Chapter – VI
OPERATIONALIZATION OF THE COURT

While the previous chapter dealt with the procedures of the International Criminal Court (ICC), this chapter examines its coming into force and other issues having a bearing on its effective functioning. This chapter deals with the ratification status of the Rome Statute and the extent of support it has drawn; the relationship agreement between the ICC and the United Nations; the Security Council’s grant of immunity to international peacekeepers from prosecution by the ICC; the efforts of the US to undermine the ICC; the referral of situations to the ICC; the sessions of the Assembly of States Parties; the financial position of the ICC; and the election of the judges, the Prosecutor and other officials of the ICC.

EFFECTING THE STATUTE

Ratification Status
As of 12 May 2005, 99 states have ratified the Rome Statute.\(^1\) To meet the requirements of equitable geographical representation for the election of judges, selection of staff and other purposes, the 99 states parties have been grouped into five regions. These are African states, Asian states, Eastern European states, Latin American and Caribbean states, and Western European and Other states. These groupings are based on precedents established by the UN General Assembly. Out of 99 states parties, 27 are African states, 12 are Asian states, 15 are Eastern European states, 20 are Latin American and Caribbean states and 25 are Western European and Other states.

The states parties according to regional groupings are as follows:

African States (State Party and date of deposit of instrument of ratification):

1. Benin, 22 January 2002
2. Botswana, 8 September 2000
4. Burundi, 21 September 2004
6. Congo, 3 May 2004

\(^1\) <www.icc-cpi.int>
7. Democratic Republic of the Congo, 11 April 2002
8. Djibouti, 5 November 2002
10. Gambia, 28 June 2002
12. Guinea, 14 July 2003
14. Lesotho, 6 September 2000
15. Liberia, 22 September 2004
16. Malawi, 9 September 2002
17. Mali, 16 August 2000
18. Mauritius, 5 March 2002
22. Senegal, 2 February 1999
23. Sierra Leone, 15 September 2000
25. Uganda, 14 June 2002
26. United Republic of Tanzania, 20 August 2002
27. Zambia, 13 November 2002

Asian States:

1. Afghanistan, 10 February 2003
2. Cambodia, 11 April 2002
3. Cyprus, 7 March 2002
4. Fiji, 29 November 1999
5. Jordan, 11 April 2002
7. Mongolia, 11 April 2002
8. Nauru, 12 November 2001
9. Republic of Korea, 13 November 2002
10. Samoa, 16 September 2002
11. Tajikistan, 5 May 2002
12. Timor-Leste, 6 September 2002

Eastern European States:

1. Albania, 31 January 2003
2. Bosnia and Herzegovina, 11 April 2002
3. Bulgaria, 11 April 2002
4. Croatia, 21 May 2001
5. Estonia, 30 January 2002
7. Hungary, 30 November 2001
8. Latvia, 28 June 2002
9. Lithuania, 12 May 2003
10. Poland, 12 November 2001
11. Romania, 11 April 2002
12. Serbia and Montenegro, 6 September 2001
13. Slovakia, 11 April 2002
14. Slovenia, 31 December 2001
15. The Former Yugoslav Republic of Macedonia, 6 March 2002

Latin American and Caribbean States:

1. Antigua and Barbuda, 18 June 2001
2. Argentina, 8 February 2001
3. Barbados, 10 December 2002
4. Belize, 5 April 2000
5. Bolivia, 27 June 2002
6. Brazil, 14 June 2002
7. Colombia, 5 August 2002
9. Dominica, 12 February 2001
10. Dominican Republic, 12 May 2005
11. Ecuador, 5 February 2002
12. Guyana, 24 September 2004
13. Honduras, 1 July 2002
14. Panama, 21 March 2002
15. Paraguay, 14 May 2001
16. Peru, 10 November 2001
17. Saint Vincent and the Grenadines, 3 December 2002
18. Trinidad and Tobago, 6 April 1999
19. Uruguay, 28 June 2002
20. Venezuela, 7 June 2000

Western European and Other States:

1. Andorra, 30 April 2001
2. Australia, 1 July 2002
3. Austria, 28 December 2000
4. Belgium, 28 June 2000
5. Canada, 7 July 2000
6. Denmark, 21 June 2001
7. Finland, 29 December 2000
8. France, 9 June 2000
9. Germany, 11 December 2000
10. Greece, 15 May 2002
Except Asia the Rome Statute has attracted states from all regions. Most of the European states have ratified the Rome Statute. The European Union (EU) has been the most active supporter of the ICC. It has decided under the EU’s Action plan on the ICC to link the ratification of the Rome Statute as a human rights issue with other agreements to be concluded by the EU. The European Commission and the European Parliament have been actively involved in the ICC ratification campaign. All NATO members except the US, Turkey and the Czech Republic have ratified the Statute. The European Commission has already given an indication to Turkey that ratification would be a crucial factor in its accession to the EU. Within a year after surrendering former President Milosevic to the ICTY, the FRY (Serbia) ratified the Statute in September 2001.  

Although Russia has signed the Statute, it is yet to ratify it. The matter is under consideration before its different public departments. Nothing is evident that would suggest a strong political support for the ICC. Both the President and the Duma have maintained silence. It is well understood that the political situation in Chechnya has turned out to be a major obstacle in the ratification of the Statute.

Almost all the major Latin American and Caribbean states have become parties to the treaty. In Africa 27 states have ratified the Rome Statute. In fact many African states were at the forefront in calling for the creation of the ICC. For speedy ratification, the

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3 Ibid, p. 395
Southern African Development Community prepared a model Bill of Ratification for its 14 members.

Among all the regions of the world, the Rome Statute has attracted very few countries from the Asian region. More opposition to the ICC has come from this than any other region of the world. The Asian countries have approached the issue of the ICC with great caution. Only 12 states from this region have ratified the treaty. All the major states of Asia including China, India, Japan, Pakistan, Indonesia and Malaysia have neither signed nor ratified the treaty. And there is no prospect of their doing so in the near future. From the Arab League only Jordan has ratified the Statute. The region has been witnessing several ethnic conflicts and civic unrest. As the region records dismal performance in observing even basic human rights standards, it is true that many Asian governments fear that their own leaders and officials may one day be brought before the ICC. In addition, many countries in Asia also lack an independent judicial structure that may make principle of complementarity meaningless for them. Most of these countries are also averse to external interference of any kind. This is in sharp contrast to African countries. They also record worst kinds of violations of human rights and humanitarian law, but they seek international intervention. They have preferred international courts to prosecute past abuses. China, a permanent member of the Security Council, also opposes the ICC. Apart from other concerns, like lower threshold for crimes against humanity and powers of the Prosecutor to initiate prosecutions on his own, China has also objected to crimes of enslavement, enforced sterilization and enforced disappearance of persons.

National Legislation

As the ICC relies too heavily on the principle of complementarity much will depend on domestic legislation enacted by the states parties to implement the Rome Statute. It is clear that in most of the cases national courts rather than the ICC will be trying offenders for crimes falling under the ICC’s jurisdiction. Many states like Argentina, Brazil, Canada, Ecuador, France, Germany, Panama, New Zealand and the UK either have enacted appropriate domestic legislation or have drafted bills as measures to implement

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5 Ibid, pp. 50-51
the Rome Statute at the national level. The national implementation measures are important to ensure that the crimes within the jurisdiction of the ICC are also made criminal offences under domestic laws so that in accordance with the principle of complementarity national courts can exercise jurisdiction over such offences. Otherwise, the whole concept of complementarity will appear meaningless. The ICC will have to assume jurisdiction if a state party fails to enact appropriate domestic law prohibiting and providing punishment for all the offences within the jurisdiction of the ICC. Further, national implementation measures are essential to provide all sorts of cooperation and assistance when investigations and prosecutions are conducted by the ICC. Such availability of procedures at the national level is crucial for the effective operation of the ICC because in most of the cases it will be dependent on cooperation of states for investigating and prosecuting crimes.

However, states have adopted different approaches in implementing the Rome Statute. The UK has adopted what is termed as the “minimalist approach.” According to the law enacted by the UK, the domestic courts are to have jurisdiction over offences enshrined in the Rome Statute when committed in the territory of the UK or by British nationals or residents outside the UK. The UK clarified that it would not move further than the obligation imposed by the Rome Statute and that it would not set up a “substitute court” because the ICC does not have universal jurisdiction. However, human rights organizations like the Amnesty International wanted the states to overcome the loopholes in the ICC’s jurisdiction while enacting legislation so that their national courts can exercise universal jurisdiction in order to prosecute crimes where the ICC is unable to do so.

There are other states such as Germany, Canada and New Zealand, which, surpassing the obligations imposed by the Statute, have enacted laws that provide near universal jurisdiction over offences under the Rome Statute. Because under domestic laws of

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7 Turns, n.6, pp.338-339
8 Ibid, pp. 347-349
Belgium, courts already enjoy universal jurisdiction over serious international crimes, a simple ratification of the Rome Statute was felt to be sufficient. France presents a different case. Although it has ratified the Statute and amended its Constitution to implement the Statute, it has not made any substantive changes in its national law except to the extent of providing procedural measures to facilitate cooperation with the ICC. Moreover, while ratifying the Statute, France has made a declaration under Article 124 of the Statute according to which it does not accept the ICC’s jurisdiction over war crimes committed on its territory or by its nationals. France is the only European country which has made such a declaration. Apart from France the only state party which has used this option is Columbia. Upon ratification France also made a controversial interpretative declaration. The declaration stated that the nuclear weapons do not come under the purview of the definitions of war crimes enshrined in the Statute. The declaration has attracted criticism because it seemed more like a reservation which is not allowed by the Statute. On the other hand, New Zealand in its interpretative declaration supported the Advisory Opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons (1996) and confirmed that the use of such weapons “would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.” Sweden has also made a similar declaration.

Relationship Agreement between the Court and the UN
According to Article 2 of the Rome Statute, the ICC is to be brought into relationship with the UN through an agreement to be approved by the Assembly of States Parties. It is well understood that for proper and effective functioning, the ICC must have appropriate relationship with the UN. On the other hand, it is also accepted that any

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10 Colombia has also made another controversial interpretative declaration concerning grant of amnesties when it ratified the Statute. The text reads as: None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian state from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia. <www.icc-cpi.int>
11 The President of the ICC is entitled to conclude such an agreement on behalf of the ICC.
relationship with the UN must not go to the extent of interference in the independence of a judicial institution.

Negotiated Draft Relationship Agreement between the International Criminal Court and the United Nations (henceforth ICC-UN Agreement) was adopted at the third plenary meeting of the Assembly of States Parties at its third session on 7 September 2004 by consensus. The ICC-UN Agreement seeks to address many of the problems which are likely to arise when both the organs will interact. Both the UN Secretariat and the Assembly of States Parties decided to apply provisionally the ICC-UN Agreement pending its formal entry into force. The Agreement has to enter into force upon approval by the General Assembly and the Assembly of the States Parties.

The ICC-UN Agreement "defines the terms on which the United Nations and the Court shall be brought into relationship." According to Article 2 of the ICC-UN Agreement, the UN recognises the ICC as an "independent permanent judicial institution" and also its "international legal personality." The ICC, on the other hand, recognizes the responsibilities of the UN under the Charter. Both are required to "respect each other's status and mandate." Both are required to cooperate and consult each other on matters of mutual interest.

Article 4 deals with the reciprocal representation between the ICC and the UN. The Secretary-General or his representative has been extended a "standing invitation to attend public hearings of the Chambers" in cases of interest to the UN or any public meetings of the ICC. Similarly, the ICC may participate in the work of the General Assembly in the capacity of observer. In addition, upon invitation the President or the Prosecutor of the ICC may also address the Security Council on matters of mutual interest. If any person enjoying privileges and immunities of the UN is alleged to be criminally responsible for a crime within the ICC's jurisdiction, the UN may waive such privileges and immunities for the ICC to exercise jurisdiction over such a person.

According to Article 15, the UN is under obligation "to cooperate with the Court and to provide to the Court such information or documents as the Court may request." The

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13 Art 23, ICC-UN Agreement
14 Art 1, ICC-UN Agreement
15 Art 3, ICC-UN Agreement
16 Art 19, ICC-UN Agreement
obligation also extends to programmes, funds and offices of the UN "to provide to the Court other forms of cooperation and assistance compatible with the provisions of the Charter and the Statute." However, if there is a risk that the disclosure of any information or document may endanger the safety or security of current or former UN personnel or prejudice the security or proper conduct of any UN operation or activity, the ICC may order appropriate measures of protection. In case where the ICC fails to do so, the UN may take such measures of protection on its own such as withholding of some information or documents. Where the ICC requests the testimony of a UN official, the UN is required to waive that person's obligation of confidentiality. The Secretary-General is authorised by the ICC to appoint a representative to assist any UN official who appears as a witness before the ICC.  

Apart from its general obligation to cooperate with the ICC, the UN is further required to cooperate with the Prosecutor. In order to facilitate such cooperation, the UN may enter into arrangements or agreements with the Prosecutor, especially when the Prosecutor is engaged in conducting investigations and is in need of assistance by the UN. The Prosecutor may also enter into such arrangements with the programmes, funds and offices of the UN. Hence, under the ICC-UN Agreement, the Prosecutor has been given very broad powers to seek assistance from the UN. He may have at his disposal massive machinery of the UN. However, in order to protect confidentiality of certain information and documents it is provided that:

The United Nations and the Prosecutor may agree that the United Nations provides documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to the other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.  

Furthermore, Article 20 protects information or documents from disclosure which the UN has obtained on condition of confidentiality. It states:

If the United Nations is requested by the Court to provide information or documentation in its custody, possession or control which was disclosed to it in confidence by a state or an intergovernmental, international or non-governmental organisation or an individual, the United Nations shall seek the consent of the originator to disclose that information or documentation or, where appropriate, will inform the Court that it may seek the consent of the originator for the United Nations to disclose that information or documentation. If the originator is a State Party to the Statute.

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17 Art 16, ICC-UN Agreement  
18 Art. 18 (3), ICC-UN Agreement
and the United Nations fails to obtain its consent to disclosure within a reasonable period of time, the United Nations shall inform the Court accordingly, and the issue of disclosure shall be resolved between the State Party concerned and the Court in accordance with the Statute. If the originator is not a State Party to the Statute and refuses to consent to disclosure, the United Nations shall inform the Court that it is unable to provide the requested information or documentation because of a pre-existing obligation of confidentiality to the originator.

Hence, in these situations the ICC will be able to do little than to refer the matter to the Assembly of State Parties or to the Security-Council.

**Privileges and Immunities Agreement**

The Agreement on the Privileges and Immunities of the International Criminal Court (henceforth Agreement on the Privileges)\(^\text{19}\) entered into force on 22 July 2004 thirty days after the deposit of the tenth instrument of ratification. As of 12 May 2005, 62 states have signed it and 24 have ratified it. Article 2 of the Agreement on the Privileges reiterates Article 4 of the Rome Statute that the ICC “shall have international legal personality and shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.” Further “[i]t shall, in particular, have the capacity to contract, to acquire and to dispose of immovable and movable property and to participate in legal proceedings.”

The ICC is “entitled to display its flag, emblem and markings at its premises and on vehicles and other means of transportation used for official purposes.”\(^\text{20}\)

Article 6 affirms immunity of the ICC, and its property, funds and assets from every form of legal process and from “search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.”

The ICC, its assets, income and other property and its operations and transactions are to be exempted from all direct taxes, which include, inter alia, income tax, capital tax and corporation tax, as well as direct taxes levied by local and provincial authorities.\(^\text{21}\) The ICC also enjoys “in the territory of each State Party for the purposes of its official communications and correspondence treatment not less favourable than that accorded by the State Party concerned to any intergovernmental organization or diplomatic mission in

\(^{19}\) ICC-ASP/1/3 (2002)

\(^{20}\) Art 5, Agreement on the Privileges

\(^{21}\) Art 8, Agreement on the Privileges
the matter of priorities, rates and taxes applicable to mail and the various forms of
communication and correspondence.” No censorship is allowed with respect to the
official communications or correspondence of the ICC. 22

UNITED STATES AS AN IMPEDING FACTOR

Unsigning of the Statute

Although the US had signed the Rome Statute, it did so to participate in the negotiations
on Elements of Crimes and Rules of Procedure and Evidence. It was clear from the very
beginning that it did not intend to ratify the treaty. On 6 May 2002, it formally
“unsigned” the treaty. 23 The US decision was unprecedented. The UN treaty section
clarified that “there was no precedent for unsigned a treaty.” This action of the US was
criticised by many states and NGOs. Although mere signing of a treaty does not entail
any legal obligation for a state, the “unsigning” of the Rome Statute “signified and
symbolised the US rejection of the ICC.” 24

Vulnerability on Account of Military Operations

The US has been consistent in its opposition to the ICC. However, there are several
NGOs like the Human Rights Watch, the Lawyers Committee for Human Rights and the
American Bar Association within the US that strongly support the ICC. The chief
concern of the US is that its service men as well as civilian leaders including the
President, the Secretary of State, the Defence Secretary may become targets of politically
motivated charges before the ICC. Further, the attacks of the World Trade Centre in New
York on 11 September 2001 have also influenced the US policy towards the ICC. As the
US launched its “war against terror” on a global scale, it was deeply concerned that its
military personnel engaged in anti-terrorism campaign abroad could become easy targets
for complaints before the ICC. Approximately 200,000 American soldiers are almost
permanently stationed across the world. The US army has a presence in about 110 states.
In 2003, the number of US troops stationed overseas rose to 400,000. Thus the US

22 Art II, Agreement on the Privileges
23 On 6 May 2002, the US informed the Secretary General that it did not intend to become a party to the
treaty; hence, it had no legal obligations arising from its signature. On 28 August 2002, Israel made a
similar communication to the Secretary-General.
24 McGoldrick, n.2, p.414
perceives that the possibility of its soldiers being indicted by the ICC is much more than soldiers of any other state. In addition, the US feels that its legitimate military actions can be scrutinised by the ICC. Therefore incidents like bombing in Serbia, missile strikes against Afghanistan and Sudan can at least be questioned before the ICC. Moreover, collateral damage or mistakes in military operations resulting in deaths of civilians can be another cause of legal action. Such incidents occur quite often during combat.25

The decision of the ICTY's Prosecutor to look into allegations of war crimes committed during NATO's military operations in Kosovo in 1999 was another cause of worry for the US. Although the Prosecutor decided not to conduct any formal inquiry, she received complaints from a group of European and Canadian legal experts backed by the Amnesty International. The issues which were raised dealt with use of cluster bombs, attacks on electrical grids and similar installations used for civilian purposes, decision to make war planes fly at high-altitudes so as to reduce risk to pilots but having the opposite effect of enhancing collateral damage.26

In recent years the US observance of international humanitarian law has been questioned especially in the context of war against terrorism. The US has denied the prisoner of war status to Taliban and Al Qaeda members held at Guantanamo Bay detention centre in Cuba. Neither in the case of Afghanistan nor in Iraq, the US initially recognised a state of armed conflict. Hence, it refused to acknowledge itself as an occupying power, applicability of the Geneva Conventions and status of detainees as prisoners of war. In both the cases it was only under international pressure that the US accepted the existence of armed conflict and the applicability of the Geneva Conventions. Even then it expressly clarified that neither Taliban nor Al Qaeda members were to be accorded status of prisoners of war. The US even refused to allow a competent tribunal to determine the status of detainees as required by the Geneva Conventions. These detainees were technically defined as "enemy combatants...captured on the battlefield seeking to harm US soldiers or allies." The US made it clear that the detainees would be prosecuted by special military commissions constituted in accordance with Presidential Order rather than by Courts martial or US Courts. Therefore such detainees do not enjoy many legal

25 For instance, in 1999 the US fighter planes bombed the Chinese Embassy in Belgrade and in 2002 the US forces bombed a wedding party in Afghanistan. Ibid, pp. 401-403
26 Ibid, p.434
protections accorded to other accused. They do not have the right to appeal. They have also been denied access to legal counsel. Moreover, the US also clarified that even if they are acquitted of charges by military commission they would continue to be kept in detention until the end of the conflict. The military commissions are to be comprised of military personnel appointed by the Secretary of Defence.\textsuperscript{27}

Interrogation techniques employed by the US authorities on these detainees are another cause of concern. Even when a detainee does not have the status of prisoner of war, he cannot be subjected to torture or other cruel, inhumane and degrading treatment under international law. It has been alleged that the interrogation of detainees at Guantanamo Bay violate fundamental norms of international law. Because detainees are not held within the territory of the US they are "beyond the constitutional protections of the United States legal system." In a controversial ruling in a petition filed on behalf of the detainees, the US District Court held that "no Federal District Court would have jurisdiction over the detainees because, although the United States had complete jurisdiction and control over and within the Guantanamo Bay base, pursuant to the lease agreement with Cuba, sovereignty over the area remained with Cuba."\textsuperscript{28}

With the entry into force of the Rome Statute, the US launched a vigorous diplomatic campaign to build support in its favour. It clarified that being a non-state party its primary concern was the exposure of its service men and government officials to surrender to the ICC. It held that if the supporters of the ICC wanted to ensure US cooperation for effective operation of the ICC, they must resolve the primary concern of the US.\textsuperscript{29}

**Security Council Exemptions**

The Security Council’s relationship with the ICC continues to be a cause of immense concern. The fears came true when the Security Council decided to use its power under Article 16 of the Rome Statute dealing with deferral of investigations and prosecutions before the ICC. In July 2002, the Security Council acting under Chapter VII of the UN Chapter, adopted Resolution 1422, which asked the ICC not to initiate investigation or


\textsuperscript{28} Ibid, pp. 108-112

\textsuperscript{29} McGoldrick, n.2, pp.408-409
prosecution for one year in any case that involved officials or personnel of a non-state party participating in a UN established or authorised operation. Paragraph 1 of resolution 1422 reads as:

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 authorized 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.30

In effect the Security Council granted exemption from prosecution to military personnel engaged in UN sponsored or authorised peacekeeping operations. Resolution 1422 also clarified the intention of the Council to renew the request “under the same conditions each 1 July for further 12-month periods for as long as may be necessary.” Furthermore, it directed member states of the UN to “take no action inconsistent with paragraph 1 and with their international obligations.”31

The resolution was adopted at the behest of the US. The US President, George W. Bush had publicly stated that as commander-in-chief, his duty was to protect US soldiers instead of turning them to an international criminal court. Before the adoption of Resolution 1422, the issue of granting exemption was extensively debated. Many like Canada and New Zealand did not agree with the US that Article 16 empowered the council to grant blanket exemption from the jurisdiction of the ICC. They held that the basic intention behind Article 16 of the Rome Statute was to empower the Council to request for deferral on a case-by-case basis. Canada claimed:

The negotiating history makes clear that recourse to Article 16 is on a case-by-case basis only, where a particular situation - for example the dynamic of a peace negotiation - warrants a 12-month deferral. The Council should not purport to alter that fundamental provision.32

The same was the opinion of New Zealand, which stated:

Attempts to invoke the procedure laid down in Article 16 of the Rome Statute in a generic resolution, not in response to a particular fact situation, and on an ongoing basis, are inconsistent with both the terms and purpose of that Article... [I]t was intended to be used on a case-by-case basis by reference to particular situations, so as to enable the Security Council to advance the interests of peace where there might be a temporary conflict between the resolution of armed conflict, on the one hand, and the prosecution of offences, on the other. Here, no conflict between

30 SC Res 1422 (12 July 2002)
31 Ibid, paras. 2-3
the two arises. The Article might also be used as a protection of last resort against frivolous or political prosecutions. Again, that does not arise here. But it certainly provides no basis for a blanket immunity to be imposed in advance...

It would be most unfortunate, to say the least, if Article 16 were to be misused in this particular way. To purport to provide a blanket immunity in advance in this way would in fact amount to an attempt to amend the Rome Statute without the approval of its States Parties.33

Earlier in 2002, the US threatened to veto UN peacekeeping missions if the blanket exemption was not granted. Thus as part of its strategy, the US placed the ICC against the peacekeeping operations. There is no doubt that its contribution to such operations is immense. Although the US soldiers do not serve under UN command, thousands of US soldiers have served in UN supported peacekeeping operations in Bosnia, Kosovo and Afghanistan. The share of the US in UN peacekeeping budget is 27 per cent. During the period 1996-2001, the US directly contributed $3.45 billion and indirectly $2.42 billion for peacekeeping operations. First time the US gave indication of its strategy when the Security Council passed a resolution on new peacekeeping mission for East Timor. The US wanted immunity of all UN peacekeepers from prosecution by any international tribunal. At that time East Timor was not yet a party to the Statute but it clarified its intention to do so. The US proposal met with strong resistance. 13 out of 15 members voted against the proposal. It is worth noting that all other permanent members of the Security Council (the UK, France, Russia and China) were also in opposition. In response, the US withdrew three military observers and 75 civilian police officers from East Timor on the very first day after the entry into force of the Rome Statute.34

Although the US had to retreat, it became clear what was in store. The US again raised the matter when the Security Council was considering a resolution for continuing the UN peacekeeping mission in Bosnia (UNMIBH). The US did not leave any doubt that if exemption from the ICC's jurisdiction was not provided, it would withdraw its 8000 soldiers participating in NATO operations in UN authorised missions in Bosnia and Kosovo. The US Representative to the Council, Richard Williamson clarified that "there should be no misunderstanding that if there is not adequate protection for US peacekeepers, there will be no US peacekeepers." However, the US did not really intend to withdraw forces. It was looking for a solution. The timing which the US selected for

33 Cited in Ibid, p.117
34 McGoldrick, n.2, pp. 415-416

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making its demand was also crucial. It was the middle of June 2002 and a decision had to be taken in a very short period. It was also not clear whether the US position also meant the end of the Stabilisation Force in Bosnia (SFOR) because SFOR was under NATO rather than the UN command. During that period, the US was contributing 2,400 personnel to SFOR in Bosnia and Herzegovina. They constituted approximately 15 per cent of the total SFOR strength of 15,800 personnel. During that period 31 states (including 18 NATO members) were contributing military and other support to SFOR. In addition, 5,200 US personnel were also stationed in Kosovo. The US position had legal implications for other states as well. Laws in Germany and Ireland allow forces to operate outside their territories only under the UN mandated peacekeeping operations. A US veto of UN peacekeeping could also have prevented their participation. 35
The US position drew strong criticism from states as well as human rights organizations. It was held that “the US proposal would see the [Security Council] trying to rewrite the rules of a treaty. This meant it would be acting as a legislature and that was beyond its competence.” Also “for the first time that diplomats could recall the US was in open dispute with its long-time allies, the UK and France.” However, it was the joint British-French proposal that was finally adopted as SC Resolution 1422. Despite the fact that the Resolution raised much controversy, it was finally adopted unanimously. The scope of the resolution includes not only the US but other non-states parties like India, China and Pakistan as well. 36
Despite that barring few like India - one of the largest contributors to UN peacekeeping operations – the US move drew criticism from every corner of the world. 120 countries formally made statements against the US position in a special session of the Preparatory Commission of the ICC on 3 July 2002. Similarly, in an open session of the Security Council convened at the request of Canada on 10 July 2002, 72 states registered their opposition against the US policy. Canada’s Ambassador to the UN raised concern that “the credibility of the Council, the legality of international treaties, and the principle that all people are equal and accountable before the law were at stake.” Nevertheless, the adoption of Resolution 1422 paved way for passing other resolutions that allowed

36 Ibid, pp. 418-419
extension of peacekeeping missions for SFOR and UNMIBH for one more year. In December 2002 when the Security Council decided to send more peacekeepers to Congo, the US again tried to secure exemption for them from the ICC’s jurisdiction. However, it could not succeed.\textsuperscript{37}

However, the US efforts for exemption continued. As a result the Resolution 1422 was further renewed as Resolution 1487 which was adopted in June 2003.\textsuperscript{38} But the Resolution 1487 could not be passed unanimously as France, Germany and Syria decided to abstain. It was also realized that the US efforts were directed less towards protecting its soldiers but more towards undermining the ICC. It was held that

\textit{[I]n every UN peacekeeping mission, the US either has no personnel in the mission, the host state is not a party to the ICC, or the ICTY has primacy. Thus, total exposure to the ICC is zero in every case...Given this, it appears that the intention is not to protect its own peacekeepers, but to undermine the court.}\textsuperscript{39}

Thus the military personnel of non-states parties engaged in peacekeeping operations enjoyed immunity for full two years. Even after the renewal of the terms of Resolution 1422, when the Security Council decided to send a multinational stabilisation force to Liberia to help implementing a ceasefire agreement, the US succeeded in securing a blanket immunity for peacekeepers from non-states parties. France, Germany and Mexico decided to abstain. According to Resolution 1497 that was finally adopted:

\begin{quote}
Decides that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of the contributing state for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by the contributing State.\textsuperscript{40}
\end{quote}

The Council’s grant of immunity expired on 30 June 2004. The US wanted the extension of exemption for one more year. The US proposed a compromise text that called for the final renewal of the resolution. When it became clear that the compromise text could not garner necessary nine votes for its adoption the US withdrew its proposal. One of the reasons why the US could not receive requisite support was the strong appeal made by the Secretary-General. He claimed that “extending the exemption once more would

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\textsuperscript{37} Ibid, pp.421-422  
\textsuperscript{38} SC Res. 1487 (12 June 2003)  
\textsuperscript{39} McGoldrick, n.2, pp.420  
\textsuperscript{40} SC Res. 1497 (1 Aug 2003), para. 7
\end{flushleft}
contradict the efforts of the United Nations – including the Council itself – to promote the rule of law in international affairs.”

**Bilateral Immunity Agreements**

The US has adopted another strategy to secure immunity for its nationals from the jurisdiction of the ICC. It has started entering into bilateral immunity agreements with other states in accordance with Article 98 of the Rome Statute.\(^{41}\) For the US, Resolution 1422 was only a temporary relief. It provided an opportunity to the US to enter into bilateral Article 98 agreements with different states. Those states can be both parties as well as non-parties to the Statute. Such agreements are meant to prevent agreeing states to surrender each other’s nationals to the ICC. A vigorous diplomatic campaign was launched by the US to conclude such agreements. It started fresh negotiations to update its over 100 Status of Forces Agreements (SOFAs) all over the world. The entire NATO force deployed throughout Europe is covered by such SOFA agreements. All US Ambassadors were asked in April 2002 to ascertain whether other states would be willing to enter into mutual agreements so as to protect their nationals from surrendering to the ICC. The US even applied political and diplomatic pressure on other states to conclude such agreements. It warned that other states might lose military assistance and economic aid if they failed after becoming parties to the Rome Statute to provide guarantees for the protection of US personnel serving in their countries. Direct threats were also used. For instance, the US withheld sale of F-16s warplanes to Chile. However, the US was careful not to identify particular states with whom it wished to seek such agreements so that they may not be prevented by supporters of the ICC from negotiating such an immunity deal with the US. In some instances the terms of the agreement were not made public.\(^{42}\) The text of proposed Article 98 agreement reads as:

1. For purposes of this agreement, ‘persons’ are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.

\(^{41}\) It must be reminded that Art 98(2) of the Rome Statute states that “[t]he 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 a sending State is required to surrender a person of that state to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of the consent for the surrender.

\(^{42}\) McGoldrick, n.2, pp.423-424
2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,

(a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or

(b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.

3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X.

4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.

5. This agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination. 43

Thus the bilateral immunity agreement proposed by the US covered not only service men and government officials but all US nationals. The US justified this stating that in addition to its armed forces and diplomatic representation, its corporations, educational institutions and NGOs are present in every part of the world. They are equally vulnerable as targets just for being US nationals. It held that American citizens are "singled out not as much for their profession as for their nationality." Because many American citizens are to be found in turbulent regions of the world, (e.g. American corporations in resource extraction areas witnessing large-scale violence), they remain prone to "politically motivated prosecutions." In Asia, the US has already signed Article 98 agreements with Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka and Thailand. It has been reported that the US has also signed such agreements in secret with Egypt, Kuwait, Liberia, Morocco and Nigeria. However, there are at least 33 states such as Canada, Germany, Norway, Switzerland and the Netherlands which have publicly declined to sign immunity deals with the US. 44

India has its own concerns for opposing the ICC and for cooperating with the US. In addition to internal disturbances in different parts of India and reports of atrocities committed by security forces, concerns raised throughout the world over attacks on

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43 Cited in ibid, p. 425
44 Ibid, pp.425-428
Muslims in Gujarat might also have influenced the Indian decision. Albeit for different reasons India shares concerns with the US over ICC’s jurisdiction over nationals of non-states parties.

In US-India talks in May 2002, there was agreement on the serious inadequacies of the ICC, its negative impact on peacekeeping operations and the importance of co-operation between US and India in opposing its applicability to non-states parties because they considered this to be beyond the limits of international law.45

With respect to European States, the US adopted the same strategy of approaching them individually. But European Union preferred a united response. In fact they it was critical of Romania which took the decision of signing an Article 98 agreement without waiting for the adoption of a common European position. It was clear that a number of EU members like the Netherlands, Germany, and France were strongly opposed to any immunity agreement as they felt that it would be completely inconsistent with “the spirit and sense of the Rome Treaty.” But there were others like Italy, the UK, and Spain which indicated their willingness to sign such an agreement. The UK, in particular, drew heavy criticism for taking side with the US. Nevertheless, informal discussions were held on the issue among EU members in Denmark. The European Commission, on the other hand, was of the view that Article 98 agreement had the potential to undermine the ICC and was incompatible with the Rome Statute. In this regard it delivered a non-binding legal advice in August 2002. Similarly, the European Parliament took a firm stand against Article 98 agreement. All these posed difficulties for a possible compromise between the EU and the US. The US drew attention towards the Military-Technical agreement with the Afghan Government of January 2002, according to which members of the International Security Assistance Force “may not be surrendered to, or otherwise transferred to, the custody of an international or any other entity or state without the express consent of the contributing nation.” That was precisely what the US wanted. That Agreement was negotiated by the UK on behalf of 19 countries that included France as well as Germany. The US claimed that to be an “evidence of double standards.”46

45 Ibid, pp. 440-441. It must be reminded that during the Rome negotiations India and the US were in opposite camps. India’s chief objection was the role assigned to the Security Council in the Statute in referring and deferring situations before the ICC and the ICC’s exercise of almost universal jurisdiction pursuant to referral of situations by the ICC.

46 Ibid, pp.429-430
Finally, the European Council gave its approval for a common EU policy but on conditions of certain guiding principles. All agreed to abide by the set of principles developed by the Council. Therefore, the EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court was considered to be the best outcome. Any other alternative would have caused "a split and a weakening of the strong EU position to support the ICC." Further, a complete refusal to cooperate with the US on the matter "would have had a very damaging effect on trans-Atlantic relations." The Guiding Principles provide that any prospective agreement must ensure that persons who have committed crimes falling under the ICC’s jurisdiction “do not enjoy impunity” and “any solution should only cover persons who are not nationals of an ICC State Party.” Moreover, according to the principles, any such agreement “should cover only persons present on the territory of a requested state because they have been sent by a sending state.” Thus it becomes clear that the agreements are to cover only US service men and other officials who are sent abroad rather than all US citizens. The reference to “sending state” instead of “state of nationality” clarifies that:

[T] he presence of a person on the territory of a requested state must arise as a result of an act of the sending state (e.g., in sending to the requested state a diplomat or as a member of a visiting military force pursuant to a SOFA).

The US and the EU started fresh negotiations with both adhering to different interpretations of these Guidelines. The EU members clarified that they were not ready to deviate from the common position. Even the UK has made it clear that it would adhere to the Principles.47

American Servicemembers’ Protection Act

Within the US legislative measures were initiated to protect US soldiers from the reach of the ICC. The US Congress held special hearings on the ICC. After the US Senate Foreign Relations Committee held hearings on the ICC in July 1998, Senator Helms suggested some very stringent measures that:

47 Ibid, pp. 430-433
(1) the US must never vote in the Security Council to refer a matter to the ICC; (2) the US must block any organization of which it is a member from providing any ICC funding; (3) the US must renegotiate its status of forces agreements and extradition agreements to prohibit their partners from surrendering US nationals to the ICC; (4) the US must provide no US soldiers to any regional or international peace-keeping operation where there is any possibility that they will come under the jurisdiction of the ICC.

The American Servicemembers’ Protection Act of 2000 was introduced in both the House of Representatives and the Senate. The Bill barred the US from intervening in peacekeeping operations in countries that became parties to the Rome Statute. However, the NATO member states could be spared. The then US Administration was against such a legislation because it curtailed its negotiating maneuverability, undermined the President’s constitutional authority as Commander-in-Chief and to make foreign policy decisions; and it could have adversely affected the crucial military alliances. Therefore, the Bill was modified and the new American Servicemembers’ Protection Act (ASPA) came into being on 2 August 2002. Although, the new law is more flexible, it still contains controversial provisions. It authorizes the US administration to use “all means necessary, including military force, to rescue a US citizen taken into the court’s custody.” This generated sharp criticism in Europe. It was referred to as the “Hague Invasion Act” as it appears to be authorizing the US government to go to any extent, even invading the Netherlands to rescue a US citizen from the custody of the ICC. The Netherlands expressed shock over this provision. The US had to make a statement addressing those concerns. It clarified that the US intended “to resolve these controversies in a constructive manner” and it “cannot envisage circumstances under which the United States would need to resort to military action against the Netherlands or another ally.”

The ASPA imposes a general prohibition on military assistance to states which are parties to the Rome Statute. However, such a prohibitions are not applicable for any NATO member country; any major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, The Republic of Korea, and New Zealand; and Taiwan. Furthermore, the President has been given the right to waive such prohibition with respect to any state if it has entered into an Article 98 agreement with the US, or when the national interests of the US so require. Approximately 50 states were reported to be under the scope of the prohibition. After the exemptions from prohibition there remained 35 states against which

48 Ibid, pp.433-435
military aids could have been withheld. In terms of value, such financial cuts were estimated to be worth $46 million for 2003 and $89 billion for 2004. Later assistance to 5 states was restored after conclusion of immunity agreements. However, in order to avoid any possible conflict between the objectives of the ASPA and war against terror, the ASPA also provides that “nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.”

US Exceptionalism

It is clear that the US views ICC as detrimental to its national interest. It cannot accept international judges and prosecutors passing judgments on its foreign policy objectives. Further, the ICC does not operate within the UN structure and it is politically accountable to none. The US cannot accept such an independent international court wielding so much power to constrain its actions. Moreover, the ICC may become a political forum whereby states opposed to US policies will find ample opportunity to advocate anti-Americanism. Its opposition to the ICC has been explained in terms of American unilateralism and exceptionalism.

America is different and has to be treated differently. Because of its global responsibilities it is a special target. Behind the US attempt to scuttle the ICC is the Bush administration's belief that the unilateral use of American military might is the paramount means of achieving US strategic interests world-wide. Viewed from that perspective, the ICC creates a powerful disincentive for US military engagement in the world. If American power is needed to quiet international trouble spots, the rules of that operation need to be written by America. This approach is argued to explain American exceptionalism, non-compliance with international agreements, non-ratification of signed treaties, rights narcissism and its distinctive rights culture.

ESTABLISHMENT OF ORGANS OF THE COURT

Assembly of States Parties

Three sessions of the Assembly of States Parties have already been held. While the first two sessions were held at the UN Headquarters in New York, the third session took place

49 Ibid, pp. 435-436
51 McGoldrick, n.2, p. 443
at the seat of the ICC in The Hague. The first Session of the Assembly took place between 3 and 10 September 2002.\textsuperscript{52} The first and second resumptions of the first session took place from 3 - 7 February 2003 and from 21 - 23 April 2003 respectively.\textsuperscript{53} The second session of the Assembly was held from 8 - 12 September 2003.\textsuperscript{54} The third session of the Assembly took place between 6 and 10 September 2004.\textsuperscript{55} The fourth session will take place from 28 November to 3 December 2005.

During its initial sessions the primary task before the Assembly was to set up the institutional framework for the ICC.\textsuperscript{56} At its first session the Assembly adopted almost all the documents prepared by the Preparatory Commission by consensus.\textsuperscript{57} Also at its first meeting the Assembly elected its Bureau. Prince Zeid Ra’ad Zeid Al-Hussein (Jordan) was elected as President; Allieu Ibrahim Kanu (Sierra Leone) and Felipe Paolillo (Uruguay) as Vice-Presidents. Other elected members of the Bureau were Austria, Croatia, Cyprus, Democratic Republic of the Congo, Ecuador, Gabon, Germany, Mongolia, Namibia, Netherlands, New Zealand, Nigeria, Norway, Peru, Romania, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland and Yugoslavia.\textsuperscript{58}

The UN Secretariat served as the Secretariat of the Assembly until 31 December 2003.\textsuperscript{59} In September 2003, the Assembly at its second session established the Permanent

\textsuperscript{57} At its First Session the Assembly of States Parties adopted the following instruments prepared by it: (a) Rules of Procedure and Evidence, (b) Elements of Crimes, (c) Rules of Procedure of the Assembly of States Parties, (d) Financial Regulations and Rules, (e) Agreement on the Privileges and Immunities of the International Criminal Court, (f) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country, and (g) Draft Relationship Agreement between the Court and the United Nations. ICC-ASP/1/3 (2002)
\textsuperscript{58} ICC-ASP/1/3 (2002)
\textsuperscript{59} The UN Secretariat was to be fully reimbursed for its services. ICC-ASP/1/Res.8 (2002)
Secretariat of the Assembly. The Permanent Secretariat started its work from 2004 onwards. It is headed by Medard Rwelamira (South Africa).

Election of Judges, Prosecutor and Registrar

**Judges**

As the Rome Statute provides only basic guidelines for the nomination and election of judges, detailed procedures in this regard were discussed at length by the Preparatory Commission at its ninth session in April 2002. With respect to election of judges, the Statute directs the ICC to take into account equitable geographical representation, representation of the principal legal systems of the world and a fair representation of female and male judges. At the time of first election of judges, there were 74 states parties. For the purpose of equitable geographical representation of the states parties there were 23 from Western European and Other States, 17 from African states, 14 from Latin American and Caribbean States, 11 from Eastern European States and 8 from the group of Asian States. On the basis of these groupings, 18 seats had to be allocated.

The requirement of the representation of the principal legal systems had generated difficulties mainly because of the absence of criteria to define principal legal systems and also because of the presence of a wide variety of legal systems in the world. It would have been impossible to give representation to all the legal systems. Other international courts regard equitable geographical representation as representative of the principal legal systems. In the case of the ICJ, allocation of seats to the permanent members of the Security Council is taken as fulfilment of this requirement. With respect to the ICTY and ICTR, it is not clear how the Security Council implemented this requirement. The requirement of fair representation of female and male judges is in accordance with demands to maintain gender balance in all relevant international judicial bodies. The Beijing Declaration and Platform for Action as well as resolutions adopted by the

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60 ICC-ASP/2/Res.3 (12 September 2003)
61 Broadly the legal systems of the first 73 states parties to the Statute can be defined as: civil law systems (42); common law systems (11); mixed systems of civil law and customary law (6); mixed systems of civil law and common law (3); mixed systems of common law and customary law (3); mixed systems of common law, Muslim law and customary law (1); mixed systems of common law, Muslim law and customary law (1); mixed systems of common law, Muslim law and customary law (1); mixed systems of common law, civil law and customary law (1). See, Thordis Ingadottir, “Nomination and Election of Judges,” in Thordis Ingadottir, ed., The International Criminal Court: Recommendations on Policy and Practice - Financing, Victims, Judges, and Immunities (Ardsley, 2003), pp. 158-159
General Assembly and the Security Council have urged states to nominate and promote women candidates for appointment or election as judges or other senior officials in international courts and tribunals. In the case of the ICTY, the requirement of fair gender representation is confined to the nomination of candidates. The Security Council has not considered this requirement in the preparation of the final list of judges. Till now women's representation in the bench of the international courts has been far less than adequate. Until recently, there were only five women judges out of a total of 75 at the ICJ, ICTY, ICTR, WTO (World Trade Organisation) and ITLOS (International Tribunal for the Law of the Sea).62

The requirement for the inclusion of "judges with legal expertise on specific issues, including, but not limited to, violence against women or children" is another innovative provision which is independent of general requirements needed for the selection of judges. This requirement is consistent with the emphasis given in the Statute to gender crimes and to protection of children. Both the ICTY and the ICTR had to face a number of cases sexual violence, which would have required services of experts. However this requirement is not linked with the appointment of female judges and the reference here is only to the "need to include" judges. Furthermore, the judges were to be elected in such a manner that at least nine having experience in criminal law and at least five having experience in relevant areas in international law must find a place.

The Assembly of States Parties adopted a very complicated procedure to implement these requirements for the nomination and election of judges.63 In accordance with the procedure adopted, 45 candidates were nominated between 9 September 2002 and 30 November 2002. The election took place during the first resumed session of the Assembly of States Parties between February 3 and 7, 2003 in New York. 33 ballots were needed for 85 states parties. It took four days to complete the elections. Among the 18 elected judges, three are from Africa, three are from Asia, one belongs to the group of Eastern European states, four are from the group of Latin American and Caribbean states and seven are from the group of Western European and Other states. Seven of the judges are female. Ten judges have been taken from list A (candidates having competence in

62 Ibid, pp. 161-164
63 ICC-ASP/1/Res.2 and ICC-ASP/1/Res.3 (9 Sept 2002)
criminal law and procedure) and eight from list B (candidates having competence in relevant areas of international law). Six judges will serve a full term of nine years, six a term of six years, and six a term of three years.

The judges were sworn in on 11 March 2003. On the same day judges elected the Presidency of the ICC. Judge Philippe Kirsch (Canada) was elected as President, Judge Akua Kuenyehia (Ghana) as First Vice-President, and Judge Elizabeth Odio Benito (Costa Rica) as Second Vice-President of the ICC. Subsequently the Presidency assigned judges to different Divisions. It may be noted that no Asian judge is included in the Presidency.

**Prosecutor**

Luis Moreno Ocampo of Argentina was unanimously elected as the Prosecutor of the ICC during the second resumption of the first session of the Assembly of States Parties on 21 April 2003. He received support of all the 78 states parties voting. His term in office started on 16 June 2003. The Assembly also elected two Deputy Prosecutors, Serge Brammertz (Investigations) and Fatou Bensouda from a list of candidates provided by the Prosecutor. After a nine-month period of preparatory activities, the Office of the Prosecutor became functional on 17 July 2003.

Since November 2002, the Office of the Prosecutor has also been engaged in conducting a series of consultations with experts such as legal practitioners and investigators form different legal systems of the world as part of efforts for smooth start up of the office. The Chief Prosecutor has called leading experts of international criminal justice as well as members of civil society to advise him on major policy questions before the Office becomes functional.

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64 The judges assigned to the Pre-Trial Division are the First Vice-President, Judge Akua Kuenyehia, and Judge Fatoumata Diarra, Judge Claude Jorda, Judge Hans-Peter Kaul, Judge Mauro Politi, Judge Tuiloma Neroni Slade, and Judge Sylvia Steiner.

The judges assigned to the Trial Division are the Second Vice-President, Judge Elizabeth Odio Benito, and Judge Rene Blattmann, Judge Maureen Harding Clark, Judge Anita Usacka, Judge Sir Adrian Fulford, and Judge Karl Hudson-Phillips.

The judges assigned to the Appeals Division are the President, Judge Philippe Kirsch, and Judge Erkki Kourula, Judge Navanethem Pillay, Judge Georgios M. Pikis, and Judge Sang-hyun Song.


66 <www.icc-cpi.int>
Registrar

Upon recommendation of the Bureau of the Assembly of States Parties, Bruno Cathala (France) was elected as the Registrar of the ICC by an absolute majority of the judges on 24 June 2003. He will hold office for a renewable term of five years.\textsuperscript{67}

Funding Arrangements

The Financial Regulations and Rules were prepared by the Preparatory Commission. The Regulations outlined in detail the functions of the Assembly, the Bureau and the Committee on Budget and Finance. The Committee on Budget and Finance is a sub-organ of the Assembly. Its prime responsibility is to review and monitor all budgetary and financial matters of the ICC.\textsuperscript{68} With respect to criteria for accepting voluntary contributions, the resolution adopted by the Assembly of States Parties requires the contributors to declare that such contributions are not intended to affect the independence of the ICC. In addition, the Registrar is required to assure himself that any contribution will not affect the independence of the ICC. He is also required to report to the Assembly about all offered voluntary contributions, irrespective of whether they are accepted or rejected.\textsuperscript{69} The first draft budget proposal was prepared by the UN Secretariat. The proposal contained reference to two scenarios (the non-referral scenario and the referral scenario). The working group of the Preparatory Commission asked the Secretariat to prepare another draft with an integrated approach and in the light of the Priority Guidelines formulated by the Commission. Hence, a revised draft budget proposal was submitted by the Secretariat at the ninth session of the Commission.

The budget for the first financial period of the Court (September 2002 to December 2003) was € 30,893,500 (€ 7,723,375 for the year 2002 and € 23,170,125 for the year 2003). 43 per cent of the budget was allocated to the Common Services Division, 22 per cent for meetings of the Assembly of States Parties and its committees, 13 percent to the Prosecutor, 9 percent to the Chambers, and 9 per cent to the Registry. One million euro was kept to meet unforeseen expenses. Further the Working Capital Fund of euro

\textsuperscript{67} \textw{<www.icc-cpi.int>}

\textsuperscript{68} The Committee on Budget and Finance is responsible for the technical examination of any document submitted to the Assembly that contains financial or budgetary implications. It is also required to review the proposed programme budget of the ICC prepared by the Registrar. ICC-ASP/1/Res.4 (3 Sept 2002)

\textsuperscript{69} ICC-ASP/1/Res.6 (2002)
1,915,700 was formed to cover the short-term liquidity requirements of the ICC.\textsuperscript{70} In order to meet the initial shortage of funds, the Bureau of the Preparatory Commission decided to establish a Trust Fund to Support the Establishment of the International Criminal Court. Contributions to the Trust Fund were treated as a credit against future assessment of states parties.\textsuperscript{71} Twenty-five states contributed a total of $3,962,468 to the Trust Fund.

Regarding the assessment of contribution for the first financial period, the UN scales of assessment was adjusted to take into account the difference in membership between the UN and the Assembly of States Parties. Mainly because the two largest contributors (the US and Japan) to the UN are not parties to the Statute, the average assessed contribution in percentage for a state party to the ICC is almost double in comparison to its contribution to the UN. The biggest contributors to the ICC are Germany (20 per cent), France (13 per cent), UK (11.4 per cent), and Italy (10.4 per cent). For the first financial period, assessed contributions ranged between 635 euro and 6.2 million euro. While nine states parties paid more than 1 million euros, 27 states parties contributed less than 2500 euro. The European Union (before expansion that included 15 member states) shared 76 percent of the ICC’s budget.\textsuperscript{72}

The budget of the ICC for the year 2004 amounted to a total of 55,089,200 euros. Out of which, €6,034,500 had been allocated to the Presidency and Chambers, €14,294,400 to the Office of the Prosecutor, €31,882,200 to the Registry and €2,878,100 to the Secretariat of the Assembly of States of Parties. In addition, €4,600,000 had been approved for the Working Capital Fund.\textsuperscript{73}

The draft programme budget for 2005 approved by the Assembly amounts to a total of €66,784,200. Out of this, €7,304,400 was assigned to judiciary, €17,022,200 to the Office of the Prosecutor, €37,312,300 to the Registry, €3,080,300 to the Secretariat of the Assembly of States Parties and €2,065,000 for investment in the ICC’s premises. Further the Assembly established a Contingency Fund in the amount of €10,000,000 to meet the cost of unforeseen expenditures. And €5,565,400 was approved as Working

\textsuperscript{70} ICC-ASP/1/Res. 13 (2002)
\textsuperscript{71} ICC-ASP/1/Res. 15 (2002)
\textsuperscript{72} Thordis Ingadottir and Cesaro Romano, "The Financing of the International Criminal Court," in Ingadottir, n.61, p. 54
\textsuperscript{73} ICC-ASP/2/10 (2003)
Capital Fund. The programme budget takes into account a total of 526 staff posts. The budget envisages a continuous growth of the infrastructure of the ICC during 2005. Further, the judicial and prosecutorial activities are also likely to increase during this period.\footnote{Programme Budget for 2005, Contingency Fund, and Working Capital Fund for 2005, scale of assessments for the apportionment of expenses of the International Criminal Court and financing of appropriations for the year 2005, Adopted at the 6th Plenary Meeting at Third Session of the Assembly of States Parties, on 10 September 2004, by consensus, ICC-ASP/3/Res. 4 (2004)}

Establishment of Trust Fund for the Benefit of Victims

The Assembly in a resolution adopted at its first session decided to establish the Board of Directors of the Trust Fund for the benefit of victims provided for in Article 79 of the Rome Statute.\footnote{ICC-ASP/1/Res.6 (2002)} The Assembly further adopted the procedure for the nomination and election of members of the Board of Directors.\footnote{ICC-ASP/1/Res.7 (2002)} By the closure of the nomination period on 21 August 2003, only one nomination of Oscar Arias Sanchez (Costa Rica) was received.

At the first meeting of its second session, the Assembly of States parties decided to extend the nomination period from 8 to 10 September. By the closure of the extended nomination period, four more nominations were received. The Assembly of States Parties, at the 5th meeting of its second session, held on 12 September 2003, elected the Members of the Board of Directors of the Trust Fund by acclamation. The Members of the Board are Queen Rania Al-Abdullah of Jordan, Oscar Arias Sanchez from Costa Rica, Tadeusz Mazowiecki from Poland, Simone Veil from France, and Archbishop Emeritus Desmond Tutu from South Africa.\footnote{ICC-ASP/2/9/Add.1 (12 Sept 2003)} These are eminent personalities who represent their respective regions.

The Fund can make payments either to individuals or to a collectivity. It may allocate funds directly to victims or to other bodies, such as an aid organization. Voluntary contributions such as grants from governments, international organizations or individuals are allowed to meet the requirements of the Fund. The first meeting of the members of the Board of Directors of the Trust Fund was held at the seat of the ICC from 20 to 22 April 2004 where a number of important decisions were taken. They discussed several
issues regarding the operation of the Fund. The issues included the management and oversight of the Fund and the possible beneficiaries. The Board Members took note of the importance of availability of resources for the effective functioning of the Fund. They urged states parties, concerned organisations as well as private individuals to help build the resource base of the Fund during its crucial initial period.

The Assembly at its third session decided to establish a Secretariat of the Board of the Trust Fund for Victims. The Secretariat is to be composed of experts who will assist the Board Members with logistics and in the formulation of relevant policies. A budget to meet the needs of the Secretariat is under preparation.  

REFERRAL OF SITUATIONS

As of now four situations have been referred to the Prosecutor – three by the states parties and one by the Security Council. Till now the Prosecutor has not used his proprio motu powers to initiate investigations. However, the Office of the Prosecutor is analyzing several other situations that have been brought to its notice by individuals and groups.

Uganda

In December 2003, the government of Uganda referred the “situation concerning the Lord’s Resistance Army.” The referral was made on condition of confidentiality. On 29 January 2004 when the President of Uganda informed that confidentiality was longer required, the referral was made public. The Office of the Prosecutor also clarified to the Ugandan authorities that in accordance with the provisions of the Rome Statute, the scope of referral would have to be interpreted broadly, and hence it would be “analyzing crimes within the situation of northern Uganda by whomever committed.” Because the referral was made along with special declaration under Article 12(3) of the Rome Statute, the ICC would have jurisdiction over crimes committed since 1 July 2002 i.e. the date of entry into force of the Rome Statute. The Presidency assigned the situation in Uganda to Pre-Trial Chamber II on 5 of July 2004.

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78 ICC-ASP/3/Res.7 (10 Sept 2004)
79 ICC-01/04 (5 July 2004)
Democratic Republic of Congo
In March 2004, the Prosecutor received referral from the government of the Democratic Republic of Congo (DRC). The referral includes crimes under the ICC’s jurisdiction committed within the territory of the DRC since 1 July 2002. After examining all the relevant information, the Prosecutor determined that there was a “reasonable basis to initiate an investigation.” In July 2004, the Presidency assigned the situation in the Democratic Republic of Congo to Pre-Trial chamber I.  

Central African Republic
On 21 December 2004 the Prosecutor received referral of situation in the Central African Republic from the representative of its President Bozize. The referral was in relation to crimes falling under the ICC’s jurisdiction committed since 1 July 2002, anywhere on the territory of the Central African Republic. The referral was publicly announced on 7 January 2005. Upon receiving information by the Prosecutor, the Presidency assigned the situation in the Central African Republic to Pre-Trial Chamber III on 19 January 2005. 

Darfur - Sudan
While other referrals have come from states parties, the situation in Darfur in Sudan has been referred to the Prosecutor by the Security Council. Finally a consensus could be reached among permanent members of the council. The US did not vote the resolution. On 31 March 2005, the Security Council while taking note of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur and determining that the situation there constituted a threat to international peace and security, decided under chapter VII of the UN Charter to refer the situation in Darfur since 1 July 2002 to the ICC’s Prosecutor.  

The Council asked the government of Sudan and all other parties to the conflict to cooperate fully with the ICC. It must be noted that Resolution 1593, “while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.”

80 ICC-01/04 (5 July 2004)
81 ICC-01/05 (19 Jan 2005)
82 UN Doc. S/RES/1593 (31 March 2005)
The Council also invited the ICC and the African Union to arrive at practical arrangements in order to facilitate the work of Prosecutor.\textsuperscript{83}

Despite the achievements, the Resolution 1593 once again secured exemption for peacekeepers from prosecution by the ICC. Paragraph of the Resolution states:

\begin{quote}
[N]ationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African union, unless such exclusive jurisdiction has been expressly waived by that contributing State.
\end{quote}

This means that peacekeepers of a non-state party cannot be tried by the ICC for the commission of any of the crimes falling under the ICC’s jurisdiction committed in Sudan without the expressed consent of the contributing State. Paragraph 6 was intended to forestall veto by the US.

The Secretary-General transmitted the Security Council Resolution 1593 to the Prosecutor in accordance with Article 17 of the ICC-UN agreement. Upon receiving the referral from the Security Council, the Prosecutor immediately informed the Presidency in accordance with the Regulations of the Court.\textsuperscript{84} Subsequently, the Presidency assigned the situation in Darfur, Sudan to Pre-Trial Chamber I on 21 April 2005.\textsuperscript{85} Meanwhile, the Prosecutor has been analyzing and seeking additional information to ascertain whether there is a reasonable basis to initiate investigation.\textsuperscript{86} He has already received a list of 51 suspects from the UN International Commission of Inquiry.\textsuperscript{87} In early June, Moreno-Ocampo clarified the prosecutorial policy that investigation would focus on individuals who “bear the greatest criminal responsibility for crimes committed in Darfur.” He stated:

\begin{quote}
The investigation will require sustained cooperation from national and international authorities. It will form part of a collective effort, complementing African Union and other initiatives to end the violence in Darfur and to promote justice. Traditional African mechanisms can be an important tool to complement these efforts and achieve local reconciliation.\textsuperscript{88}
\end{quote}

\textsuperscript{83} ibid, paras. 2-3
\textsuperscript{84} According to Regulation 45 of the Regulations of the Court, the Prosecutor is required to “inform the Presidency in writing as soon as a situation has been referred to the Prosecutor by the Security Council under article 13, sub-paragraph (b) of the Statute.”
\textsuperscript{85} ICC-02/05 (21 April 2005)
\textsuperscript{86} OTP/050404/LMO-dr (4 April 2005)
\textsuperscript{87} OTP-EN.20050405.46 (11 April 2005)
\textsuperscript{88} OTP/LSU/066-05 (6 June 2005)
SUMMARY OBSERVATIONS

The early entry into force of the Rome Statute and its ratification by 99 states in such a short period indicates a strong support for the ICC. The ICC has drawn support from all regions of the world except Asia. It is important to note that it does not have the support of the sole superpower (the US), the most populous state (China), the largest democracy (India). The US has been consistent in its opposition to the ICC. It has made every possible effort to secure immunity of its citizens from the jurisdiction of the ICC. The US has also entered into bilateral immunity agreements with other states (states parties as well as non-states parties) to prevent surrender of American citizens to the ICC. As American forces are stationed across the globe, the US feels particularly vulnerable to politically motivated charges in the ICC. It also does not want the ICC to rule on its foreign policy objectives, military strategies and military tactics employed during combat.

Even in the face of active US opposition, the ICC has become almost fully operational. Its institutional framework is already in place. The Assembly of States Parties has completed three sessions. The judges, Prosecutor, Registrar and other officials of the ICC have been elected. The strong European Union support has ensured financial stability of the ICC. The ICC is also an issue which has generated clear divisions between the EU and the US. Nevertheless, the ICC has been brought into relationship with the UN. The UN has ensured full cooperation to the ICC. Further, the Prosecutor will have the advantage of having the UN machinery on its side during investigations and prosecutions. Four situations have already been referred to the Prosecutor. What is worth noting is that among these one situation was referred by the Security Council. The US was prevented from using its veto power. All the four situations before the ICC are from the African region. This is not surprising keeping in view the strong support which the ICC enjoys in the region.