objectives (and limitations) of international criminal justice must be effectively communicated to affected societies (Zacklin, 2004: 544):

The ICTY and ICTR have . . . been the victims of general misunderstanding on the part of the populations for whom they function as courts. Criminal courts exist for the purpose of establishing international accountability – not to uncover the fates and locate the remains of loved ones. Nor is it the purpose to provide an official history. To the extent that a historical record is integral to individual trials, it might be said that this is incidental . . .

It has been suggested that the Slobodan Milosevic proceedings were unduly complicated and protracted by Prosecutor Carla Del Ponte's resolve to establish a comprehensive historical narrative of the Balkans conflict. Those critiques particularly abounded when Milosevic unexpectedly died in the latter stages of his trial in March, 2006. In any event, it was a precedent-setting development in international criminal justice as the first

indictment (and subsequent trial) of a sitting Head of State for alleged acts committed in that capacity (see McDonald, 2004: 570).

As discussed throughout this study, the ad hoc tribunals inspired and informed the Rome Statute's drafting and negotiation. They embodied and articulated the distinct criminality and global concern with the atrocities and the underlying conflicts. The very proposition of a permanent tribunal, however, reflected the widely acknowledged need to progress beyond the ad hoc model, as Kirsch and Oosterveld reflect (2001: 1147):

There was broad recognition that, even when international justice worked through the establishment of ad hoc tribunals, it remained inherently selective. . . . Many crimes were committed elsewhere that required justice, but about which nothing was done. By the same token, major powers and their nationals were largely sheltered from any possibility of being subject to jurisdiction of the ad hoc tribunals. The problem of selectivity also contributed to the perception that the Security Council should not retain exclusive control over international justice.

Given those concerns, the Rome Statute's Overview declares the need for a permanent tribunal, in part, "to remedy the deficiencies of ad hoc tribunals", including perceptions of "selective justice" (1998). A fundamental *raison d'être* of the ICC, then, is to deliver broader and more consistent justice than ad hoc arrangements can deliver. The Rome Statute's Overview also expresses concerns with "tribunal fatigue" or the loss of political will to create and sustain these mechanisms due to their inherent delays, expense and limited legal scope and competence (1998; see Cassese, 2005: 458). For those reasons, the Security Council will be more inclined to refer situations to the Court than to establish more ad hoc tribunals (Broomhall, 2003: 151; also see Zacklin, 2004: 545). In its various objections to the ICC, the U.S. has touted ad hoc tribunals as alternate mechanisms for dispensing justice (Department of State, 2008c). Its acquiescence in the Council's referral of the Darfur situation to the Court, however, likely further negates any remaining impetus for full-blown international ad hoc tribunals in the future. In May,

2007, the Council did resolve to establish a more discrete Special Tribunal for Lebanon to prosecute offences relating to the February, 2005 assassination of former Lebanese President Rafiq Hariri (UNSC, 2007b).

Their limitations notwithstanding, the ad hoc tribunals have contributed to the progressive development of the substantive law (Ratner and Abrams, 2001: 220):

The early decisions of the ICTY and ICTR demonstrate that they will play an authoritative and dynamic role in helping to clarify and advance international law; each ad hoc tribunal is influencing the jurisprudence and practice of the other, national courts, the incipient ICC, and even the [International Court of Justice].

I have discussed important doctrinal advances in previous chapters, including the decisive recognition of war crimes applicable in non-international armed conflicts, as well as the distinct status of crimes against humanity (apart from armed conflict situations), the recognition of various crimes committed specifically or disproportionately against women and children, and the need to safeguard those and other vulnerable victims and witnesses in the administration of justice. They have also enhanced the fundamental perception of international criminal justice as a viable governance enterprise (Charney, 2001: 122; also see McColdrick, 2004a: 35; and Goldstone and Bass, 2000: 58):

The ICTY and ICTR have legitimated the prosecution of international crimes to the international community and have elaborated on the pertinent law through their statutes, rules, and judgments. They have thus created a substantial and tangible body of jurisprudence, which was lacking in the past. . . . Many of these developments have been prominently reported in the popular press and have spawned a growing body of scholarship. Through these advances governments have become accustomed to the idea that international criminal law constitutes a real and operative body of law, which in turn has facilitated domestic prosecutions . . .

In operational respects, therefore, the ad hoc tribunals have performed a significant intermediate role in demonstrating both the potential and challenges for the ICC project and broader efforts to administer international criminal justice.

IV. The Emergence of Internationalized or Mixed (Hybrid) Tribunals

In contrast to the declining relative prominence of international ad hoc tribunals proper, so-called ‘internationalized’ or mixed (hybrid) tribunals represent an emerging trend within international criminal justice. For that reason, this section is more prospective and contemplative than section III. In potentially combining the respective advantages of national and international proceedings, permitting prosecutions beyond what the Rome Statute prescribes, or perhaps just enabling States Parties to address offences under its complementary framework, such mechanisms offer an innovative and pragmatic supporting component to the broader program. They may be particularly useful in post-conflict situations where the requisite political will exists to prosecute international crimes, but where effective proceedings cannot be administered due to a breakdown of the judicial system (e.g. civil wars in East Timor, Sierra Leone) (Cassese, 2005: 458-459; and Cassese, 2003: 343-344 & 456). Even if stability has been achieved over a longer transitional period, historical factors might render the judiciary incapable of dispensing justice even-handedly, or with the perception of fairness and independence (e.g. Cambodia) (Ibid). In those types of scenarios, internationalized mechanisms not only raise core policy questions (and potential) for the administration of justice, but also more fundamental complexities in terms of how distinct aspects of state sovereignty, responsibility and capacity are approached in broader societal reconciliation efforts.

These courts have a mixed composition, including both international judges and judges from the host state (Cassese, 2005: 458; Cassese, 2003: 343). There are two principal architectural models (Ibid: also see Knoops, 2003: 11). First, there are tribunals established as an organ of the state in question, as part of its judiciary. Examples include

the Special Panel for Serious Crimes in East Timor established under the UN Transitional Administration for East Timor (UNTAET), and the Kosovo Internationalized Panels established under the UN Interim Administration Mission in Kosovo (UNMIK). Second, there are tribunals established under international agreement, which exist and operate separately from the national judiciary in accordance with their distinct statutes. The most prominent examples are the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). The prevailing scholarly view is that the Iraqi Special Tribunal (IST), established by the Legal Committee of the Governing Council in consultation with legal experts and staff in the Coalition Provisional Authority, is not a genuinely internationalized judicial body (see Zolo, 2004).

The international community may support these hybrid initiatives in various ways, including providing technical expertise and training, security, judicial assistance and financing (Cassese, 2005: 458-9; Cassese, 2003: 345-346; and Ratner and Abrams, 2001: 343). Recognizing that it has suffered from “tribunal fatigue”, Ratner and Abrams note that the UN has been correspondingly receptive toward the idea of hybrid tribunals for Sierra Leone and Cambodia (2001: 221-222; also see Cassese, 2005: 458). Non-governmental organizations may also contribute resources and expertise (Ratner and Abrams, 2001: 184). Those mechanisms may also entail various types and degrees of cooperation and coordination with the ICC. The Court itself has declared: “The interrelationships between those different institutions has continued to develop, as evidenced by the Court’s assistance to the Special Court for Sierra Leone and other efforts directed toward international justice” (UN-ICC, 2006: Summary). For security reasons, the SCSL’s trial of Charles Taylor, the former Liberian President, is being held

at the seat of the ICC in The Hague pursuant to a Security Council-sanctioned Memorandum of Understanding between the two courts (ICC-UN, 2006: Para 59 & 60). The trial is being conducted by SCSL judges and by its own Statute and Rules, though the ICC is providing detention and courtroom services and facilities (Ibid: Para 60). The SCSL is supported by the Security Council, and the voluntary support of donors, but it is not a Chapter VII judicial body like the ICTY and ICTR that import the Council's enforcement authority (Kirsch et al., 2004: 292; also see Murphy, 2004: 318). The Rome Statute has also been referenced as an authoritative source of international law by the East Timor Serious Crimes Panel, which has essentially incorporated its substantive definitions of crimes (Knoops, 2003: 14).

These approaches may also raise admissibility questions under the Rome Statute's complementary framework. Because the existing hybrid tribunals are addressing conduct pre-dating the Statute's entry into force, however, these are prospective considerations. As discussed in chapter 6, 'inability' refers to cases where, "due to a total or substantial collapse or unavailability to its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings" (Rome Statute, 1998: Art. 17.3). Burke-White surveys the requisite capacity elements for genuine, effective national prosecutions under the complementarity format (2005: 576; also see Ratner and Abrams, 2001: 183):

Four key analytical factors can be derived from Article 17 [Issues of Admissibility], their commentaries, and a range of international agreements and instruments addressing judicial 'best practices' to judge the effectiveness of judicial systems in states recovering from a total or substantial judicial collapse.

These include the availability of experienced and unbiased judicial personnel, the presence of a viable legal infrastructure, the existence of adequate operative law, and a sufficient police capability to undertake arrest and investigation.

These factors are crucial to a genuine investigation and prosecution as they address the *ability* of the national government to apprehend suspects, collect evidence, provide security to victims and witnesses, and undertake unbiased adjudication.

If a state is willing to prosecute offences, but unable to conduct effective proceedings within the ordinary course of administering justice, then a mixed tribunal approach may help address those types of capacity gaps.

Recall from chapters 5 and 6 the “sufficient gravity” admissibility criterion for ICC proceedings (Rome Statute, 1998: Art. 17.1(d)). As with national courts in the ordinary course, hybrid tribunals may support the Court by prosecuting conduct that may not satisfy that threshold. As Broomhall notes (2003: 103-104):

These initiatives, with all of their shortcomings, are likely to be the forerunner of similar future efforts that will emerge as an ICC with limited resources, encountering crimes that the Statute seeks to suppress, will give indirect encouragement to its States Parties (conceivably working through the United Nations) to support initiatives that will provide accountability without taxing the abilities of the Court itself.

The consequences of complementarity should therefore be understood not solely in terms of proceedings undertaken by national governments acting in isolation, but rather as ‘joint ventures’ placed at varying degrees between the national and international planes.

Cassese also prospectively and favourably considers the role of such tribunals within that broader context (2003: 456; also see Knoops, 2003: 2):

The system of ‘internationalized’ courts could prove very effective also when the ICC is firmly established: indeed, it may ensure a proper functioning of the complementarity mechanism and prevent the Court from being flooded with hundreds of cases because of the inadequacy of national justice systems due to the collapse of the local judiciary. Mixed or ‘internationalized’ tribunals will prove even more important whenever the collapsing apparatus is that of a State that is not party to the ICC Statute.

The ICC Office of the Prosecutor itself has also acknowledged their potential role in furthering the objectives of complementarity (ICC-OTP, 2003: 7) [my emphases]:

The strategy of focusing on those who bear the greatest responsibility for crimes . . . will leave an impunity gap unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing perpetrators to justice are used. . . .

If the ICC has successfully prosecuted the leaders of a State or organization, the situation in the country might then be such as to inspire confidence in the national jurisdiction. The *reinvigorated*

national authorities might now be better able to deal with the other cases. In other instances, the international community might be ready to combine national and international efforts to ensure that perpetrators of serious international crimes are brought to justice.

It appears, therefore, that a mixed tribunal approach could or would not fully pre-empt ICC proceedings under the complementary framework. The passage of time and other aspects inherent to mixed tribunals would seemingly signify or presuppose the very ‘inability’ of national justice systems that permits direct ICC involvement.

In more broadly emphasizing the role and potential for international law to harness national laws and institutions to serve broader governance objectives, Slaughter and Burke-White praise the capacity-building properties of these mechanisms (2007: 337-338; also see Burke-White, 2002: 23). They may be particularly well-suited to addressing emerging patterns of conflict in the post-Cold War era that I considered in chapter 5, and contributing to broader reconciliation and reconstruction efforts. In all situations, however, the appropriate course of administering justice will depend upon a range of circumstantial variables. Holding trials in the territorial state where the offences were committed may serve to educate and inform the local population, and promote gradual reconciliation through their public stigmatization of the offenders and conduct (Cassese, 2005: 459; Cassese, 2003: 345; and Burke-White, 2002: 24). They may also be more expeditious than international proceedings without compromising international standards (Cassese, 2005: 459; Cassese, 2003: 345). Apart from funding and security, practical challenges include harmonizing prosecution and judicial functions across national and international components, which may be complicated by differences in language, experience and legal philosophy (Cassese, 2005: 459; Cassese, 2003: 345).

These approaches broadly reflect the overarching norms of international criminal justice. They seek to prosecute offenders for serious international crimes, rather than, for example, relying solely upon non-prosecutorial measures that I discuss in section V.

Justice in its various forms is particularly vital in post-conflict situations. Former UN-Secretary General Kofi Annan has stressed (UNSC, 2004: Para 3):

Our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long-term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.

The International Federation for Human Rights has similarly declared: “Experience has shown once and again that no lasting peace can be attained in societies divided by massive crimes, if accountability, justice and redress for victims and the entire society are not attained” (FIDH, 2007: 5). These measures also reaffirm the central role of the territorial state in enforcing justice. Indeed, they demonstrate sensitivity toward nationalist sentiments that might be offended by full-blown international proceedings, while also incorporating the practical benefits of involving local prosecutors and judges familiar with local language and norms (Cassese, 2005: 459; Cassese, 2003: 344). The international component may entail a positive “spill-over effect” that contributes to the broader democratic training and acculturation of local judicial officials (Cassese, 2005: 459; Cassese, 2003: 345). All of these aspects raise broader policy questions. As I discuss in chapter 8, the “responsibility to protect” encompasses three components: *reacting*, *preventing* and *rebuilding* – including justice and reconciliation (ICISS, 2001: Para 513). These approaches may also permit the prosecuting state to incorporate offences, penalties or other legal features distinct to its own national justice system.

In the short-to-medium term, these internationalized approaches may continue to increase in relative prominence, particularly in developing regions where support for the ICC is high and where the processes of ratifying and implementing the Rome Statute may help galvanize and equip local authorities to prosecute past offences. Over a more extended time trajectory, however, they may decline in relative significance as the number of States Parties increases and a greater proportion of offences fall within the Statute's complementary scope (i.e. its initial temporal jurisdiction becomes less of a factor and its spatial voids are narrowed). As with many aspects of this governance program, it may take many years to refine and evaluate their relative role and efficacy. At present, they constitute a novel mini-series of judicial experiments, which may offer useful benefits and insights for international criminal justice, and potentially broader revelations for democratic transition and capacity-building in post-conflict situations.

V. The Supplementary Role of Non-Prosecutorial Truth-Seeking Commissions

This chapter and study are principally concerned with the administration of international criminal justice: prosecuting individual persons for serious international crimes. I recognize, however, that non-prosecutorial truth-seeking mechanisms may also advance distinct peace, justice and reconciliation objectives in transitional societies. Those approaches may be viewed as stressing *restorative* justice over *retributive* justice (Joseph, 2005: 3; Quinn, 2004: 3). Quinn characterizes *restorative justice* as “a process of active participation in which the wider community deliberates over past crimes, giving centre stage to both victim and offender [and seeking] to bestow dignity and empowerment upon victims, with special emphasis upon their contextual factors” (2004:

3). To those and related ends, investigatory commissions – often referred to as truth commissions or commissions of inquiry – “officially investigate and provide an accurate record of the broader pattern of abuses committed during repression and civil war” (Joseph, 2005: 10; also see Ratner and Abrams, 2001: 228; and Hayner, 2002: 23). Insofar as they purport to preclude or substitute for criminal prosecutions, by granting amnesties or pardons, those approaches raise significant legal and policy issues in relation to the Rome Statute and international criminal justice more generally. In fact, sweeping, un-principled amnesties fundamentally offend the core objectives of punishment, deterrence and denunciation through the imposition of individual criminal responsibility. According to Hayner, however, such amnesties are neither a typical feature of past experiences, nor inherent to forward-looking conceptions of such projects (2002: 98-99). Hayner suggests there is actually a “natural and close relationship” between the respective approaches (2002: 87; also see Ratner and Abrams, 2001: 151).

Hayner outlines four broad characteristics of these mechanisms (2002: 14):

(1) truth commissions focus on the past; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) a truth commission is a temporary body, typically in operation for six months to two years, and completing its work with the submission of a report; and (4) these commissions are officially sanctioned, authorized or empowered by the state (and sometimes also by the armed opposition), as in a peace accord.

The South African Truth and Reconciliation Commission (TRC), established by the Government of National Unity’s Promotion of National Unity and Reconciliation Act (1995), is perhaps the most well-known of these mechanisms (see Hayner, 2002: 40; and Minow, 1998: 52). Similar approaches have been taken in Argentina, Chile, El Salvador

and Guatemala (Hayner, 2002: 32-40; also see Joseph, 2005: 10).⁷⁹ The ICC negotiations involved sharply contrasting views concerning the Court's role and priority in relation to non-prosecutorial measures, particularly if those alternative approaches involve amnesties barring national prosecution (Cameron, 2004: 90):

The main arguments advanced in favor of amnesties were their supposed value for national reconciliation, and for establishing and maintaining peace and democracy. On the other hand, many delegations feared with good reason that explicitly allowing an amnesty to be an exception to admissibility would totally undermine the struggle against impunity.

The ICC framers reconciled or contained these competing positions by incorporating a “creative ambiguity” into the Rome Statute, such that national amnesties are neither expressly validated nor impugned outright in relation to the Court's authority (Stahn, 2005: 708; also see Robinson, 2003: 483; Cameron, 2004: 90; and Joseph, 2005: 21). I now consider the three main provisions under the Statute by which the ICC might defer to such measures, before examining broader policy considerations regarding the appropriate interrelationship between prosecutorial and non-prosecutorial approaches.

First, the Rome Statute provides that “in considering whether to initiate an investigation, the Prosecutor shall consider whether [inter alia]: Taking into account the gravity of the crime and the interests of victims, there is nonetheless substantial reasons to believe that an investigation would not serve the interests of justice” [my emphasis] (1998: Art. 53.1(c)). According to Robinson, the phrase ‘interests of justice’ is properly construed as extending beyond retributive, criminal justice (2003: 488). The 2003 Policy Paper of the ICC Office of the Prosecutor acknowledges this prosecutorial discretion (ICC-OTP, 2003: 7). As I stressed in chapter 6, then, prosecutorial policy will help shape

⁷⁹ Beyond these 5 particularly noteworthy commissions, Hayner considers 16 less prominent cases (2002: 50-71): Uganda, Bolivia, Uruguay (1974), Zimbabwe, Uganda (1986), Nepal, Chad, South Africa (ANC), Germany, African National Congress II, Sri Lanka, Haiti, Burundi, Ecuador, Nigeria and Sierra Leone.

the Court's overall margin of deference toward operations and decisions of national justice systems. That exercise will require delicate legal and policy considerations on a case-by-case basis: "The Prosecutor will need to consider carefully the seriousness of the offenses and, in the case of amnesties or pardons issued after conviction, whether the prosecution by national authorities was, in fact, genuine" (Ratner and Abrams, 2001: 219). Upon concluding from an investigation that there is "not a sufficient basis for prosecution" because it is "not in the interests of justice", the Prosecutor must inform the Pre-Trial Chamber and provide reasons for the conclusion, as well as the referring State Party or Security Council (see Rome Statute, 1998: Art. 53.2(c)). The State Party or Security Council may then seek review of the Prosecutor's decision by the Chamber, or the Chamber may review the decision on its own initiative (Ibid: Art. 53.3 (a) & (b)).

Second, as also discussed in chapter 6, the Rome Statute generally provides that a case is inadmissible to ICC where it "has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute, unless the decision resulted from the *unwillingness* or *inability* of the State genuinely to prosecute" [my emphases] (1998: Art. 17.1(b)). As mentioned there, commentators have expressed mixed views regarding whether amnesties and pardons would (or should) be interpreted or characterized as evidencing such 'unwillingness' or 'inability'. Nsereko proposes a measured approach for making such determinations (1999: 119):

[The] granting of blanket amnesties . . . without a prior investigation and careful delving into the merits is *prima facie* evidence of unwillingness or inability of the State concerned to prosecute them. The situation is, however, different when the State has investigated the case and, in its sovereign wisdom, decided not to prosecute the persons concerned by granting them amnesty or pardon. . . . [The ICC] should not dismiss out of hand the State's efforts at national reconciliation as unwillingness or inability to prosecute. Peace and national reconciliation are legitimate goals for any country to pursue.

As mentioned in chapter 6, the discussion of complementarity and admissibility in the OTP Policy Paper does not address this issue (see Sarooshi, 2004a: 943). In any event, prosecutorial discretion will again be significant, including perhaps beyond the ICC to guide third-party states considering whether to exercise universal jurisdiction to prosecute nationals from amnesty-granting states. As mentioned above in section II, the Princeton Principles on Universal Jurisdiction declare amnesties as being “generally inconsistent with the obligation of states to provide accountability” (Princeton Project, 2001: 31).

Third, as discussed in chapters 3 and 4, the UN Security Council may pre-empt or suspend ICC proceedings (Rome Statute, 1998: Art. 16):

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

Here the ICC negotiations were markedly contentious (see Kirsch et al., 2004: 289; Weschler, 2000: 92; and Scharf, 2000a: 179). That feature, together with the provision for Security Council referrals to the ICC that I considered in chapter 6, perhaps duly reflects the Council’s overarching international peace and security mandate and authority under the UN Charter (1945, Chapter VII). As Scharf argues (2000a: 179):

Notwithstanding the popular catch phrase of the 1990s, “no peace without justice,” achieving peace and obtaining justice are sometimes incompatible goals. In order to end an international or internal conflict, negotiations often must be held with the very leaders who are responsible for war crimes and crimes against humanity. When this is the case, insisting on criminal prosecutions can prolong the conflict, resulting in more deaths, destruction, and human suffering.

By more critical accounts, however, that deferral prerogative risks undue political intrusions into the Court’s operations, and reflects a dubious assumption that its functions may conflict with the simultaneous workings of the Council (e.g. Nsereko, 1999: 112).

Sarooshi probes the dimensions and limitations of the oft-cited “peace and justice paradox”, including circumstances in which the Council may actually bolster the ICC by referring situations that would otherwise exceed its competence (2004b: 109). As I mentioned in chapter 6 and further discuss in chapter 8, the Council took such action in referring the Darfur, Sudan situation in March, 2005. There may be situations (or timeframes), however, when respective peace and justice objectives co-exist in tension, which may prompt the Council to pre-empt or suspend ICC proceedings in the interests of peace talks. That is essentially what occurred in respect of the Dayton peace process for the former Yugoslavia in the mid-1990s, which effectively proceeded independently of the ICTY, albeit prior to Milosevic’s indictment by that tribunal (Scharf, 2006: 38; also see Kirsch et al., 2004: 284). In this context, the Princeton Principles on Universal Jurisdiction appear relatively cautious (Princeton Project, 2001: 25):

[The] imprudent or untimely exercise of universal jurisdiction could disrupt the quest for peace and national reconciliation in nations struggling to recover from violent conflict or political oppression. Prudence and good judgment are required here, as elsewhere in politics and law.

The Council-ICC relationship, and the broader interrelationships between peace and various forms of justice, remain to be developed and refined by this program.

Having outlined those outstanding legalities, I now consider the social functions and objectives of non-prosecutorial mechanisms in relation to international criminal justice. Ratner and Abrams stress the significance of identifying the primary purpose of a given policy for holding individuals accountable – for example, justice and closure, national reconciliation, deterrence, rehabilitation, and the expression of moral condemnation (2001: 155). Those objectives may also exist in tension, however: “Remembrance and amnesia compete for dominance in the way different sectors of a

population choose or are forced to respond to the problem of crime and atrocity”

(Simpson, 2004: 60). Varying forms of accountability, then, may tend to privilege one or more of these objectives in relation to others (Ratner and Abrams, 2001: 156):

Attempts to pierce the veil of impunity enjoyed by those associated with a previous regime might in some instances threaten the functioning of the new political system. The larger and more powerful the segment of the population responsible for such abuses, the greater the potential link between any process of accountability and political or social upheaval. Apart from questions of instability, new regimes may seek to use accountability as a weapon to settle old scores and stigmatize large classes of the population . . .

Cassese acknowledges that “special historical, political, or social circumstances” may warrant alternative approaches (2003: 450-452; also see Ratner and Abrams, 2001: 158):

This may be done, in particular, where there are too many perpetrators, and therefore it would prove too difficult, costly, or time consuming to institute trial proceedings for all, or when the former government is still strong and any major trial of all the persons who orchestrated or ordered atrocities would be likely to jeopardize the stability and viability of the new democratic government.

Elsewhere, in acknowledging the appropriateness of the TRC format, Cassese stresses that amnesties were not granted automatically, but subject to strict criteria and only available to individuals fully disclosing their conduct in relation with a political objective (1999: 4). That assessment broadly corresponds with Stahn’s guiding proposition that amnesties or pardons should “only be permitted in exceptional cases, namely where they are conditional and accompanied by alternative forms of justice” (2005: 708). Joseph critically cites the blanket amnesties passed by the Pinochet regime in Chile, and bestowed by the Lome Accord in Sierra Leone (2005: 24). Joseph emphasizes the transparency of the TRC, conversely, which was “democratic and genuine” and was not intended “to shift or to hide someone or a group from prosecution” (Ibid: 13).⁸⁰

⁸⁰ The South African Constitutional Court upheld the Promotion of National Unity and Reconciliation Act, including its amnesty provisions, in *Azanian Peoples Organization v the President of the Republic of South Africa* (25 July 1996) (see Cassese, 1998: 3).

As mentioned in section III, and as Ratner and Abrams stress, “adversarial proceedings before a criminal tribunal are designed primarily to determine the guilt of individuals, not to produce a comprehensive and balanced analysis of a conflict’s historical, political, social, or moral context” (2001: 224; also see Hayner, 2002: 100). In those respects, non-prosecutorial truth-seeking mechanisms may augment or bolster the functions and objectives of criminal adjudication. Though they vary, such approaches generally pursue the following aims (Hayner, 2002: 24; also see Minow, 1998: 87-88):

- To discover, clarify, and formally acknowledge past abuses;
- To respond to specific needs of victims;
- To contribute to justice and accountability;
- To outline institutional responsibility and recommend reform; and
- To promote reconciliation and reduce conflict over the past.

Hayner emphasizes distinct contributions to justice, including appraising the role of the courts in the repressive system and recommending corresponding reforms (2002: 105).

For those and other reasons, Hayner questions the common idea of a “trade-off” between truth and justice (2002: 86; also see Minow, 1998: 9). Cassese highlights the advantages and flaws of such approaches (2003: 10-11):

The advantages of these Commissions as a way of reacting to atrocities are evident: they (i) further understanding in lieu of vengeance, reparation in lieu of retaliation, and reconciliation instead of victimization; (ii) promote a kind of historical catharsis, through public exposure of crimes; (iii) delve into the historical, social, and political roots of the crimes; (iv) establish a historical record of the atrocities committed; and (v) prevent or render superfluous long trials against thousands of alleged perpetrators.

Nonetheless, the flaws of these Commissions should not be underestimated. In many cases they have proved unable to bring about true reconciliation. In addition, even when they have identified the culprits (a relatively rare occurrence), the crimes they have committed are usually cancelled through amnesty laws, or else the offenders are granted pardons exempting them from the punishment for the crimes perpetrated. Even the fairer and much more effective Commission established in South Africa in 1995 did not always bring about real and lasting reconciliation. In many cases the Commission pardoned the authors of the horrific crimes, whether Afrikaners or

members of the ANC. Thus it sparked resentment and anger among the victims and their relatives, who desired retribution, or at least ordinary criminal justice.

Given those shortcomings or limitations, non-prosecutorial truth-seeking commissions should perform a secondary (or subordinate) role, including public hearings and full cooperation with national courts or international tribunals (see Cassese, 2003: 450-452).

Recalling the respective abstract merits of national and international criminal proceedings that I outlined in chapter 6, it is important to recognize, for the purposes of this present discussion, the overall merits and imperatives of criminal prosecutions (Cassese, 1998: 6; also see McColdrick, 2004a: 10-11) [author's emphases]:

- Trials establish *individual responsibility* over *collective* assignment of guilt . . .;
- *Justice dissipates the call for revenge*, because when the Court metes out to the perpetrator his just deserts, then the victims' calls for retribution are met;
- By dint of dispensation of justice, victims are prepared to be *reconciled* with their erstwhile tormentors, because they know that the latter have now paid for their crimes;
- A fully reliable record is established of atrocities so that *future generations* can remember and be made fully cognizant of what happened.

As I have stressed or proposed throughout this study, serious international (or global) crimes demand individual criminal responsibility as a global standard of accountability (Sands, 2003: 71-72; also see Bassiouni, 1999: 795):

If nothing else, that is one clear consequence of the creation of the International Criminal Court: in establishing it, the international community has determined that criminal courts (as opposed to civil courts, or administrative courts, or human rights courts) are to be a principal means for the enforcement of international criminal law, and that national courts (within the states in which the crimes are committed and in third states) and international courts have a role to play.

Benjamin Ferencz has declared: "There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance" (cited in Rome Statute, Overview, 1998). For those reasons, and as I have proposed more generally, non-prosecutorial mechanisms should

perform a secondary or subordinate role – albeit a potentially very useful and complementary one – to criminal adjudication: “Where used to supplement criminal investigations and prosecutions, truth commissions may offer important benefits that are not provided by prosecution alone” (Robinson, 2003: 484).

Given the accelerated development and momentum of international criminal justice over the past fifteen years, however, it may take many more years for those non-prosecutorial mechanisms to themselves evolve and adjust. Accordingly, time will be needed for firm policy and scholarly conclusions to be drawn concerning their relative role, efficacy and status.⁸¹ There is general consensus that amnesties would (or should) be respected only when stemming from a legitimate, principled process (see Cassese 2003: 315-316; Dugard, 2002: 700-701; and Broomhall, 2003: 101-102). How, when (and where) those issues are addressed and resolved are amongst the many outstanding and intriguing questions presented by the emerging program of *complex adjudication*, which I now conceptualize more holistically in the concluding section of this chapter.

VI. The Novelties and Challenges of Complex Adjudication

In this chapter, I have examined rules and mechanisms for administering justice outside of the Rome Statute’s complementary framework. Though not constituted or bound by a *system per se*, those semi-autonomous components mutually support that core ICC-State Party juxtaposition by addressing – or potentially addressing – temporal and

⁸¹ The Ugandan situation may provide an early opportunity for developing such appraisals. As part of a broader peace agreement between the Ugandan government and the Lord’s Resistance Army (LRA) on 29 June, 2007, the parties signed an Agreement on Accountability and Reconciliation. Its vague principles have prompted concerns about the adequacy or genuineness of its contemplated national trials under the complementary framework (see FIDH, 2007: 4-5; also see Inder, 2007: 16-17). The LRA has also demanded that ICC arrest warrants issued in July, 2005 against senior LRA leaders be dropped (Ibid: 4).

spatial voids in its scope and application. That collective, multifaceted effort is guided by the overarching understandings and ideals of international criminal justice as a common governance *program*, rather than by a centralized and hierarchical jurisdictional ordering with an attendant format of binding judicial precedent. As a permanent institutional expression of those fundamental norms at the global level, the Court's effective governance role and authority extend beyond the Rome Statute as the foundation of a broader "transnational legal order for the prosecution of international crimes" (Clapham, 2003: 76). In contrast to the legally explicit and formalized governance provisions that I considered in chapters 5 and 6, these dimensions are substantially normative, but perhaps no less significant. In that extended capacity, the ICC provides further impetus to the recognition and rationalization of 'universal jurisdiction' as a broader basis for national prosecutions than what the complementary framework effectively prescribes. The Court also constructively coexists with and inspires ad hoc international and internationalized efforts to prosecute offences that are beyond its own legal competence and/or exceed the capacity of affected states to address within the ordinary course of administering justice.

I have also examined the supplementary role of non-prosecutorial truth-seeking commissions, which may augment criminal adjudication by pursuing distinct peace, justice and reconciliation objectives in transitional societies. State responsibility and private civil actions – neither of which are prejudiced or otherwise affected by the Rome Statute, as discussed in chapter 5 – may be viewed as additional, supportive components for vindication, accountability and redress. Immigration measures such as denaturalization and deportation may also contribute to or reinforce the underlying objectives of international criminal justice (see Ratner and Abrams, 2001: 228). An over-

reliance upon such non-penal responses, however, may violate states' obligations to enforce international criminal law (Ferdinandusse, 2004: 1047). Ideally, state authorities will combine or coordinate such measures with criminal prosecutions. Canada's Crimes against Humanity and War Crimes Program, for example, integrates and rationalizes policy-making and operational efforts by national justice, police and border services officials in investigating and prosecuting international crimes in Canada, or supporting prosecutions elsewhere, as well as taking measures to deny or revoke refugee, residency or citizenship status of offenders within Canada (DOJ, 2008b).

I now conclude this chapter by conceptualizing the collective nature and novelty of those various components, and evaluating the attendant challenges for administering justice consistently, cohesively and effectively. This admixture of hard treaty law, institutional arrangements, customary rules and jurisprudence, and soft law and legal norms constitutes a uniquely diffuse and nebulous form of global *governance*. In linking those properties to the sovereign state as the primary administrator and enforcer of justice, this emerging program departs both from the conventional horizontal ordering of inter-national law and, conversely, from dimensions of centralization and hierarchy envisaged or implicit within global *government* conceptions. As a truly *sui generis* arrangement that is neither systematic by design nor de facto – and indeed may still be at an embryonic developmental stage – this program is not easily categorized within existing international relations and global governance terminology. The pressing question is whether this eclectic arrangement works (or is workable). As mentioned in section I, there are two principal complicating factors – one jurisdictional, the other jurisprudential. Those are the features and challenges of *complex adjudication*: a

dynamic and contingent situation by which the Rome Statute authoritatively governs the ICC-State Party juxtaposition under the complementary framework, but otherwise fulfills a normative, non-exclusive governance role. I now examine those twin challenges.

First, as discussed in section II, there is no decisive authority for determining priority amongst potentially competing national proceedings. Two or more states may potentially seek to prosecute the same offender and conduct, perhaps including the territorial state and/or the state of nationality under the Rome Statute, and/or another state (whether or not a State Party) exercising universal jurisdiction. This complication is a challenge, but not necessarily a shortcoming per se (Ferdinandusse, 2004: 1049-1050).

The unregulated concurrence of national jurisdictions is an ambiguous phenomenon. While there are definite advantages to territorial prosecutions, the unfortunate reality is that states prosecute international crimes adequately only when committed by other or past regimes. Therefore, giving primacy to courts that exercise territorial jurisdiction seriously complicates prosecutions in foreign courts, which provide the only realistic chance of enforcement.

In each case, a prosecutor acting not on the basis of territorial jurisdiction will have to prove the inactivity of the territorial courts, which is the rule rather than the exception in [international criminal law]. Indeed, one may ask whether formulating a hierarchy of national jurisdictions is desirable so long as the underutilization of national courts, rather than competition between them, is the most pressing problem. . . .

Also, an abstract hierarchy of jurisdictions may not always correspond adequately to practical cases. . . .

In any case, a formal jurisdictional hierarchy can only be a framework for a proper division of cases, not the final word. In this respect, it will be instructive to see the choices made by the prosecutor of the ICC.

The ICC Office of the Prosecutor has declared (ICC-OTP, 2003: 5):

In a case where multiple States have jurisdiction over the crime in question, the Prosecutor should consult with those states best able to exercise jurisdiction (e.g. primarily the State where the alleged crime was committed, the State of nationality of the suspects, the State which has custody of the accused, and the State which has evidence of the alleged crime) with a view to ensuring that jurisdiction is taken by the State best able to do so.

That passage contemplates that the ICC Prosecutor may perform a coordinating role even between competing national prosecutions, and even when such national proceedings are

undertaken by non-States Parties (under various jurisdictional foundations) and/or by States Parties asserting universal jurisdiction. In those respects, and provided there exists sufficiently broad and deep normative commitment by states to enforce the law – a fundamental prospective issue I consider in chapter 8 – compliance in the actual administration of international criminal justice is or may become substantially a function of “managing” roles and responsibilities as much as compelling adherence to underlying rules (see Chayes and Chayes, 1995: 4; also see Downs and Trento, 2004: 29-30; Slaughter and Burke-White, 2007: 339; and Burke-White, 2002: 79 & 84-85).

The most practical implication of determining – or failing to determine or establish – jurisdictional priority concerns attendant requests for international cooperation and judicial assistance, particularly for arrest and surrender/extradition of individuals for trial. The Rome Statute provides rules and procedures to govern situations when State Parties or other states receive competing requests between, for example, surrendering a person to the ICC and extraditing that person to another State Party or state (1998: Art. 90).⁸² As an international treaty, however, and as distinct from the ICTY and ICTR arrangements discussed in section III, the Rome Statute potentially competes with other treaties in cases of conflicting requests or obligations respecting extradition and/or surrender (Knoops, 2003: 182; also see Ciampi, 2002b: 1631). The overall situation is made further complex by controversial bilateral immunity (Article 98) agreements that

⁸² Under the Rome Statute, ‘surrender’ means “the delivering up of a person by a State to the Court”, whereas ‘extradition’ means “the delivering up of a person by one State to another as provided by treaty, convention or national legislation” (1998: Art. 102(a) & (b)); see Robinson, 2002: 1852; and Swart, 2002a; and Schabas, 2001: 110). As mentioned in chapter 6, States Parties’ international cooperation and judicial assistance obligations may include arresting and surrendering persons to the Court (Ibid: Art. 89). The Court may also “invite” non-States Parties to provide international cooperation and judicial assistance, including surrender and extradition, on the basis of ad hoc arrangements or agreements (Ibid: Art. 87.5(a)).

many States Parties and other states have concluded with the U.S. subsequent to the ICC negotiations, thereby undertaking not to surrender Americans to the Court.⁸³ The Rome Statute essentially provides that the ICC may not require States Parties to act inconsistently with their obligations under international law or under international agreements (1998: Art. 98.1-2).

In all cases of requests for extradition and other forms of judicial assistance, states are governed by their domestic rules and procedures (Ratner and Abrams, 2001: 258). In fact, many states have laws barring extradition outright, or only pursuant to a treaty or statute (Ratner and Abrams, 2001: 258; also see Kittichaisaree, 2001: 283; Broomhall 2003: 139; and Cassese 2003: 360-361). As mentioned in chapter 6, however, the Rome Statute obliges States Parties to take measures to permit all aspects of international cooperation and judicial assistance (1998: Art. 88). In this and other aspects that I have discussed in this chapter and previously, those national measures may extend beyond the Rome Statute to permit broader prosecutions and/or cooperation and judicial assistance.

Second, the current architecture of international criminal justice does not entail an overarching scheme of binding judicial precedent by which national courts (as subsidiary courts) are bound by prior substantive rulings of the ICC as a hierarchically superior body. The ICC is not even bound by its own prior decisions, as mentioned in chapter 6

⁸³ The American Service-Members' Protection Act proscribes U.S. military assistance to states which have not signed an Article 98 agreement, with some exceptions (U.S. Department of State, 2008a). The U.S. has also bolstered its existing Status of Forces agreements, which define areas of legal responsibility held by a host country over American service personnel. These agreements generally reserve to the U.S. primary jurisdiction over alleged criminal offences involving U.S. forces when committed between Americans, or when committed by Americans within the course of their official duties (U.S. Department of State, 2000b).

(Ibid: Art 21.2). Ferdinandusse warns of “jurisprudential fragmentation” that may result from this uncoordinated format (2004: 1051; also see Pocar, 2004: 307):

There is no higher court to authoritatively decide points of law in [international criminal law], nor a system of binding precedent or *stare decisis*. In fact, international courts are not even required to follow their own case law, let alone that of others. National courts follow the jurisprudence of their own legal system, but international law does not require them to follow the precedents of international(ized) courts. Furthermore, since each court functions within its own legal framework (statute or national law), which only partially overlaps with that of other courts, incoherence looms in [international criminal law] jurisprudence.

Thus Ferdinandusse appeals for constructive interaction not only across criminal courts at different levels, but also with human rights courts and truth commissions: “The division of labour between all these actors, the consistency and uniformity of their work and the thorough use of the output of other courts are central issues in enhancing the legitimacy and efficiency of [international criminal law]” (2004: 1053). As I have proposed in this chapter, the overarching norms, principles and objectives of international criminal justice should promote such doctrinal coherence. Burke-White conceptualizes a “community of courts” to capture the unifying properties of international criminal justice as a common governance enterprise (2002: 3; also see Slaughter, 2004: 100-101):

The emerging system of international criminal justice can be conceived as a community of courts: a set of adjudicatory bodies in interdependent, self-organizing relationships. This emergent community of courts is engaged in a common endeavor – ensuring accountability for serious international crimes. Within this community, courts – both national and supranational – interact in various ways. Their jurisdictions often overlap; they are linked both horizontally and vertically; they apply a similar set of laws.

It is commonly anticipated, moreover, that the ICC and other international courts, having the most authority and expertise, will assume the lead in establishing an “informal hierarchy of precedents” (Ferdinandusse, 2004: 1051; Buergenthal, 2001: 272; Slaughter, 2004: 75; and Chayes and Slaughter, 2000: 242-243).

As discussed in chapter 6, it is prudent for States Parties to implement the Rome Statute’s substantive penal provisions to permit effective national proceedings and thereby pre-empt ICC intervention. Given their presumptive priority under the complementary framework (and more generally), national courts may encounter substantive legal issues that have not been addressed by the ICC or elsewhere. As the front-line administrators of justice, therefore, national courts may also become major contributors to substantive jurisprudential doctrine. As Schabas notes (2001: 19):

National courts have shown, in recent years, a growing enthusiasm for the use of international law materials in the application of their own laws. The Statute itself, and eventually the case law of the International Criminal Court, will no doubt contribute in this area.

National and comparative law influences may also flow *upward* from national courts to the ICC (Ferdinandusse, 2004: 1052). As mentioned in chapter 5, the ICC may apply, as a secondary source of law, “general principles of law derived by the Court from national laws of legal systems of the world” (see Rome Statute, 1998: Art. 21.2(c)).

As discussed throughout this study, the ad hoc tribunals’ jurisprudence is reflected in the Rome Statute. The ICTY, in turn, has declared (cited in Schabas, 2001: 20):

Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallize them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.⁸⁴

The Rome Statute has also influenced other ad hoc internationalized (mixed) initiatives for administering international criminal justice, as considered in section IV. Thus Knoops refers to the broader potential for a constructive “cross-fertilization of international criminal law jurisprudence” that would include decisions of international ad hoc and mixed tribunals (2003: 1). Delmas-Marty likewise conceives of a “pluralist”

⁸⁴ The ICTY Appeals Chamber has also declared, however: “In international law, every tribunal is a self-contained system unless otherwise provided” (cited in Gallant, 2003: 576).

model to characterize that normative (rather than hierarchical) interaction (2002: 1916). As Ratner and Abrams observe, though the International Court of Justice (ICJ) and regional human rights courts such as the Inter-American Council of Human Rights, the European Court of Human Rights and the African Court of Human Rights do not adjudicate matters of individual criminal responsibility per se, they may still encounter and address issues relating to international criminal law, including determining when states have breached international obligations and declaring what remedial measures such non-compliant states must take (2001: 225; also see Gallant, 576; and Ferdinandusse, 2004: 1046-1047). As discussed in chapter 5, for example, the ICJ held in March, 2007 that Serbia violated its obligations to prevent and punish genocide under the Genocide Convention in respect of the 1995 Srebrenica massacre (ICJ Judgment, 2007).

Given those complex interrelationships, the development of international criminal law and judicial institutions exhibits features of what Slaughter refers to as an emergent “global legal system” (2004: 67). At this broader level again, however, the word ‘system’ has distinct implications and limitations (Ibid) [my emphases]:

It is a far different kind of *system* than has been traditionally envisaged by international lawyers. That vision has always assumed a global legal hierarchy, with a world supreme court such as the International Court of Justice resolving disputes between states and pronouncing on rules of international law that would then be applied by national courts around the world. What is in fact emerging is messier and much more complex. Its is a *system* composed of both horizontal and vertical networks of national and international judges, *usually arising from jurisdiction over a common area of the law* or a particular region of the world.

Chayes and Slaughter situate the ICC-State Party relationship within a broader conception of “supranational adjudication” that is defined by informal interrelationships rooted in the common subject matter those courts are concerned with, rather than by an overarching world court (2000: 244). They stress that the Court’s authority will be

enhanced by its mandated judicial composition, which includes more specialists in criminal law than international law (Ibid: 243; see Rome Statute, 1998: Art. 36.5):

By ensuring that the members of the ICC are not drawn from an elite, specialized and often insulated group of international law professors and practitioners, the treaty ensures a broader base of legitimacy for the Court. National judges and prosecutors will see their former colleagues on the Court and assess the Court's judgments accordingly. Above all, as international law becomes simply 'law, interpreted and applied by both supranational and national judges and shaped by their respective training and expertise, it becomes much less remarkable and much more effective.

Within this context, constructive judicial exchange toward a coherent jurisprudential doctrine of substantive international criminal law will depend, in part, upon professional identities and socialization, including shared recognition and respect for the overarching nature of the international criminal justice regime as a common governance program.

Buergenthal stresses (2001: 273-274; also see Gallant, 2003: 579) [my emphases]:

[It] is important for all tribunals . . . to recognize that they are all *part of the same legal system* and that this fact imposes certain obligations. Of these, the most basic one is the obligation to accept the *methodological and doctrinal unity* of the international legal system. This means, among other things, that each tribunal has an obligation to respect the general and specific competence of the other judicial and quasi-judicial institutions which comprise the system, to recognize that it has an obligation, when rendering judgments, to take into account the case-law of other judicial institutions that have pronounced on the same subject and, most importantly, to promote and be open to jurisprudential interaction or cross-fertilization.

Slaughter refers to “judicial globalization” as a process by which jurists interact and exchange views in various formal and less structured ways across borders (2004: 100-103; also see Byers, 1999: 141). Given the overlapping communities of law-makers, jurists, institutional officials, civil society actors, and scholars that subscribe to a broadly common and coherent understanding and vision of the ICC's authoritative role within this emerging governance program, the Rome Statute and the Court's actual operations and jurisprudence should continue to inspire, inform and integrate those broader efforts.

As I have sought to demonstrate in this chapter, fundamental to the ICC's novel governance properties is its pre-eminent situation within a broader *program* of

enforcement efforts, which recognizes the need for multifaceted and mutually supportive contributions toward punishment, deterrence and denunciation. That collective effort remains underdeveloped, however, as Axworthy observes (2004b: 209) [my emphases]:

What is lacking right now is a sense that the ICC is an anchor institution in the international criminal justice network with many components including international tribunals such as [the ICTY, ICTR and SCSL], truth and reconciliation commissions and national criminal legal systems. But there is no framework for treating and embracing all these individual components as a whole. There are no networks to collaborate, strategize, exchange resources and personnel, formulate policy, undertake research and educate the world community (governments as well as the people on the street or in the villages) about what international criminal justice is about and what it can achieve.

As I have proposed, that lack of comprehensive integration stems from the magnitude and complexity of the ICC project and other major developments occurring within only a few years. Enhancing inter-relationships (networks) across those various components will be vital to their collective effectiveness and viability. In the meantime, this emerging program – rooted in the ICC as its pre-eminent institutional and normative expression – already demonstrates novel, overlapping and intertwined governance measures. As a product of knowledge, ideas and values, it reflects a broader justice and rule-of-law narrative in the post-Cold War era (IJT, 2006: 18-19):

[Beyond] its personal evolution, the ICC is inseparable from those numerous legal processes in preparation, underway or already completed elsewhere in the world, as well as the non-judicial truth-seeking mechanisms and reparations programs. It reflects a similar singular problem as much as it falls within a multiform, extraordinarily diverse, contingent, and creative search for justice which led to its creation and accompanies its growth.

Even more broadly, international criminal justice is substantially defined by its juxtaposition within a more comprehensive and integrated global human security agenda, which I now discuss in the concluding chapter of this study.

PART III

**EXPANDING THE HORIZONS OF
INTERNATIONAL LAW AND GOVERNANCE**

Chapter 8

EXPANDING THE HORIZONS OF INTERNATIONAL LAW AND GOVERNANCE

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I. Introduction

This chapter concludes this study's core proposition that the ICC is implicative of new directions and expanded possibilities for global governance. I opened this study by posing three guiding questions regarding the ICC: *What is it? How did it happen? What does it represent?* Given the interrelated nature of these analytical queries, the preceding chapters have contributed in various ways to my overall examination and portrayal. At this concluding stage, however, it is appropriate to focus more pointedly upon the third and final question: what the ICC more broadly represents or signifies for patterns and possibilities of international law and governance. Substantively, those expanded horizons extend beyond international criminal justice, and the human rights and humanitarian law protections which it seeks to uphold, to encompass other fundamentally overlapping human security-related domains. In this final chapter, then, I seek to distill and synthesize the Court's most essential and broadly significant implications. I also provide a cautious prospective appraisal at this early juncture of its existence, and situate its role and limitations within extended normative and governance context.

In developing these concluding summations, observations, and evaluations, this chapter proceeds in three parts. First, I review and synthesize the core analyses and propositions I developed in Parts I and II of this study, which relate to the Court's distinct historical context and negotiation, and its novel governance properties as a going concern. These collective dimensions support this study's core proposition that the ICC has expanded the horizons of international law and governance. Second, I appraise prospectively the Court's central challenges as a viable governance undertaking. These aspects include genuine and effective national proceedings, state cooperation and judicial assistance with ICC proceedings, general deterrence, and progressing toward the ideal of universal ratification and implementation of the Rome Statute. Third, I consider the Court's role within the context of broader trends toward a comprehensive and integrated global human security agenda. Given the inherent and practical limitations of international criminal justice, even when administered effectively in an appropriate forum, its contributions are inherently secondary to more fundamental development, prevention and intervention measures.

II. Summation and Synthesis of Core Analyses and Propositions

In chapter 2, I proposed that the Court's historical foundations are crucial for interpreting the emergence and maturation of fundamental legal norms over several decades, which ultimately achieved formal institutionalization in the ICC. I identified the novel judicial proceedings and pronouncements of the post-Second World War International Military Tribunal at Nuremberg as a decisive departure – a *paradigm shift* – from previous eras of international law and governance, which catalyzed a novel tension

in its state-centric ordering and focus. I described how the conventional image of relatively autonomous and self-contained states was eclipsed by a more complex view of global society which encompassed individual persons in their immediate capacities, and with their own distinct concerns or vulnerabilities. The sovereign state remained the pre-eminent social organizing unit, but was increasingly subject to new dimensions of internal contestation and external scrutiny. Those challenges to state authority referenced or embodied the very human rights standards that states enshrined and developed in Nuremberg's aftermath. Even though the Cold War impeded consistent enforcement of international criminal justice, Nuremberg's normative legacy endured to inform political actions and discourses. In this way, I demonstrated that cross-cutting political and normative dynamics may simultaneously inhibit and facilitate progressive governance initiatives. Thus I proposed that advancements in human security-related areas may require permissive political conditions at both international and domestic levels. These conditions must converge with sufficient normative momentum and cohesion to present a margin of opportunity for formal institutionalization. Particularly ambitious initiatives like the ICC, with significant or complex state sovereignty implications, may be more viable when they reflect a robust inter-subjective normative consensus based upon a set of essential principles and objectives to be advanced or protected.

In chapter 3, I examined the novel dimensions of transnational cooperation, consensus-building and compromise over several years of the Court's preparatory negotiations. I described how the distinct political and normative conditions of the early 1990s instigated a protracted and complex institutional process. It drew and built upon shared purpose and compromise in elevating the ICC project from a distant prospect to a

very serious and viable proposition. I proposed that those proceedings, culminating in and combined with the final negotiations, exemplified the procedural dynamics and substantive possibilities of emerging forms of multilateralism and transnational cooperation. Those dimensions include a human security-related agenda, the concerted contributions and impact of a diverse diplomatic alliance of progressively oriented states, the qualitative integration and influence of non-state actors, and dense and interdependent working relationships forged between and across state, non-state and institutional actors. I emphasized that those unique multilateral properties remain vital and inherent to the continuing *ICC project*, including efforts toward universal ratification, implementation and adherence to the Rome Statute. I focused particularly upon the formation of two cooperative enterprises that embodied and spurred those escalating multilateral dynamics approaching the final Rome negotiations: the ‘Like-Minded Group’ of States (LMG) and the non-governmental Coalition for an International Criminal Court (CICC). I drew upon non-conventional or alternative conceptions of *power* to evaluate how the LMG propelled the process forward by providing the political will, resources and leadership to sustain focus and build compromise and momentum. I characterized the CICC as an exemplary *transnational advocacy network* that constructively brought transnational interests, values and perspectives to bear upon negotiations. I considered how these respective collectivities articulated coherent and mutually compatible normative visions for an independent and effective tribunal, which invited broader support for the ICC project.

In chapter 4, I focused upon the final ICC negotiations in 1998. I proposed that those proceedings exemplified the process and possibilities of multilateral and transnational cooperation. I stressed that the significance of this encounter lies

particularly in the degree to which those novel dimensions were manifest in the drafting and negotiation of a major governance initiative. As discussed throughout this study, the Rome Statute entails many fundamentally interrelated legal and political issues, including significant and complex state sovereignty implications. I examined the qualitative integration, engagement and contributions of the CICC and a range of other progressive non-state actors. I proposed that those aspects were both unprecedented and fundamental to the final outcome. I then considered the LMG's pivotal role in controlling and directing the procedural and substantive agenda of the proceedings to their successful conclusion, including a fast-track negotiating process and a final package proposal. The LMG maintained its internal unity and resolve, and combined efforts with the CICC to enlist the support of other more hesitant states, isolated major skeptics and detractors, and more generally managed political sensitivities in preserving the Rome Statute's substantive integrity. I proposed that this positive result testified to the effective negotiating tactics and strategies of the Court's proponents, the effective packing of provisions for an independent and effective tribunal without jeopardizing its overall political appeal or acceptability, and the broader facilitative properties of emerging trends in multilateralism and transnationalism.

In chapter 5, I examined the Court's *vertical integration* of individual persons as its principal subjects and objects – distinct bearers of international legal responsibilities and protections respectively. In transcending the inter-national (horizontal) law of states and superseding the application of municipal law within states, these penal and protective dimensions reflect and reinforce an exceptional trans-national (vertical) plane within international law and governance. They recognize and affirm that persons, in their direct

and individual capacities, have a fundamentally global existence. Beyond the core Nuremberg Principles, the Rome Statute also reflects more recent lessons from the ad hoc tribunals, and progressive epistemic insights voiced in the ICC negotiations. In institutionalizing the foundational principle of ‘individual criminal responsibility’, the Court’s penal orientation uniquely affirms that individuals’ discrete actions warrant oversight and sanction. Its related provisions concerning national laws, superior orders, and official capacity (and/or immunity) further affirm the super-ordinate duties and constraints imposed upon individuals. I also examined the human rights protections accruing to suspected and accused persons in ICC proceedings.

In seeking to punish, deter and denunciate egregious affronts to individual dignity, autonomy and well-being, conversely, the Court’s protective mandate signals a novel and significant directional shift in scope and priorities toward the concept of *human security*. I stressed that the ‘global’ character of those crimes is principally normative in nature, rather than territorial or trans-boundary per se. These offences are defined by the scale and gravity of their physical and/or psychological assault upon individuals in their most direct and essential capacities – as human beings, rather than as citizens or residents of states. The Rome Statute is correspondingly sensitive to the concerns and well-being of individuals as victims and witnesses. It also progressively recognizes the distinct susceptibilities of women and children to certain crimes that have been inadequately prosecuted and/or improperly characterized in the past, and seeks to address their particular vulnerabilities within the administration of justice. I concluded that the Court’s correlative vertical features may point to an embryonic transnational order that directly binds individuals with the global community as a whole. I emphasized, however, that

states are vital to expressing this *global citizenship* by participating in cooperative governance enterprises like the ICC. As I discuss further in section IV, these features may inspire and inform initiatives in other human security-related governance domains.

In chapter 6, I considered the Court's 'complementary' relationship to national justice systems as its defining governance property in the actual administration of international criminal justice. I described how this unique *vertical judicial network* fuses the ICC's supranational oversight and regulatory properties with states' primary authority and capacity to prosecute international crimes. I examined the criteria that prescribe and limit national priority under the complementary framework, and aspects of judicial and prosecutorial discretion that will mediate and refine those rules over time. In recognizing legitimate policy reasons for privileging national justice systems, but stressing that the ICC itself has the distinct supranational authority to evaluate the effectiveness and bona fides of national proceedings (or lack thereof), I proposed that this arrangement coherently blends innovation and practicality. I stressed the Rome Statute's national implementation as an essential governance feature of the ICC project. It should include substantive and jurisdictional provisions to permit effective national proceedings, and measures to ensure all forms of cooperation and judicial assistance to the Court.

I also considered how the complementary framework extends beyond a mere division of powers to constitute an indeterminate process of signaling and adjustment between the ICC and national justice systems. I characterized the ICC as a court-of-last-resort that exists primarily to facilitate and monitor effective national proceedings and, only failing that, to administer justice itself. I proposed that this varied supranational

competence is appropriately tailored to address past shortcomings of international criminal justice – whether due to states’ unwillingness or inability to enforce the law – without unduly usurping states’ primary authority. I examined how the three trigger mechanisms for ICC proceedings respectively converge with the ‘admissibility’ criteria and related provisions to govern its competence to directly administer justice. I recognized, however, that the ICC is not entrenched within a centralized enforcement authority (or capacity) at the supranational level. Thus its proceedings require the cooperation of states, which possess the distinct authority and capacity to enforce the law within their respective jurisdictions. I stressed that this format’s practicability hinges upon the depth of the underlying normative commitment to the Court, and that non-compliance will compromise its direct proceedings and its broader objectives, as I discuss in section III. I also considered the role of horizontal *government networks* that link counterpart national officials in joint performance of enforcement and other functions.

In proposing that the complementary design may potentially serve as a model for other governance initiatives, I stressed its political feasibility and practical coherence in both recognizing and harnessing states’ primary role and authority. Within this relatively diffuse or decentralized arrangement, the Court’s supranational regulatory properties are subject to reasonably precise and predictable rules, stemming from careful deliberation. In observing that states have ceded and apportioned responsibilities with the ICC, I concluded that this novel juxtaposition of authority transcends often-skewed debates about the contemporary role, capacity and disposition of the state. I proposed a more nuanced outlook: a *reconstituted state* that is integral to brokering, implementing and enforcing transcending governance arrangements, but also subject to their super-ordinate

purview and authority. I acknowledged that the state sovereignty implications of these collective features may be subjectively interpreted. Given the sovereign sensitivities of criminal justice in general, and states' traditional reluctance to commit to binding dispute settlement mechanisms, I proposed that the Court's supranational authority is indeed novel and significant, notwithstanding its legal circumscription under the complementary framework and its practical limitations under the state-cooperation arrangement.

In chapter 7, I considered the Court's pre-eminent situation within a broader, multifaceted framework of measures for prosecuting, deterring and denouncing international crimes. I examined how those additional components mutually support the core ICC-State Party juxtaposition by addressing temporal and spatial voids in the scope and application of the Rome Statute's complementary framework and related jurisdictional provisions. In considering their varying potential contributions and implications under the Statute, I proposed that those efforts are made coherent by the overarching understandings and ideals of international criminal justice as a common governance *program*, if not a fully integrated and structurally centralized *system*. Those fundamental norms include individual criminal responsibility, and the primary authority (and duty) of states to enforce justice. As a permanent organizational expression of those maxims, the Court's effective governance role and authority extends beyond the Rome Statute. In this extended normative capacity, the ICC reflects, inspires and guides the broader development of international criminal law and judicial institutions. I also discussed subsidiary or operating norms and principles that may help determine the appropriate judicial forum and/or legal mechanism to dispense justice in a given case.

I considered how the ICC provides further impetus to ‘universal jurisdiction’ as a broader basis for national prosecutions than what the complementary framework effectively prescribes. Given that some of its central aspects are complex and/or unsettled, I stressed that its effective utilization will require underlying normative commitment to ensuring justice and shared understanding of applicable roles and responsibilities in varying circumstances. I then considered how the ICTY and ICTR have made enduring contributions by progressively developing the substantive law in several crucial respects, and providing a normative impetus and a practical working model for the ICC negotiations and other initiatives. They have also revealed major operational challenges associated with state cooperation, and the essential role of effective outreach and communications strategies, which I discuss in section III.

I then examined so-called ‘internationalized’ or mixed (hybrid) tribunals as an emerging and innovative approach for prosecuting offences pre-dating the Rome Statute’s entry into force, and perhaps enabling prosecutions in partial fulfillment of the complementary framework. I outlined their principal models and features, and stressed their particular potential in post-conflict and transitional situations. I also considered how non-prosecutorial truth-seeking commissions may augment criminal proceedings by pursuing distinct peace, justice and reconciliation objectives, including providing a more holistic and contextual portrayal of patterns of abuse. In considering whether and how the ICC might defer to such approaches under the Rome Statute, I proposed that they should perform a supplementary role that does not preclude or substitute for criminal adjudication by granting sweeping amnesties or pardons. I also proposed that state

responsibility and private civil actions may be viewed as additional supporting components, together with denaturalization and deportation measures.

I concluded that this collective program is not easily categorized within existing international relations and global governance terminology. I described the result as a uniquely dynamic and contingent situation of *complex adjudication*: the Rome Statute authoritatively governs the ICC-State Party juxtaposition under the complementary framework, but otherwise fulfills a normative, non-exclusive governance role. I examined two principal features and challenges of this latter scenario. First, there is no decisive authority for determining jurisdictional priority amongst potentially competing national proceedings, which may complicate or frustrate processes of cooperation and judicial assistance. I stressed the role of government networks and the ICC Prosecutor in determining the appropriate forum for adjudication in varying circumstances, and in coordinating multi-jurisdictional efforts accordingly. Second, this format does not entail an overarching scheme of judicial precedent by which substantive ICC rulings would have broader binding application. I emphasized the need for jurists to share recognition and respect for the overarching nature of the common governance program and the distinct subject-matter of international criminal law. I reiterated the Court's normative role in integrating broader efforts, including overcoming these twin challenges.

III. A Glance Forward

The Court's very establishment is a remarkable development, given the historical obstacles it faced, its innovative governance properties, and complex state sovereignty implications. In this section, I examine the principal challenges to its viability and

effective functioning. Here it is instructive to re-consider from chapter 1 the Court's core objectives, as expressed in the Overview to the Rome Statute (1998):

Why do we need an international criminal court?

- ... To achieve justice for all
- ... To end impunity
- ... To help end conflicts
- ... To remedy the deficiencies of ad hoc tribunals
- ... To take over when national criminal justice institutions are unwilling or unable to act
- ... To deter future war criminals

Given these ideals, but also the resilient horizontal structural ordering of international law and governance as a whole, the vast array of potentially intervening global political variables, and the inherent limitations confronting any criminal justice system, the question arises how the Court's regulatory impact and effectiveness are to be assessed or interpreted. Recall that international criminal justice involves two distinct levels of regulation: proscribing certain individual conduct in accordance with substantive penal rules, and mandating and guiding state actions in administering justice over individual transgressions. These may be understood as "primary" and "secondary" obligations respectively (see Burke-White, 2002: 78-80). I now prospectively appraise these related but distinct governance planes (in reverse order). I then offer a prognosis for efforts toward the ideal of universal ratification and implementation of the Rome Statute, and briefly consider some major issues approaching the 2010 Review Conference.

The complementary framework sustains the presumptive priority of national justice systems insofar as they are *willing* and *able* to conduct genuine and effective proceedings. States Parties' ratification of the Rome Statute is *prima facie* evidence of their *willingness* to administer justice. As evidenced by the practice of 'self-referrals', however, there are questions about their *ability* to fulfill their primary role. There are

concerns that some developing states enthusiastically proceeded to ratify the Rome Statute without taking adequate national implementation measures. Broader ratification and implementation efforts must continue to involve technical assistance and capacity-building measures to existing States Parties, where necessary. Notwithstanding those challenges, the overall, long-term prospects for national compliance with the complementary framework are encouraging. The outlook is less certain and clear for offences not directly governed by the complementary framework and related aspects of the Rome Statute's jurisdictional regime. Within this broader situation of *complex adjudication*, national prosecutions based on universal jurisdiction may provide a significant contribution, provided there is sufficient commitment to enforcing justice over conduct and offenders with no direct nexus to the prosecuting (custodial) state.

I have repeatedly proposed that normative coalescence around the rules, principles and objectives of international criminal justice suggests progression in state sovereignty as a *meta-constitutive* institution that fundamentally structures international law and politics, but is itself subject to normative changes in its qualitative meanings and implications. As both a doctrine and a practice, it is increasingly recognized as implying responsibilities as well as prerogatives, including a duty to prosecute international crimes or otherwise assist enforcement efforts. Those obligations are codified in the Rome Statute, and inherent to the very conception of universal jurisdiction. As Ratner and Abrams stress (2001: 336):

Whatever individual responsibility the law establishes, it must be coupled with another form of responsibility – that of states and the rest of the international community. But here we mean not state responsibility in the international law sense of liability for the violations themselves, but rather in terms of a duty to achieve justice for the victims through accountability of the offenders. For although individuals commit crimes, only other actors on the international stage can ensure that they are properly punished or otherwise assessed for their abuses.

As discussed in chapters 5 and 7, the March, 2007 decision of the International Court of Justice is noteworthy in distinguishing state responsibility from individual criminal responsibility, and in determining that Serbia failed to prevent *and punish* genocide by not apprehending and surrendering Radovan Karadzic and Ratko Mladic to the ICTY (ICJ Judgment, 2007: Para. 450). In ICTY and ICTR Prosecutor Carla Del Ponte's final report to the European Union Parliament on 4 December, 2007, before leaving office on 10 December, Del Ponte stressed that Serbia's admission to EU membership must be subject to the capture and surrender of these individuals (see Saunders, 2007). This proposition apparently accords with the prevailing view amongst EU officials (Ibid).

That ICTY experience, as with the ICC's own experiences thus far in the Darfur situation, suggest that cooperation and judicial assistance will be a defining challenge, particularly the arrest and surrender of individuals for trial. The practicability of this arrangement hinges critically upon the depth of the ICC project's underlying normative foundations. As Ratner and Abrams observe more generally (2001: 263):

Although the architecture of international law enforcement cooperation is far from complete, the most significant barrier to accountability for gross abuses of human rights is not a lack of law. Rather, even with many legal obligations to render judicial assistance, the failure of states to cooperate, whether because of a lack of political will or of the capacity to do so, will continue to hinder many methods of accountability.

As those above-noted experiences suggest, however, states that will not or cannot themselves administer justice may correspondingly fail to provide cooperation and judicial assistance to the ICC. If the Court's own proceedings are hampered in this way, its more diffuse impact in facilitating effective national proceedings, as well as promoting deterrence and respect for the rule of law, will likewise be frustrated or compromised.

States Parties and non-state ICC proponents must press international criminal justice concerns at the highest levels of bilateral and multilateral exchange. They must weave those imperatives within the incentive structures of the most salient issues within global politics – strategic, economic and diplomatic. As Broomhall stresses, “the ICC places some of its most critical functions at the disposal of its States Parties’ processes and decisions, albeit within a framework that ensures a dialogue that is ultimately likely to favour the Court’s aims” (2003: 151). The 2007 Report on Cooperation of the Bureau of the Assembly of States Parties declares (ICC-ASP, 2007d: Para 23):

The Court underlines that diplomatic and public support is of vital importance for its work. Such support can be divided into four separate but interrelated ‘circles’. The first concerns the mainstreaming of Court issues within national administrations, the second bilateral activities of States Parties, the third mainstreaming within regional fora and the fourth is United Nations and related issues.

As ICC President Philippe Kirsch emphasized, however, to the sixth Assembly of States Parties on 30 November, 2007, such resolve has been lacking (ICC-ASP, 2007a):

[Public] and diplomatic support for the Court and international justice more broadly is vital to a strong and effective Court. Earlier this year, relative silence was observed in situations where public support for the Court and the need for justice more broadly would have been expected. Silence in these situations may send, and indeed has sent the wrong messages to perpetrators and potential perpetrators of serious international crimes. Strong public support is essential to demonstrate that the Court has the backing to be effective.

In ICC Prosecutor Louis Moreno-Ocampo’s own remarks to the Assembly, he noted that despite repeated appeals for support from “key partners” – the UN and various regional organizations – to call on Sudan to arrest and surrender the two indicted individuals, “the Sudanese failure to comply with their legal obligation to arrest was not included in the agenda of relevant international meetings” (ICC-ASP, 2007b). Moreno-Ocampo reiterated those and other concerns in his semi-annual report to the Security Council on 5 December, 2007 (ICC-OTP, 2007b: Para 34):

The Prosecutor regularly meets with officials involved in seeking a comprehensive solution for Darfur . . . The Prosecutor has explained that enforcement of the Court’s decisions must be

consistently and publicly presented as a non-negotiable, integral part of any comprehensive solution, a vital contribution to ending crimes and to achieving key political, security and humanitarian goals.

Insofar as concurrent peace negotiations in the Sudan have been detached from international criminal justice concerns, those trends threaten to thwart the Court's direct proceedings there, and undermine its broader credibility and normative objectives.

National implementation of the Rome Statute is vital not only as a practical and technical exercise to permit effective national proceedings, but also as a catalyzing and socializing process in reinforcing the fundamental principles and ideals of international criminal justice (Robinson, 2002: 1849-1850) [author's emphasis]:

[The] process of ratification and implementation of the Rome Statute will have significant *intrinsic* value. In the course of ratifying and implementing the Rome Statute, policy-makers, officials, legislators, politicians, and members of global civil society will be required to confront the persistent problem of impunity. Important issues of national and international criminal justice will be discussed and debated in ministries, in legislatures, and in the media. Thus, this process will help inform thinking and shape perspectives on accountability issues.

In addition, most countries will be acting to strengthen their own legislative capacity to prosecute [international crimes]. This global process will help strengthen both the ability and the conviction of governments to bring war criminals to justice. Thus, even before the ICC begins its first investigation, the ICC Statute will have a significant educational and inspirational impact.

Again, though, beyond equipping and resolving themselves to enforce justice, States Parties must also be emboldened, together with other ICC proponents, to more broadly and vigorously support and pursue such imperatives at all levels and sites of governance.

Here Wippman's conception of a "pre-commitment device" is instructive (2004: 181)

By obligating themselves to support prosecutions now, without reference to any specific country or situation, states can surmount political obstacles that might preclude them from supporting an ad hoc tribunal in particular cases in the future. They will have a ready answer to present to other governments, and to domestic interest groups, who when the time comes might view the prosecutions as unfriendly acts. Thus, by ratifying the Rome Statute, governments may lay the groundwork for prosecutions they view as desirable at a greatly reduced political price.

This analysis suggests that international institutions matter in shaping the perceptions, preferences and conduct of political actors – a central premise of this study. The

mutually constitutive dynamics of international law and politics will continue to unfold in the case of the ICC. Established by collective political action, the Court itself must now condition fundamentally political processes in order to function effectively. As Broomhall proposes, “the best remaining hope for the entrenchment of international criminal law as a regular feature of the international system is the development of a deeply rooted culture of accountability that leads to a convergence of perceived interests and of behaviour on the part of States responsible for enforcing this law” (2003: 3).

Having provided some prospective evaluations for the administration of justice, I now consider the Court’s ultimate role and objective: detering individual transgressions of substantive penal proscriptions. Here the “real story of the new Court may actually be the crimes which never take place” (Clapham, 2003: 67). It is particularly difficult to make firm predictions at this early juncture, however, and may be equally problematic to draw future conclusions. Serious international (or global) crimes are tragically common, and yet not typical or regularized enough to empirically evaluate or verify in connection with the ICC as an independent variable. Even if offences decline in frequency and severity over given time intervals, the *causal* nexus (if any) between such patterns and the ICC will remain empirically un-falsifiable. Indeed, the very factors that may militate against future perpetrations may *correlate* with the normative momentum spurring the ICC project. Given these evaluative complexities, the Court’s deterrent properties and potential must be interpreted qualitatively and cautiously.

There are indeed bases from which to reasonably contemplate a general deterrent effect. As recognized by the Report of the UN High-level Panel on Threats, Challenges

and Change: “A more secure world: *Our shared responsibility*” (UN High-level Panel Report) (2004: Para 90; also see Kirsch et al., 2004: 287):

There have been few more important recent developments [in preventing conflicts] than the Rome Statute creating the International Criminal Court. In cases of mounting conflict, early indication by the Security Council that it is carefully monitoring the conflict in question and is willing to use its powers under the Rome Statute might deter parties from committing crimes against humanity and violating the laws of war.

This passage supports Burke-White’s “multi-level global governance” conception that I examined in chapter 6 (2005: 557). Beyond entailing a complex and indeterminate interplay between ICC and national authorities under the complementary framework, the Court’s reflexive properties may extend to individual actors (Ibid: 586):

Conceiving of the ICC as part of a system of multi-level global governance further suggests that the Court will alter the incentives not just of government officials but also of perpetrators or potential perpetrators of international crimes within its jurisdiction. The iterative interactions between the Court as a supranational governance organ and the state (or its citizens) should produce an observable effect on the behaviour of would-be criminals.

In citing supporting anecdotal evidence from the Court’s involvement in the Democratic Republic of Congo, Burke-White stresses that effective outreach initiatives in target regions will be crucial for realizing its deterrent potential (Ibid: 587-589). The Court’s experiences thus far in the Darfur situation, however, cast some doubt as to whether it has helped prevent or mitigate offences. In his report to the UN Security Council on 5 December, 2007, the ICC Prosecutor cited, *inter alia*, continued targeted attacks against displaced persons perceived to be sympathetic to rebel causes (ICC-OTP, 2007b: Para 40 & 85). Persistent transgression by all parties to the conflict may reflect the Sudanese government’s own disregard for the ICC. Here the Court’s dual governance planes converge. If its operations and credibility are undermined by lack of state cooperation, then its deterrence properties (if any) will be correspondingly compromised.

The Court's Strategic Plan for Outreach identifies six objectives for "ensuring quality of justice and being a well-recognized and adequately-supported institution" (ICC-ASP, 2006b: Para 1.3).⁸⁵

- To provide accurate and comprehensive information to affected communities regarding the Court's role and activities;
- To promote greater understanding of the Court's role during various stages of proceedings with a view to increasing support among the population for their conduct;
- To foster greater participation of local communities in the activities of the Court;
- To respond to the concerns and expectations expressed in general by affected communities and by particular groups within these communities;
- To counter misinformation;
- To promote access to and understanding of judicial proceedings among affected communities.

The 32-page document does not discuss 'deterrence' per se, but does list participants in hostilities as amongst its 13 categories of "target groups" (Ibid: Para 29). Kirsch has stressed that "public and diplomatic support can contribute directly to the prevention of crimes by reinforcing expectations, including among potential perpetrators, that the Court's decisions will be enforced and that the international community's commitment to justice will be upheld" (ICC-ASP, 2007a: 5).

Though questioning the Court's general deterrence functions, and its capacity to actually prevent large-scale conflicts, Cameron acknowledges that it may condition broader processes in global politics to support its underlying objectives (2004: 93-94):

An investigation and prosecution, even if custody is not obtained, will . . . insert a little more (legalized) morality into international relations. Certain politicians and military leaders will no longer be 'clean'. The room for maneuver for governments in other States to carry on business as usual with those who are marked by the ICC will be much less.

⁸⁵ This document was produced in furtherance of the broader Strategic Plan of the International Criminal Court (ICC-ASP, 2006c).

The scope will be correspondingly greater for NGO pressure, and internal, ethical influence, on governments, financiers and business people, resulting (hopefully) in an array of diplomatic, financial and economic measures against the people identified. This might not sound like much but it is an important step forward.

Booth stresses that “the punishment of each and every offender is not necessary to achieve respect for the rule of law or to declare our disgust at the acts committed” (2003: 182). Indeed, addressing the so-called *culture of impunity* is not necessarily tantamount to ending all situations of *de facto impunity*. Short of fully realizing that latter ideal, the ICC project may still succeed in mainstreaming its justice imperatives and sending a credible global warning. As UN Secretary-General Ban Ki Moon has declared, the ICC “both embodies and drives a profound evolution in international law and culture [and] serves notice to any would-be Milosevic or Charles Taylor that their actions today may lead to international prosecution tomorrow” (ICC-ASP-2007c). Wippman offers a skeptical but fair appraisal of the Court’s challenges and prospects (2006: 100):

In practice the Court will be hampered by legal, financial and political constraints; there is little evidence to support the deterrence claims; national legal systems in the countries where atrocities are most widespread are usually inadequate and will be unable to fulfill the role assigned to them under the Court’s Statute; and the signaling/rule-of-law promotion function of the Court is likely therefore to be relatively modest. But the Court can contribute to the marginalization of extremists in some contexts, and it can, over the longer term, reinforce normative constraints against the commission of atrocities, even if only at the margins.

In also expressing doubts about deterrence per se, Charney does highlight the broader stabilizing role of international criminal justice: “A stronger argument could be made that consistent prosecutions will eventually deter persons who may be tempted to foment the very circumstances that encourage such criminal actions” (1999: 462).

The Court's prospects at both primary and secondary regulatory levels are significantly tied to the Rome Statute's ratification and implementation.⁸⁶ As of 1 March, 2008, there were 105 States Parties, each having signed and ratified the Statute: 29 African states, 13 Asian states, 16 Eastern European states, 22 Latin American and Caribbean states, and 25 Western European and other states (ICC-ASP, 2008). An additional 34 states had signed the Statute (CICC, 2008b). Overall participation has exceeded expectations, and there is fairly broad global representation, apart from the Asian and Middle East/North Africa regions. Those regional discrepancies are overshadowed by the disproportionate abstention of more powerful and/or populous states including China, India, Indonesia, Israel, Pakistan and the U.S. This pattern admittedly lends some support to the broader proposition that power resists international law and institutions (Mearsheimer, 1994-5: 7). As discussed in chapter 4, however, those states have generally explained or justified their positions, rather than opposing the very proposition of a permanent tribunal. It is also noteworthy that they all participated in the ICC negotiations, and that the U.S., Russia, and China, acting through the Security Council, concurred or acquiesced in establishing the ad hoc tribunals, and referring the Darfur situation to the ICC. With those three largest permanent Council members remaining non-parties to the Rome Statute, however, the Court's credibility is significantly compromised, as evidenced by the Sudanese government's own refusal to recognize its authority and jurisdiction.

⁸⁶ See Plan of Action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court (ICC-ASP, 2006a). Also see Report of the Bureau on the Plan of Action (ICC-ASP, 2007e).

Prospects for U.S. ratification remain unlikely, given the revocation of its original signature and the range of legal and diplomatic tactics it has employed to shield its nationals from the Court's jurisdiction in any circumstances (see Jones, 2006: 237-242). The U.S. is typically wary of external legal entanglements and of the more universalistic or egalitarian aspects of international law (Krisch, 2003: 56). Thus its policy toward the ICC is consistent with its tendency to privilege "exceptional international law" – either seeking to shape the general law to its preferences, or to reserve to itself exceptional prerogatives contrary to the principle of reciprocity (Byers, 2002: 124; also see Sinclair and Byers, 2007: 338). This disposition is accentuated by the constitutional requirement that international treaties be ratified by a two-thirds Senate majority (Krisch, 2003: 44). Murphy cites a broader historical mistrust of centralized power in the U.S., particularly of external sources (2004: 354). Its position reflects a relatively conventional view of state sovereignty, compounded by a perception of "asymmetrical sovereignty costs" associated with the ICC (Fehl: 2004: 378). As alluded to in chapter 6, engagement with the Court may be viewed as an undue derogation of its sovereignty and independence, and the domestic autonomy and external flexibility which they are understood to afford.

This broad stance also substantially transcends American partisan politics. Though the Bush Administration's oppositional approach may be contrasted with the Clinton Administration's more conciliatory posture, the ICC was barely mentioned in the 2004 Presidential campaign and has not emerged as a salient issue in the major 2008 Presidential primary contests. Thus it is unlikely that the essential U.S. policy of remaining a non-party to the Rome Statute will be qualitatively altered in the near-future. It may be realistic, however, to contemplate a more constructive American posture that

acknowledges the Court's legitimate role and existence, as evidenced by the Darfur referral and a more general softening of rhetorical tone by U.S. officials in recent years. A similar outlook exists for China and Russia.

Pursuant to the Rome Statute, a Review Conference shall be held in 2010, at which time amendments may be considered, including to the list of crimes (1998: Art. 123; also see Art. 121 ('Amendments')).⁸⁷ As discussed in chapter 4, aggression is presently listed as a fourth, undefined crime. By some accounts, these provisions not only invite amendment, but in fact imply a mandate or duty to pursue and achieve consensus. It is unlikely that definitional agreement will be reached, however, given the range of fundamentally divergent perspectives manifest in the ICC negotiations, which have persisted in the discussion papers and reports produced by the Special Working Group on the Crime of Aggression. Some States Parties may be wary of seeking to incorporate a crime that the U.S. has forcefully argued would fundamentally conflict with the Security Council's prerogatives under the UN Charter, unless ICC prosecutions were subject to the Council's pre-determination of aggression. Such an approach is strongly opposed by many ICC proponents as a political encroachment upon the Court's judicial independence and impartiality (e.g. FIDH, 2007: 15-16; also see Cassese, 2007: 846).

The Rome Statute provides (1998: Art. 5.2; see Kirsch et al., 2004: 291) [my emphases]:

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

⁸⁷ For information concerning practical and organizational issues surrounding the Conference, see the Report of the Bureau on the Review Conference (ICC-ASP, 2007f). Also see Review Conference: Scenarios and Options – Progress report by the focal point, Mr. Rolf Einar Fife (ICC-ASP, 2007g). Uganda has campaigned to host the Conference. The venue and the specific dates will be determined by the resumed 6th session of the Assembly of Parties in June, 2008.

Schabas cautions: “The debate about aggression sits within the Rome Statute like a time bomb, capable of transforming the Court and even jeopardizing its future” (2004: 140). Given the remarkable acceleration of international criminal justice over the past fifteen years, it may be premature to seek to *deepen* the Court’s authority and competence by expanding the range of crimes. It may be more prudent to re-double efforts toward *widening* the Court’s regulatory scope through broader ratification of the present structure, and capitalize upon the Review Conference’s profile and momentum to serve that objective, and to further consolidate the ICC project as a matter of global priority.⁸⁸

IV. Complementing Development, Prevention and Intervention

I have devoted this study to analyzing the ICC, and I have fundamentally endorsed both its design and its ideals. I acknowledge, however, that there are inherent and practical limits to international criminal justice, even when administered effectively in an appropriate forum. It is slow, tedious, expensive, and can never deliver true remedial justice that would undo the physical, psychological and emotional harms suffered by victims, their families and their communities. The *global* nature of serious international crimes demands that they not only be duly prosecuted, but also prevented or contained, where and to the extent possible. The Responsibility to Protect Report (R2P Report), which I mentioned in chapters 5 and 6, defines ‘human security’ as “the security of people – their physical safety, their economic and social well-being, respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms” (ICISS, 2001: Para. 2.21). International criminal justice is vital

⁸⁸ Subsequent conferences may be requested by any State Party, and will convene if a majority of States Parties agree (Rome Statute, 1998: Art. 123.2; see Slade and Clark, 1999: 442).

to this progressive conception, but its role is fundamentally secondary (or supplementary) to economic and social development programs, other structural measures aimed at conflict prevention and promoting respect for the rule of law, and global commitment to timely and robust interventionist responses, when necessary, to halt or mitigate atrocities.

Development programs are crucial to addressing the root causes of international crimes: societal conditions that are conducive or permissive of such transgressions. Those efforts should be commensurate with the sustained commitment to the ICC project: the Court “should not provide an excuse for not taking more proactive (and expensive) long-term action to prevent conflicts from arising, such as reform of the international economic system geared at reducing poverty” (Cameron, 2004: 93). The UN High-level Panel Report similarly emphasizes: “When poverty is added to ethnic or regional inequalities, the grievances that stoke civil violence are compounded” (2004: Para 45). The 1994 Human Development Report, mentioned in chapter 5, stresses that human security’s components are “interdependent” and that it is “easier to ensure through early prevention than later intervention” (UNDP: 22-23). McColdrick states (2004c: 471):

What is vital is that the existence of the ICC does not become an excuse for not taking other measures that are necessary to prevent and respond to mass atrocities. The exercise of a whole range of peaceful diplomatic strategies must be used. Education and dissemination of humanitarian and human rights law to the military, and increasingly, to civilian populations remain the most effective long-term strategies.

As discussed in section III, effective outreach and communications strategies are vital to fulfilling the normative properties of international criminal justice, which extend beyond deterrence to include fundamental respect for the rule of law.

At the Rome negotiations, Iris Almeida of the International Centre for Human Rights and Democratic Development stated (UNDCP-Speeches, 1998: 17 June):

We believe that without effective measures to protect and promote human rights, there can be no democratic development. In our view, a true democracy must be based on respect for the whole family of human rights, namely economic, social, political and civil rights and the elimination of impunity. By combating impunity, the Court can be an effective instrument in the promotion of democratic institutions.

The Vienna Declaration and Programme of Action recognizes that “all human rights are universal, indivisible, and interdependent” and, in turn, that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing” (UNGA, 1993: Para I.5 & I.8). These pronouncements evidence a recent and significant trend toward “the gradual interpenetration and cross-fertilization of previously compartmentalized areas of international law” (Cassese, 2005: 45):

[This] shows that at least at the normative level the international community is becoming more integrated and – what is even more important – that such values as human rights and the need to promote development are increasingly permeating various sectors of international law that previously seemed impervious to them.

In a holistic respect, the Court’s role in promoting “global justice” extends beyond its core punishment, deterrence and denunciation functions: “A humane world order requires the rule of law as a context to strengthen efforts to create fairer political, social and economic conditions” (Franceschet, 2006: 256). As proposed in chapter 5, those broader initiatives themselves may recognize or build upon global citizenship-like dimensions. The Declaration on the Right to Development, for example, expresses that “the human person is the central subject of development and should be the active participant and beneficiary” and that “all human beings have a responsibility for development, individually and collectively” (UNGA, 1986: Para 2.1 & 2.2).⁸⁹

⁸⁹ The Declaration also emphasizes states’ pivotal role, for example their “primary responsibility for the creation of national and international conditions favourable to the realization of the right to development”

The normative momentum of international humanitarian intervention has paralleled the progressive development of international criminal law and judicial institutions in the post-Cold War era. Unlike the ICC project, however, a consensus framework has not yet crystallized in the sense of specific and binding prescriptions. As discussed in chapter 1, the UN Charter’s human rights provisions have traditionally been subordinate to the “sovereign equality” of states and the proscription of intervention “in matters which are essentially within the domestic jurisdiction of any State” (1945: Arts. 2.1 & 2.7).⁹⁰ In chapter 5 I considered how the ICC helps progressively re-juxtapose those respective vertical and horizontal principles. A significant additional hurdle for humanitarian *intervention*, however, is that it contemplates, by definition, more direct or intrusive (potentially forcible) external involvement that is qualitatively deeper and distinct from the Court’s supranational regulatory properties. The Rome Statute itself, then, does not sanction such measures (1998: Preamble, Para. 7 & 8) [original emphases]:

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

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

Again, though, the ICC project reflects many of the same values and ideas that have informed discussions toward a more consistent and coherent humanitarian intervention framework. As discussed in chapter 6, for example, the R2P Report progressively

(Para 3.1), and their “duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development” (Para 4.1).

⁹⁰ The R2P Report itself recognizes (ICISS, 2001: Para 2.7): “Sovereignty has come to signify, in the Westphalian concept, the legal identity of a state in international law. It is a concept which provides order, stability and predictability in international relations since states are regarded as equal, regardless of comparative size or wealth”.

reflects the *reconstituted state* by its conception of “sovereignty as responsibility” rather than “sovereignty as control” (ICISS, 2001: Para 2.14).⁹¹ Stemming from that essential premise, it proposes that if a state is “unwilling or unable” to fulfill its primary internal responsibilities, then ultimate external responsibility rests with the international community to safeguard vulnerable populations (Ibid: Para 2.29).⁹² It further mirrors international criminal justice in recognizing that “the frontline defence of the rule of law is best conducted by the judicial systems of sovereign states” (Ibid: Para. 2.20).

Notwithstanding these normative parallels, progress in international criminal justice has perhaps been achieved at the expense, or in lieu, of deeper political commitment to more interventionist measures, when necessary. Smith observes a trend toward characterizing and addressing human rights and humanitarian law atrocities as a “criminal justice problem” rather than as an “intervention problem” (2002: 178). The UN High-level Panel Report acknowledges that collective security institutions have performed poorly in addressing challenges posed by large-scale atrocities (2004: Para 36) [my emphases]:

This is a normative challenge to the United Nations: the concept of State and international *responsibility to protect* civilians from the effects of war and human rights abuses has yet to truly overcome the tension between the competing claims of sovereign inviolability and the right to intervene.

⁹¹ The UN High-level Panel Report similarly articulates a progressive conception of “sovereignty and responsibility” (2004: Para 29) [my emphases]: “In signing the Charter of the United Nations, States not only benefit from the *privileges* of sovereignty but also accept its *responsibilities*. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider community”.

⁹² Again, the UN High-level Panel Report echoes these propositions (2004: Para 201) [my emphases]: “[There] is growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from catastrophes, when they are *unable or unwilling* to do so that responsibility should be taken up by the wider international community . . .” (see Manusama, 2005: 617-618).

As discussed in chapter 7, the enhanced mandate and specialized expertise of commissions of inquiry may promote more robust, transparent and timely responses by the UN Security Council (see generally Alston, 2005). The Darfur Commission may have prompted the U.S. and China to abstain from, rather than veto, the Council's referral of the situation to the ICC – consistent with the UN High-level Panel Report's specific appeal to the permanent Council members (2004: Para 256; see Alston, 2005: 606). As that very instance perhaps also suggests, however, the ICC may import a "moral hazard" into broader human security and governance considerations (Smith, 2002: 177-178):

If international actors feel confident that human rights criminals will eventually be brought to justice . . . , they may be less inclined to intervene to stop human rights crimes while they are happening, something international actors have been reluctant to do in any case. Intervention and tribunals are not mutually exclusive of course. The international community may intervene first and hold trials later.

But there are a number of reasons – an a priori preference for law over coercion, public opinion tilting away from intervention and strongly toward tribunals, growing unease over the use of force in humanitarian missions, UN caution, member-state wariness, and possibly the ICC's own ban on aggression – to believe that even when faced with urgent human rights disasters, decision-makers may defer to the Court rather than risk intervention.

Given the Court's practical obstacles in the Darfur situation, moreover, it may not simply be a question of whether international criminal justice proceedings are sufficient as an alternative response to forcible intervention: the ICC may be fundamentally unable to achieve its objectives without corresponding military involvement and support.

Roach takes a more optimistic view in citing the potential synergies between ICC and Security Council involvement in crisis situations – a "mutual legitimacy push" by which their respective actions would catalyze and bolster each other (2005: 433).

Sarooshi also contemplates how the Court and Council may perform mutually supportive functions: the Council may refer situations to the ICC and extend the Court's jurisdiction to non-States Parties, and the Court's attendant proceedings may assist the Council in

maintaining peace and security (2004b: 109). Upon announcing a formal investigation into the Darfur situation, the ICC Prosecutor declared that it “will form part of a collective effort . . . to end the violence in Darfur and to promote justice” (ICC-OTP, 2005). Notwithstanding his repeated appeals for support, however, the Council’s August, 2007 resolution authorizing a hybrid peacekeeping force neither references the ICC, nor authorizes those personnel to pursue and apprehend the two indicted individuals (see UNSC Res. 1769).⁹³ Moreno-Ocampo has suggested: “Where feasible, provisions can be included in the mandate of peacekeeping missions” (ICC-ASP, 2007b: 5).

A major discussion point concerns the authority and bases by which intervention is deemed warranted as an exceptional course of action, and by which specific measures are decided upon. The UN High-level Panel Report declares (2004: Para 204):

The effectiveness of the global collective security system, as with any legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy – their being made on solid evidentiary grounds, and for the right reasons, morally as well as legally.

That Report recognizes “seriousness of threat” as amongst five criteria to guide the UN Security Council’s authorization or endorsement of military force (Ibid: Para 207(a)).⁹⁴

In the case of international threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

The R2P Protect similarly recognizes “just cause” as amongst six criteria for military intervention as a particularly extraordinary measure (ICISS, 2001: Para 4.16).⁹⁵ It contemplates the following scenarios that may justify such recourse (Ibid: Para 4.19):

⁹³ The force is known as the United Nations-African Union Mission in Darfur (UNAMID).

⁹⁴ The other four criteria are as follows (2004: Para 207): (b) proper purpose, (c) last resort, (d) proportional means, (e) balance of consequences.

⁹⁵ The other five criteria are as follows (2001: Para 4.16): right authority, just cause, right intention, last resort, proportional means, and reasonable prospects. The report recognizes that military intervention

Large-scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or

Large-scale “ethnic cleansing”, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

These provisions recognize that large-scale atrocities warrant and demand genuine forcible intervention, with international criminal justice performing a secondary role.

The *responsibility to protect* has emerged as a powerful and expansive normative maxim in the global arena of ideas, interests and values – if not a fully crystallized principle of customary law, as acknowledged by the R2P Report itself (ICISS, 2001: Para 2.24). Though often equated with military intervention as a response to human catastrophe, it includes non-forcible responsive measures, and more broadly encompasses the responsibility to *prevent, react* and *rebuild* (Ibid: Para 2.32). The UN High-level Panel Report similarly acknowledges “a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies” (2004: Para 201). International criminal justice may contribute in all of these respects, but is fundamentally limited in its sole or isolated capacity. In ongoing crisis situations, its own role should be viewed to inherently demand a broader and deeper response: “A more activist logic would make rescue rather than retribution the primary duty of the international community” (Smith, 2002: 180). In fact, more interventionist measures would reflect the moral and ethical foundations and ideals of international criminal justice (Clapham, 2003: 67):

Just as Nuremberg served to educate a generation about the international commitment to repress war crimes and aggressive war, we can hope that [the ICC] serves to put us all on notice that we all have responsibilities not only towards those we see around us but also those who suffer due to our action, our inaction and our silence.

requires a higher threshold of justification than political, economic and judicial measures reflecting a *responsibility to react* (Ibid: Para 4.2).

As I have proposed in this concluding section, moreover, that same normative basis should also be viewed to support front-line development and prevention measures.

International criminal justice has achieved a quantum leap in the post-Cold War era, highlighted by the final establishment of the ICC as an exceptional fixture within the formal structure and normative fabric of international law and governance. In combating *extraordinary* threats to individual safety and well-being, the Court is a vital cornerstone toward implementing a comprehensive and integrated global human security agenda. That overarching effort must also continue to develop measures that more effectively address daily conditions on the ground, including more *ordinary* risks and vulnerabilities. Globalization presents both challenges and opportunities for international law and governance. There is mounting consensus that effective approaches must holistically combine human rights, democracy, development, environmental sustainability, and peace and security matters. The requisite measures are inter-dependent because the essential challenges and objectives are themselves inextricably linked. The UN Millennium Declaration recognizes that “only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable” (UNGA, 2000: Para 5).⁹⁶ As I have centrally proposed in this study, the ICC provides an innovative architectural model and a powerful normative impetus for more broadly expanding the horizons of international law and governance around the globally transcending concept of *human security*.

⁹⁶ The UN Millennium Declaration cites *shared responsibility* as amongst 6 “fundamental values” that are “essential to international relations in the twenty-first century” – together with *freedom, equality, solidarity, tolerance, and respect for nature* (UNGA, 2000: Para 6). It also calls upon all states to “consider signing and ratifying the Rome Statute” (Ibid: Para 9), and recognizes the imperatives of “protecting the vulnerable” against genocide and armed conflicts (Ibid: Para 26).

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Annex I: Resolutions Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Annex II: List of States Participating in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Annex III: List of Organizations and Other Entities Represented at the Conference by an Observer

Annex IV: List of Non-governmental Organizations Represented at the Conference by an Observer

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