

Triggering the jurisdiction of the International Criminal Court

*Daniel D Ntanda Nsereko**

Professor of Law, University of Botswana, Gaborone, Botswana

Summary

African countries have been subjected to various ideologies, often coinciding with wars and armed conflicts that in turn result in flagrant human rights abuses. Countries such as the DRC, Liberia, Rwanda, Sierra Leone, Sudan and Uganda are testimony to such abuses. Against the backdrop of these conflicts in Africa, this article explores numerous operational aspects relating to the jurisdiction of the International Criminal Court. It considers issues such as the basis of jurisdiction, jurisdiction over foreigners and bilateral immunity agreements. The article further explores mechanisms that can trigger the jurisdiction of the ICC. These mechanisms include state referrals, Security Council referrals and initiatives taken by the prosecutor.

1 Introduction

The twentieth century is generally acknowledged as one of the bloodiest centuries in the history of mankind. Pernicious ideologies such as apartheid, communism, fascism and Nazism were developed and perfected during its course. These ideologies, in turn, inspired the emergence of some of the worst tyrannies known to man, and produced two world wars and countless lesser wars and armed conflicts. These wars and conflicts were used as the justification for or context within which the most flagrant abuses of human rights and heinous deeds were committed. They wrought untold sorrow, woe and suffering to millions of people all over the world. Africa had its share of this sorrow, woe and

* LLB (East Africa), MCJ (Howard), LLM (New York), JSD (New York); Certificate in International Law (The Hague Academy of International Law); Advocate, High Court of Uganda; NSEREKOD@mopipi.ub.bw

suffering. Events that engulfed such countries as Burundi, the Democratic Republic of the Congo, Liberia, Rwanda, Sierra Leone, Sudan and Uganda left thousands of Africans killed, maimed, destitute and homeless. Millions of others were forced to flee their countries as refugees.¹

Notwithstanding, the twentieth century also recorded countless significant achievements in most areas of human endeavour. In the spheres of the rule of law and human rights, one such achievement is the establishment of the International Criminal Court (ICC or Court). The Rome Diplomatic Conference adopted its Statute, the Rome Statute, in 1998.²

At a regional level, African states demonstrated strong support for the establishment of the ICC. The Southern African Development Community (SADC) adopted 'Principles of Consensus on the Court' in 1997. Another decision on the Court was adopted during the following year by the SADC Ministers of Justice/Attorneys-General. In 1999, 14 Southern African states reaffirmed their commitment to the ICC process through the adoption of the Pretoria Statement of Common Understanding on the ICC.³ The Pretoria Statement affirmed a continued commitment to support the ICC process and to accelerate the ratification of the Rome Statute; to adopt implementing legislation; to share information on the implementation of the Rome Statute; and committed parties to further participation in the processes of the ICC.⁴

As of May 2004, there were 139 signatories and 94 state parties to the Rome Statute. African support consisted of 20 signatories and 24 state parties.⁵ Egypt is, however, the only African state that made declarations regarding the Rome Treaty.⁶

¹ Generally see DDN Nsereko 'Victims of abuse of power, with special reference to Africa' (1994) 28 *University of British Columbia Law Review* 171.

² Rome Statute of the International Criminal Court, UN Doc A/conf 183/9 (1998), (1998) 37 *International Legal Materials* 999. The Statute came into force on 1 July 2002, 60 days after 60 states ratified it. As of 10 June, 94 states had ratified the Statute. Twenty-four of these states were from Africa. They are Benin, Botswana, Burkina Faso, Central African Republic, Congo (Brazzaville), Democratic Republic of the Congo, Djibouti, Gabon, The Gambia, Ghana, Guinea, Lesotho, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia.

³ Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

⁴ NGO Coalition for an ICC 'Southern African governments adopt a common approach to ICC ratification' (1999) 12 *International Criminal Court Monitor* 3.

⁵ African signatories: Algeria, Angola, Burundi, Cameroon, Cape Verde, Chad, Comoros, Côte d'Ivoire, Egypt, Eritrea, Guinea-Bissau, Kenya, Liberia, Madagascar, Morocco, Mozambique, Sao Tomé et Príncipe, Seychelles, Sudan and Zimbabwe.

African state parties: Benin, Botswana, Burkina Faso, Central African Republic, Congo (Brazzaville), DRC, Djibouti, Gabon, The Gambia, Ghana, Guinea, Lesotho, Malawi, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia. For a detailed list on the status of ratification, see <http://www.isc-icc.org/signedlist.html> (accessed 31 July 2004).

⁶ Egypt's declarations are available at <http://www.un.org/law/icc/statute/status.htm> (accessed 31 July 2004).

Unlike the *ad hoc* tribunals for the former Yugoslavia and Rwanda or the Special Court for Sierra Leone, the ICC is a permanent international court. It serves as a reminder to tyrants all over the world, and especially those in Africa, that they can no longer oppress their fellow human beings with impunity. Even though tyrants may appear to be above the law, with the Court in place, they can be held accountable for their criminal conduct.

The Court was launched during June 2003 with the election of the 18 judges and a prosecutor in February and April respectively.⁷ The registrar was appointed during June of the same year. Of the 18 judges (seven women and 11 men), three represent Africa.⁸ Africa's commitment to the process is further exemplified by that fact that the first matters that the ICC was tasked with were referrals from Africa: the Democratic Republic of the Congo (DRC) and Uganda.⁹

This article discusses the Court's jurisdiction and focuses on how that jurisdiction may be set in motion.¹⁰

2 Jurisdiction

2.1 Bases of jurisdiction

The Court has jurisdiction over natural persons who commit international crimes such as aggression, genocide, crimes against humanity and war crimes.¹¹ While the Statute defines genocide, crimes against humanity and war crimes, it does not define aggression. The task of defining aggression was assigned to the Assembly of States Parties.¹²

As an international court created by treaty, the ICC derives its jurisdiction from the Rome Statute. However, the Statute does not vest the Court with universal jurisdiction such as that given by customary international law to municipal courts over crimes against the law of

⁷ Ms Fatou Bensouda (The Gambia) was appointed as the Deputy Prosecutor for Prosecutions.

⁸ Judge Ms Fatoumata Dembele Diarra (Mali), Judge Ms Navanethem Pillay (South Africa) and Judge Mrs Akua Kuenyehia (Ghana).

⁹ Democratic Republic of Congo: The referral by the Congo relates to atrocities committed in recent years by the Congolese rebel leader Jean-Pierre Bemba. Uganda: Uganda's referral deals with the terror campaigns of the Lord Resistance Army (LRA) in the Northern parts of Uganda.

¹⁰ Generally see DDN Nsereko 'The International Criminal Court: Jurisdictional and related issues' (1999) 10 *Criminal Law Forum* 87–120.

¹¹ Art 5 Rome Statute.

¹² See DDN Nsereko 'Genocide under the Rome Statute of the International Criminal Court' (2002) 71 *Nordic Journal of International Law* 497–521. Also by the same author see 'Defining aggression: An important agenda item for the Assembly of States Parties to the Rome Statute of the International Criminal Court' (2003) *Acta Juridica* 256.

nations, *delicta juris gentium*. A proposal by the Korean delegation to the Rome Diplomatic Conference would have vested a variant of universal jurisdiction in the Court.

Jurisdiction would have vested in the Court where:

- (a) the perpetrator of a crime within its mandate was a national of a state party;
- (b) he or she committed the alleged crime in the territory of a state party;
- (c) he or she was arrested in the territory of a state party — the custodial state; or
- (d) the victim of the crime was a national of a state party.

While the majority of the delegations at the Rome Conference supported this proposal, they did not adopt it because of stiff opposition by the permanent members of the Security Council, notably the United States.¹³ Instead, they adopted article 12(2), according to which the Court has jurisdiction over an alleged perpetrator only when the perpetrator is a national of a state party *or* he or she committed the offence in the territory of a state party — (a) and (b) above. The only way that the Court can exercise jurisdiction over an individual who commits the crimes in the territory of a country that is not a state party, or is a national of a country that is not a state party, is by either of the two countries making a declaration under article 12(3), accepting that the Court would exercise jurisdiction ‘with respect to the crime in question’.¹⁴ However, the Statute does not make it clear when a state that is not party to the Statute can make such a declaration. It appears that it may make such a declaration on a case-by-case basis after a crime has been committed. The crime in question must, however, have been committed after the Statute came into force.¹⁵ This interpretation is consistent with the need to give notice to prospective offenders that the ICC is already in place to try them. Article 12(3) is further commendable in that it makes the ICC accessible to states that were not able to become party to the

¹³ Ambassador David Scheffer, head of the United States delegation, threatened that the United States ‘would have to actively oppose this court if the principle of universal jurisdiction or some variant of it were embodied in the jurisdiction of the court. As theoretically attractive as the principle of universal jurisdiction may be for the cause of international justice, it is not a principle accepted in the practice of most governments of the world. . . .’ United States Delegation, Intervention on the Bureau’s Discussion Paper (A/CONF 183/C 1/L.53) 9 July 1998.

¹⁴ Art 12(3) Rome Statute. The declaration must be lodged with the Registrar of the Court.

¹⁵ Art 11(1) of the Rome Statute provides that ‘[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute’. Para 2 provides that ‘[I]f a state becomes a party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that state, unless that state has made a declaration under article 12, paragraph 3’.

Statute at the time that the crimes were committed. For example, states that have recently been liberated from dictatorship and are not party to the Statute will be able to vest the ICC with jurisdiction over erstwhile dictators and their cohorts simply by making the required declaration. In that case, however, those states must be prepared to co-operate fully with the Court without delay or exception in accordance with part 9 of the Statute.

2.2 Foreigners

It is important to note that for the Court to exercise jurisdiction over an accused person, it is not necessary that both the state of the perpetrator's nationality and the one in whose territory the crime was committed be parties to the Statute. It is enough if at least one of them is. This point frustrated the United States during the negotiation process. Reacting to this position, Ambassador David Scheffer, the Chief US negotiator, asked the question:¹⁶

The fundamental question is, will the Court be able to prosecute even the officials and personnel of a government without that government having joined the treaty or otherwise submitted to the jurisdiction of the Court? This is a form of extraterritorial jurisdiction which would be quite unorthodox in treaty practice — to apply a treaty regime to a country without its consent . . . We have grave difficulties with a court of this character being established that presumes to have jurisdiction over the citizens of a country that has not ratified the treaty creating the Court, except in those situations where the Security Council has taken enforcement action under chapter VII of the UN Charter which binds member states.

The plenipotentiaries at the Rome Conference rejected these arguments on the solid ground that when a foreigner comes into the territory of a country, that foreigner must submit to its jurisdiction. The foreigner is duty bound to observe all the laws of that country, and in case of non-observance, is amenable to the legal processes of the country.¹⁷ The foreigner must also accept the institutions of that country as he or she finds them. A state that becomes a party to the ICC Statute adopts the Statute as part of its *juris corpus*.¹⁸ Foreigners in a country are deemed to have accepted in advance that should they, whilst in its territory, commit offences within the mandate of the ICC, that country may elect to hand them over to the ICC for trial. Criminal responsibility is an *individual* responsibility and not that of a person's state of nationality. The question of that state submitting to the jurisdiction of the Court does not arise.

¹⁶ See United States Delegation Intervention on the Bureau's Discussion Paper (A/CONF 18 3/C 1/L.53) 9 July 1998.

¹⁷ See JL Brierly *The law of nations* (1963) 278; R Jennings & A Watts *Oppenheim's international law* (1992) 904–910.

¹⁸ In some states, treaties automatically become part of the national laws on ratification. In others there may be a need to enact special statutes incorporating the treaties into the national legal system.

The question is asked as to whether it should make a difference that the individuals concerned are officials and personnel of a government. This answer is negative. As the Nuremberg International Tribunal so poignantly declared, in matters of international criminal law, 'individuals have international duties which transcend the national obligations of obedience imposed by the individual state'.¹⁹

2.3 Bilateral immunity agreements

It is against this backdrop that the United States has pressured a number of countries, including many state parties, to enter into impunity or bilateral immunity agreements.²⁰ By these agreements, states undertake not to surrender any United States citizens in their territory to the Court to answer charges for the crimes they might have committed. The US government concludes these agreements under its American Service Members' Protection Act of 2 August 2002. That Act authorises the US President to use all means necessary, including force, to free any American service member that might be held by the Court. It also authorises the President to terminate American military and other assistance from any state that is not a member of NATO that refuses to enter into the agreements with the US.²¹ States thus enter into these agreements generally out of fear of losing American aid.²² These

¹⁹ *France et al v Goering et al* [1946] Ann Dig 202 221.

²⁰ As of 31 December 2003, 73 countries had concluded agreements with the United States. They include Afghanistan, Albania, Azerbaijan, Bahrain, Bhutan, Bolivia, Bosnia-Herzegovina, Botswana, Cambodia, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Dominican Republic, East Timor, Egypt, El Salvador, Gabon, The Gambia, Georgia, Ghana, India, Honduras, Israel, Macedonia, Madagascar, Maldives, Marshall Islands, Mauritania, Mauritius, Micronesia, Mongolia, Mozambique, Nauru, Nepal, Nicaragua, Palau, Panama, Philippines, Romania, Rwanda, Senegal, Seychelles, Sierra Leone, Sri Lanka, Tajikistan, Thailand, Togo, Tonga, Tunisia, Tuvalu, Uganda, Uzbekistan and Zambia.

²¹ The Nethercutt Amendment of 15 July 2004 further withheld funds from the Economic Support Fund from 50 states that refused to enter into impunity agreements with the United States. These included Benin, Republic of Congo, Lesotho, Mali, Namibia, Niger, South Africa and Tanzania.

²² Eg, on agreeing to sign the agreement, President Jagdeo of Guyana is reported to have said: 'I need the military co-operation with the US to continue, it is as clear as that.' Similarly, in justifying his country's action in entering into the agreement with the US, Prime Minister Lester Bird of Antigua and Barbuda said: 'This agreement is important to Antigua and Barbuda because the US Congress passed a law which prohibited the US government from providing military assistance to countries which did not sign article 98 agreements. Consequently, since July, we lost all US support to our coast guard which is crucial, both to search and rescue operations and to the interdiction of drug trafficking. The loss of this support has seen a significant increase in the amount of cocaine entering our territory and, in turn, this has spawned criminal activity.' 'A & B signs war crimes treaty with US' *Antigua Sun Daily News* 3 October 2003.

agreements purport to be made under article 98(2) of the ICC Statute.²³ However, agreements envisaged under that article are only those that (i) were in force between states that are parties to the ICC Statute (ii) before the Rome Treaty came in force and (iii) related to armed forces personnel only. They were meant to cover such agreements as Status of Forces Agreements (SOFs) and Status of Mission Agreements (SOMs), and were designed to resolve any conflicts that might arise between the obligations to states imposed by such agreements and those arising from the ICC Statute.²⁴ The United States is not a party to the Rome Statute and has no commitment to the attainment of its goals. The agreements entered into with states extend not only to military personnel but also to civilian officials, former officials, tourists and mercenaries. David Scheffer, formerly the US Chief Negotiator at the Rome Conference, explained thus:²⁵

We successfully negotiated article 98 in the treaty, preserving the core principle of the nearly 100 military status-of-forces agreements the United States has with other countries. The principle is that the nation that sent military forces deployed on foreign soil — the 'sending state' — retains primary criminal jurisdiction over its soldiers unless it consents to local prosecution. We purposely negotiated the words 'sending state' to ensure that Americans sent on official mission overseas — military, diplomatic, humanitarian — would retain this important protection. But article 98 was never intended to protect unofficial actions, such as those taken by mercenaries or others acting without US authority. Other countries agreed and gave us this well-defined protection.

It is submitted that these agreements not only undermine the integrity of the ICC, but also violate the principle of equality before the law and contravene the obligations undertaken by state parties to the Rome Statute.²⁶ They are also an affront to those states' national dignity.

²³ The provision reads as follows: 'The court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of the sending state is required to surrender a person of that state to the court, unless the court can first obtain the co-operation of the sending state for the giving of consent for the surrender.'

²⁴ Generally see D Fleck (ed) *The handbook of the law of visiting forces* (2001).

²⁵ DH Schaffer 'Unwilling hands: US sabotages International Court at its own peril' *The Seattle Post-Intelligencer* 1 February 2004.

²⁶ By entering into those agreements, state parties incapacitate themselves from co-operating fully with the Court as required under art 86 of the Rome Statute. Yet, art 18 of the Vienna Convention of the Law of Treaties also obliges parties to a treaty to refrain from acts which 'would defeat the object and purpose of a treaty'.

3 Trigger mechanisms

3.1 The International Law Commission proposals

The issue of who should have the authority to set in motion or trigger the jurisdiction of the Court was one of the most contentious before the Preparatory Commission and the Rome Diplomatic Conference. According to the International Law Commission (ILC) draft, only state parties to the Statute could lodge complaints with the prosecutor, alleging that crimes within the Court's jurisdiction appear to have been committed. However, they could only complain in respect of genocide if they were party to the Genocide Convention. To complain about other crimes, they had to accept the Court's jurisdiction over those crimes.²⁷ Even then, not all state parties could complain in a given case. Only state parties in whose territory a suspect was found (the custodial state) or in whose territory the offence was committed (the territorial state) would be able to do so.²⁸ The Security Council would also have had power to refer to the Court matters that it might be dealing with under chapter VII of the UN Charter, which vests in the Council power to decide on measures to seize situations that it considers to be a threat to the peace, breach of the peace or an act of aggression. The trial and punishment of individuals responsible for such situations may be regarded as such measures. Nevertheless, during the Nuremberg, Yugoslav or Rwanda Tribunals, the ICC prosecutor would have had no power *proprio motu* to initiate investigations or to commence prosecutions without a prior complaint by a state or a referral by the Security Council.

Opposition to a prosecutor with such powers centred on the issue of state sovereignty. It was argued that criminal investigations tended to be intrusive into the internal affairs of a state and that for the prosecutor to commence investigations in the territory of a state *proprio motu*, without a request and against the wishes of that state, would amount to a diminution of that state's sovereignty.²⁹ It was also argued that states would most likely not co-operate with the prosecutor or with the Court, and any proceedings commenced without the political goodwill of states, particularly those directly concerned with the case, would be doomed to failure.

It was further argued that an independent prosecutor, who is not accountable to a superior political authority, would be a 'loose-cannon' prosecutor, likely to abuse his powers and to commence proceedings

²⁷ See draft art 25.

²⁸ See draft art 21.

²⁹ See, eg, the editorial comment of the *Detroit News* 28 July 1998 A6, asserting that 'the international tribunal is an extremely bad idea that would work only to the extent that it is able to breach national sovereignty'.

that were wholly unfounded.³⁰ Developing states also expressed fears that such a prosecutor might fall under the sway of powerful states bent on harassing the weaker ones. Lastly, it was argued that the prosecutor might also create a workload that cannot be sustained by the available resources.

Advocates of an independent prosecutor with *proprio motu* powers pointed out that past experience with human rights instruments demonstrates that states are very reluctant to file complaints against each other. This is probably so because of fear of straining relations with each other. It may also be due to fear of terrorist reprisals. It may also be due to a lack of moral authority, realising that they, too, have skeletons in their closets that they would not want to be exposed. To date, no state has made use of the state complaint procedures under the International Covenant on Civil and Political Rights,³¹ the Inter-American Convention on Human Rights,³² the Organization of African Unity's African Charter on Human and Peoples' Rights,³³ or the United Nations (UN) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.³⁴ Only 12 state complaints have been filed under the European Convention for the Protection of Human Rights and Fundamental Freedoms since it came in force in 1953.³⁵ With the exception of the European Convention, virtually all the complaints under the instruments just mentioned have been filed by non-governmental organisations (NGOs) acting on behalf of individuals. Since most defendants before the ICC are likely to be key government or military officials, their states are not likely to complain against them.

As has been noted, the Security Council cannot always be relied upon to refer situations to the prosecutor for action, even when the facts of the situation indicate that such referral is called for. In 1998 a UN team, mandated to investigate allegations of atrocities in the Democratic Republic of the Congo, found that troops under Rwandan command

³⁰ See, eg, F Hiatt 'The trouble with the War Crimes Court' *The Washington Post* 26 July 1998 C07, when he castigates supporters of the Court for 'cheering the creation of not just a court but a powerful prosecutor's office that will be accountable to almost no one, subject to none of the checks and balances that restrain law enforcement in a democracy and empowered to punish people who have virtually no say over its operation'.

³¹ 999 UNTS 171, adopted on 16 December 1966, entered into force on 23 March 1976, *per art 49*.

³² 1144 UNTS 123, adopted on 22 November 1969, entered into force on 18 July 1978, *per art 74*.

³³ OAU Doc CAB/LEG/67/3 rev 5, adopted on 17 June 1981, entered into force on 21 October 1986, *per art 63*.

³⁴ Adopted 10 December 1984, 1465 UNTS 85, entered into force on 26 June 1987, *per art 27(1)*.

³⁵ 213 UNTS 221, adopted on 4 November 1953, entered into force on 3 September 1953, *per art 66*.

committed crimes against humanity, including the systematic murder of Hutu refugees during the campaign that brought Laurent Kabila, of the Democratic Republic of the Congo, to power. The team recommended that these crimes be referred to an international criminal court. The Security Council, for political and other undisclosed reasons, chose not to pursue the matter.³⁶ Therefore, if the prosecutor were to be left to sit back and wait for states to complain or the Security Council to refer situations to him, he would have very little work and the Court would stay dormant.

On the issue of sovereignty, it must also be pointed out that the obligation of state parties to the ICC Statute should not depend on whether they are in favour of action in a particular case. States must co-operate fully, and at all times, when their co-operation is reasonably and legitimately sought by the prosecutor.³⁷ By adhering to the ICC Statute, states surrender some degree of sovereignty and freedom of action to the prosecutor acting on behalf of the international community. Indeed, states frequently enter into treaties by which they subject themselves to restrictions on their freedom of action and to binding judicial procedures in case of disputes. Establishing the ICC by way of a treaty has the same effect: It imposes restrictions on state sovereignty like any other treaty. This is inevitable. As President Arthur Robinson of Trinidad and Tobago asserted:³⁸

[The] mere fact of having an international criminal law was an indication that states recognised the need to observe particular rules of behavior and so bind themselves in their conduct in relation to individual human beings as well as other states.

The International Criminal Tribunal for the former Yugoslavia has also underscored this point when it stated that:³⁹

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as protection for those who trample underfoot the most elementary rights of humanity.

On the issue of the possible abuse of power and the commencement of unfounded prosecutions, Justice Louise Arbour, former prosecutor for both the Yugoslav and Rwanda Tribunals, aptly commented that:⁴⁰

³⁶ See 'UN hit for inaction on Congo' *Terraviva* Rome 16 July 1998 No 24 7.

³⁷ Art 86 of the Rome Statute provides that '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.'

³⁸ Press Conference by President Robinson on 9 October 1997.

³⁹ *Prosecutor v Dusko Tadic a/k/a 'Dule'* (Case No IT-94-1-AR72), decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995.

⁴⁰ Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court 8 December 1997.

If unfounded charges are laid, the accused will be acquitted. But if persons guilty of crimes within the statute are out of reach of the prosecutor, the very purpose of the statute will be defeated.

Moreover, the prescribed qualifications of the prosecutor, and the transparent methods of his or her appointment, ensure the professional competence and impartiality of an incumbent and guard against possible abuse of his or her powers.

Regarding the stretching of resources, the prosecutor will surely be aware that such resources are not limitless. He or she will be sensible enough not to commence proceedings against every conceivable offender; but rather proceed against those persons in responsible positions, especially senior government officials, army commanders and others who might have played key roles in perpetrating particularly heinous crimes. The prosecutor must be independent, must have a discretion and be at the service of states, without becoming the servile tool of states.

The final decision of the Rome Conference was to allow the prosecutor, states and the Security Council to trigger the jurisdiction of the Court. Article 13 of the Statute provides as follows:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

3.2 State referrals

State parties to the Statute may refer to the prosecutor for investigation and prosecution any situation in which one or more of the crimes within the Court's jurisdiction might have been committed.⁴¹ These crimes need not be committed in their territory or involve their nationals. It is enough if they are committed on the territory of a state party or by a national of a state party. States that are not party to the Statute, but have made declarations under article 12(3), are also allowed to refer particular cases to the prosecutor for investigation and prosecution, provided that they undertake to co-operate under part 9 of the Statute. Nevertheless, the right of a state that is not party to the Statute to refer cases to the prosecutor is limited to crimes committed in its territory or by its nationals.

⁴¹ Art 13 ICC Statute.

It should be emphasised that, save for referrals by states that are not party to the Statute, state referrals are not restricted to specific cases in the sense of allegations against particular individuals. They cover 'situations'. A situation is a set of circumstances or episodes, such as a war or other untoward episodes, in which one or more of the crimes within the Court's jurisdiction have been committed.⁴² It is the duty of the prosecutor to investigate and determine which, if any, crime or crimes have been committed and by whom. Needless to say, in referring a situation to the prosecutor, the state concerned must, as far as is possible, provide the prosecutor with sufficient information to enable him to decide whether there is a reasonable basis to undertake the investigation. The prosecutor cannot commence the investigation unless that threshold is met.⁴³ The first two state referrals were from the Democratic Republic of the Congo and Uganda.

An advantage of state referrals is that it assures the prosecutor of the co-operation of the referring state. Another advantage is that it saves the prosecutor the political embarrassment of having to initiate proceedings in respect of situations in a certain state's territory against the wishes of that state. The third advantage is that the prosecutor need not seek the authorisation of the pre-trial chamber, which is needed when he or she initiates the proceedings *proprio motu*.⁴⁴

3.3 Security Council referrals

The Security Council, for its part, may also refer *situations* to the prosecutor when it is acting under chapter VII of the Charter.⁴⁵ For example, the Council acted under these powers when it established the *ad hoc* tribunals for the former Yugoslavia and for Rwanda.⁴⁶ Rather than creating *ad hoc* tribunals for each new situation, the Council can now

⁴² See DDN Nsereko in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) art 118, margin 6.

⁴³ In December 2003, President Yoweri Museveni of Uganda referred to the prosecutor the situation concerning the Lord's Resistance Army. The prosecutor, after determining that there was 'a sufficient basis' to conduct investigations, decided to commence the investigations; <http://icc-cpi.int/php/news/latest/php> (The Hague, 29 January 2004). However, under art 18 of the Statute, the prosecutor is obliged to notify all state parties of his intention to investigate. If, on receiving the notification, a state that otherwise has jurisdiction indicates that it is exercising or intends to exercise such jurisdiction in respect of the same situation, the prosecutor must defer to that state. The only way that the prosecutor may commence investigations and prosecution in such circumstances is by seeking and obtaining authorisation from the pre-trial chamber. See also DDN Nsereko 'Preliminary rulings regarding admissibility' in Triffterer (n 35 above) art 18.

⁴⁴ Art 15.

⁴⁵ As above.

⁴⁶ See Security Council Resolution 827 of 1993 establishing the International Criminal Tribunal for the former Yugoslavia, and Resolution 955 of 1994 establishing the International Criminal Tribunal for Rwanda.

refer such situations to the ICC. The greatest advantage of a Security Council referral is that it is binding on states, regardless of whether they are state parties or whether they 'accept' the jurisdiction of the Court. In accordance with article 25 of the UN Charter, they must co-operate fully with the Court in the discharge of its duties in respect of the referral.

Acceptance of the Security Council as one of, and not *the only*, body that can trigger the jurisdiction of the Court, did not come without a price. The permanent members of the Security Council, particularly the United States, favoured the International Law Commission provision that would have forbidden an ICC prosecution arising out of 'a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under chapter VII of the Charter, unless the Security Council otherwise decides'.⁴⁷ This provision was unacceptable to the majority of the delegations at the Rome Conference, as the Council was notorious for keeping certain situations on its agenda for an indefinite period of time without doing anything about it. If the provision were accepted, it would have resulted in the ICC never being able to take any case arising out of such situations. To appease the permanent members of the Council, the Conference adopted the following compromise, known as the Singapore Proposal:⁴⁸

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 adopted 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.

There are four important points in respect of this provision:

The first is that, although the Council's action is billed as 'a request', it is actually a command to the Court to defer to its jurisdiction.

The second point is that the request must be made by way of resolution and that to be adopted, the resolution requires the affirmative concurrence of all the permanent members of the Council present and voting; it is liable to a veto by any of the permanent five; it is a consolation.

The third point is that it is clear from both the context and the language of article 16 that the purpose of the article was to suspend ICC action on cases arising out of a specific or particular situation that the Security Council may still have to deal with. The basis for this assertion is the assumption that, as long as the Security Council is busy with a situation that possibly involves international peace and security, other bodies, including the ICC, should not interfere. The Council must have the 'first right to act'.⁴⁹ After all, the Charter vests it with primacy in these

⁴⁷ Art 23(3) ILC draft.

⁴⁸ Art 16.

⁴⁹ See K Ambos 'The role of the prosecutor of an international criminal court from a comparative perspective' (1994) 45 *The Review of the International Commission of Jurists*.

matters. Untimely or precipitous investigations or prosecutions by the ICC might undermine its diplomatic efforts to normalise a volatile situation.⁵⁰

The fourth point is that the provision is likely to be abused, as the Council needs not give reasons for its 'request' to the Court for the stay of any prosecution. Those unstated reasons might be purely political. The 'request' may be repeated *ad infinitum*, and the Court's action stayed indefinitely. In the meantime, valuable evidence may be destroyed, and witnesses may disappear.⁵¹

Fears of abuse of the resolution did indeed materialise, just days after the Rome Statute came into force. It so happened that the mandate of the UN Mission in Bosnia and Herzegovina (UNMIBH), to which the United States made significant contributions, in the form of both human and material resources, was about to expire. The United States threatened to cut off its contributions unless its nationals who are serving, or who served in any such mission, were granted immunity from prosecution by the ICC for anything they did or omitted to do in relation to the missions. Anxious not to forfeit the United States' contributions to UNMIBH and other peacekeeping missions, the Security Council acceded to the US' demands. Purporting to act under chapter VII of the Charter, the Council on 12 July 2002 passed Resolution 1422 that reads as follows:

- 1 *Requests*, consistent with the provisions of article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing state not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
- 2 *Expresses* the intention to renew the request in paragraph 1 under the same conditions each July for further 12-month periods as may be necessary;
- 3 *Decides* that member states shall take no action inconsistent with paragraph 1 and with their international obligations;

⁵⁰ It is, however, not true that the simultaneous exercise of jurisdiction by the Court over the same matter that is being dealt with by the Council necessarily undermines the efforts of the latter. This assumption was held to be legally unsound by the International Court of Justice. The Court held that it could and did adjudge the legal aspects of a case, the subject matter of which was under the active consideration by the Council under ch VII of the Charter. No one was able to claim afterwards that the Council's efforts were thereby undermined. See *Nicaragua v United States* [1986] ICJ Reports 14. See also *United States Diplomatic and Consular Staff in Iran case (USA v Iran)* ICJ Reports (1980) 3. Generally see RStJ Macdonald 'Changing relations between the International Court of Justice and the Security Council of the United Nations' (1993) 31 *The Canadian Yearbook of International Law* 3.

⁵¹ A proposal by the Belgian delegation that would have provided for the preservation of the evidence and protection of witnesses was omitted from the final text of the Statute.

4 *Decides to remain seized of the matter.*

This resolution is of doubtful legal rectitude.⁵² First, it is a misuse of the Statute, particularly article 16. Article 16 was never intended to be the basis for granting to prospective indictees of the Court blanket exemption from its jurisdiction in respect of future and unknown situations. Article 16 envisages only existing situations with which the Security Council may be seized. The resolution justifies the invocation of the article in order 'to facilitate member states' ability to contribute to operations established or authorised by the United Nations Security Council'.⁵³ This was never the purpose of the article.

Secondly, before invoking article 16, the Council must allege the existence of an actual situation that constitutes a threat to international peace and security.

Thirdly, the resolution specifically refers to 'current or former officials or personnel from a contributing state not party to the Rome Statute'. Such reference violates article 27 of the Statute that declares as irrelevant any distinction based on official capacity, and aims at combating impunity.⁵⁴

The above assertions lose their validity even though, when passing the resolution, the Council claimed that it was acting in consistence with article 16. The resolution was merely intended to weaken the Court by perpetually stripping it of jurisdiction over potential violators of international humanitarian law. As was feared, it was renewed as a matter of course on 12 July 2003,⁵⁵ and the renewal was followed by another resolution, that of 1 August 2003, under which the Security Council set up the Multinational Stabilisation Force for Liberia and again exempted all personnel participating in the force from the ICC jurisdiction.⁵⁶ Resolution 1422, and those that followed it, are a disservice to the cause of the rule of law and respect for the law. They undermine the authority of the ICC and encourage impunity. They send

⁵² See also C Stahn 'The ambiguity of Security Council Resolution 1422 (2002)' (2003) 14 *European Journal of International Law* 85–104. See also Council of Europe Parliamentary Assembly Resolution 1336 (2003) on Threats to the International Criminal Court of 25 June 2003.

⁵³ See para 7 of the Preamble to the Resolution.

⁵⁴ Art 27 para 1 Rome Statute reads as follows: 'This Statute shall apply 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.'

⁵⁵ See S/RES/1487 (2003).

⁵⁶ S/RES/1497 (2003). To show their opposition to the exemption, France, Germany and Mexico abstained from voting on the resolution. In a statement to the press immediately following the vote, UN Secretary-General Kofi Annan said: 'Frankly my sentiments are with those countries that abstained.'

the wrong signal to people who serve in peacekeeping operations and those who might be tempted to violate international humanitarian law that they can do so and get away with it.⁵⁷ Lastly, the resolutions were unnecessary, because individuals serving on UN peacekeeping missions remain under the jurisdiction of their home states. Whenever a serviceman is accused of committing a crime, he or she is immediately sent home where he or she is dealt with. As long as the home state is dealing with him or her, the case will not be admissible before the ICC. It would only be admissible if it were to be shown that the state concerned was unable or unwilling to investigate or to prosecute genuinely or effectively.⁵⁸ These resolutions may discredit the Security Council as being a servile tool of the United States' foreign policy that is hostile to the Court.⁵⁹ US attempts to renew the resolution in June 2004 failed, because of a lack of support by the majority of the members of the Security Council.

3.4 The prosecutor's initiatives

Regarding the prosecutor, the Statute empowers him to initiate investigations and prosecutions *proprio motu*, without a referral by either a state or the Security Council. He or she may act on information received from states, organs of the UN, intergovernmental and non-governmental organisations 'or other reliable sources that he or she deems appropriate'.⁶⁰ These other sources include victims, relatives of victims and eyewitnesses. However, before he or she can proceed with full investigations, the prosecutor must seek authorisation from the pre-trial chamber. The chamber, for its part, may not authorise any investigations unless it is satisfied that 'there is a reasonable basis to proceed', and that the case appears to fall within the jurisdiction of the Court.⁶¹

⁵⁷ In a statement expressing his concern over extending 'UN peacekeepers' immunity from ICC action', Secretary-General Kofi Annan said: 'I can state confidently that, in the history of the United Nations, and certainly during the period that I have worked for the organisation, no peacekeeper or any other mission personnel has been anywhere near committing the kind of crimes that fall under the jurisdiction of the ICC.' Press Release SG/SM/8749 SC/7790, 12 June 2003.

⁵⁸ Art 17 Rome Statute.

⁵⁹ This servility was further shown by Council Resolution 1502 of 26 August 2003 on the Protection of United Nations Personnel, Associated Personnel and Humanitarian Personnel in Conflict Zones. The resolution was introduced by Mexico and co-sponsored by Bulgaria, France, Germany, Russia and Syria following a terrorist attack on the UN headquarters in Baghdad the previous week, in which over 20 UN staff were killed or injured. The resolution made reference to the fact that under the Rome Statute, an attack intentionally directed against humanitarian personnel was a war crime. The reference to the Rome Statute was deleted from the resolution at the insistence of the United States.

⁶⁰ Art 15 ICC Statute.

⁶¹ As above.

There are also other preliminary steps that the prosecutor must take before he or she seeks the pre-trial chamber's authorisation. When he or she determines that there is a reasonable basis to proceed with an investigation, the prosecutor must, before applying for the trial-chamber's authorisation, notify 'all state parties and those which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned'.⁶² Within one month of receiving such notification, a state may inform the Court that 'it is investigating or has investigated its nationals or others within its jurisdiction' with respect to the acts disclosed in the prosecutor's notification.⁶³ Thereafter that state may request the prosecutor to defer to the state's investigation of those persons. When a state makes such a request, the prosecutor must comply, 'unless the pre-trial chamber, on the application of the prosecutor, decides to authorise the investigation'.⁶⁴ The pre-trial chamber may authorise the investigation where, for example, it is satisfied that the state concerned is either unwilling or unable to genuinely carry out the investigation and bring the culprits to justice. Either the state concerned or the prosecutor may appeal the decision of the pre-trial chamber to the appellate chamber. When the prosecutor has deferred to the investigations of a state, or pending the ruling of the pre-trial chamber, he or she may, exceptionally, seek the authorisation of the chamber to pursue some investigations for the purpose of preserving evidence that may subsequently be lost to the Court. This may be the case in situations of on-going armed conflicts where witnesses may be killed or go missing and vital evidence destroyed.

Where, after a referral from a state or the Security Council or on receipt of information from other sources, the prosecutor declines to investigate on the ground that 'there is no reasonable basis to proceed',⁶⁵ or declines to prosecute on the ground that 'there is not a sufficient basis for a prosecution',⁶⁶ the pre-trial chamber may, either at the instance of a state that made referral or the Security Council, 'request' him to reconsider his decision.⁶⁷ However, the 'request' can be construed as an order. This assertion is borne out by the fact that for the most part the prosecutor's decision not to investigate or to prosecute is not effective unless and until it is confirmed by the pre-trial chamber.⁶⁸

⁶² Art 18 ICC Statute. This article was inserted at the insistence of the United States. See Statement of the US Delegation on 'Article 11bis — Preliminary rulings regarding admissibility' (A/AC.249/1998/WG.3/DP.2) (3 April 1998).

⁶³ As above.

⁶⁴ As above.

⁶⁵ Art 53(1).

⁶⁶ Art 53(2).

⁶⁷ Art 53(3).

⁶⁸ Art 53(3) para (b).

Unlike a prosecutor at the national level, particularly under the common law jurisdictions, the prosecutor's powers of initiative are severely restricted. He or she cannot carry out any investigations to verify the information he or she has received. The prosecutor must rely solely on sources other than his or her office. All that he or she can do is seek additional information from states, organs of the UN, intergovernmental and non-governmental organisations or other reliable sources. He cannot commence investigations without authorisation from the pre-trial chamber. Again, the prosecutor has to defer to national jurisdictions whose only interest in a matter may be to delay or stymie the international criminal justice processes. These procedures were, doubtless, put in place in deference to the states' primary responsibility and right to investigate and prosecute international crimes that fall within their jurisdiction.⁶⁹ They ensure that the prosecutor, in exercising pre-trial powers, is accountable to some authority. Lastly, these procedures serve to allay the fears of those states that were concerned that their sovereignty might be compromised by the decisions of a 'freewheeling' prosecutor, by subjecting those decisions to scrutiny by a panel of impartial and independent judges.⁷⁰

4 Concluding remarks

From the standpoint of the rule of law and justice, the International Criminal Court is one of the greatest achievements of the twentieth century. It is a powerful weapon against impunity. However, for the Court to be effective, its jurisdictional reach must be as wide as possible. To achieve this, and in the absence of universal jurisdiction, it is imperative that as many states as possible be parties to its Statute. This will make it very difficult for perpetrators to find safe havens. States that are not able or willing to investigate situations in which atrocities have been committed must be willing to refer those situations to the Court. In this respect, in deciding to refer to the Court situations that took place in their territory, both Uganda and the Democratic Republic of the Congo must be commended.

⁶⁹ The intention of the architects of these procedures was to enable states to stop the Court's involvement 'before the prosecutor of the International Criminal Court initiated an investigation because even initiation of an investigation might interfere with the exercise of national jurisdiction'. See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court* (GA 50th session Supp A/50/22 September 1995 10).

⁷⁰ Generally see DDN Nsereko 'Prosecutorial discretion before national courts and international tribunals' (2004) 2 *Journal of International Criminal Justice* (forthcoming December 2004).

Civil society has in the past played a crucial role in galvanising international opinion in favour of the Court. It must continue its campaign until there is near-universal ratification. It must also continue to be vigilant to ensure that state parties live up to their obligations under the Statute and that they do not violate those obligations, as has happened with respect to bilateral immunity agreements that some have entered into with the United States.

Lastly, to exercise his *proprio motu* powers under the Statute, the prosecutor will rely largely on the independent information provided by victims and people in close proximity to the places where the crimes are committed, or to witnesses with first-hand information about the crimes. Civil society again has a vital role to play in this respect. After all, civil society constitutes 'the people' of the United Nations and the conscience of the international community.