1999


Jill F. Blake
University of Windsor

Follow this and additional works at: https://scholar.uwindsor.ca/etd

Recommended Citation

This online database contains the full-text of PhD dissertations and Masters’ theses of University of Windsor students from 1954 forward. These documents are made available for personal study and research purposes only, in accordance with the Canadian Copyright Act and the Creative Commons license—CC BY-NC-ND (Attribution, Non-Commercial, No Derivative Works). Under this license, works must always be attributed to the copyright holder (original author), cannot be used for any commercial purposes, and may not be altered. Any other use would require the permission of the copyright holder. Students may inquire about withdrawing their dissertation and/or thesis from this database. For additional inquiries, please contact the repository administrator via email (scholarship@uwindsor.ca) or by telephone at 519-253-3000 ext. 3208.
INTERNATIONAL CRIMINAL COURT: A UNITED NATIONS REFORM IN PROGRESS

By:

JILL F. BLAKE

A Thesis
Submitted to the College of Graduate Studies and Research through the Department of Political Science in Partial Fulfillment of the Requirements for the Degree of Master of Arts at the University of Windsor

Windsor, Ontario, Canada

(c) 1999
NOTICE:
The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

AVIS:
L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.
ABSTRACT

The purpose of this study is to examine a cutting-edge reform initiative which the United Nations is in the process of developing, in order to decide if this is a practical reform idea. This reform began in 1989 with a General Assembly Resolution, submitted by Trinidad and Tobago, to establish an International Criminal Court. In June/July, 1998, a Plenipotentiary Conference was held in Rome to decide whether or not to proceed with the establishment of a permanent International Criminal Court (ICC).

Chapter One provides a brief analysis of some United Nations targets for reform and some proposals as to reform initiatives. The purpose of this chapter is to provide concrete examples of other reform initiatives in order to see how complicated any United Nations reform initiative can become.

Chapter Two provides a clear historical analysis of the reform initiative to establish an ICC. This chapter also provides a brief explanation of some of the practical aspects of the proposed Court such as composition, jurisdiction, enforcement, and a brief discussion of the development of international law which would assist such a court.

Chapter Three examines five supposed benefits which proponents of this reform initiative have given for support of this United Nations reform initiative. These benefits include: deterrent value, the issue of impunity, ability to assist the United Nations with its goal of maintaining peace and security,
strengthening the rule of law, and assisting States that are unwilling or unable to try offenders in national courts.

Chapter Four examines three potential obstacles to the establishment of an International Criminal Court. These obstacles include: the role of the Security Council in triggering Chapter VII violations, as well as the issue of aggression, the role of an independent Prosecutor triggering his/her own investigations, and the high ratification number which is needed to make the Court a reality.

Chapter Five, as a concluding chapter, analyzes both the supposed benefits and potential obstacles to the establishment of an International Criminal Court in order to establish whether or not this reform initiative is a practical one.
ACKNOWLEDGMENTS

The author wishes to dedicate this thesis to three special Professors from the University of Windsor. First, the original third reader was to be Dr. Stuart Nease who passed away before the thesis was completed. Dr. Nease was looking forward to being involved in this academic study of a United Nations reform which interested him immensely. Second, an excellent History Professor who recently retired from the University of Windsor, Dr. Ian Pemberton passed away before the completion of this thesis. The author enjoyed several of Dr. Pemberton's courses, and was often struck by his intelligence, his attention to detail, and his love for history. Both Dr. Nease and Dr. Pemberton will be missed by many students and professors from the University. Third, the author wishes to acknowledge the patient mentoring of a superb Political Science Professor, Dr. Donald Briggs. Dr. Briggs was a great source of information and assistance in the developing of this thesis.

The author would also like to thank the Department of Political Science for the opportunity to successfully complete both a B.A. and an M.A. at this wonderful facility. The professors in this department rank very high in intelligence, experience, and open-mindedness.

Also, the author would like to acknowledge members of the Masters course who were both understanding and helpful in the development of this thesis.

Finally, the author would like to thank all those who
assisted in practical ways with the completion of this thesis, including family, friends, and especially my daughters Allison and Patricia who gave their mother the opportunity to prove that age is no barrier to attaining a good education.

Any errors or omissions are entirely the responsibility of the author.
# TABLE OF CONTENTS

ABSTRACT iii

ACKNOWLEDGMENTS v

CHAPTER

1. UNITED NATIONS REFORM MOVEMENT 1
   Historical Perspective 1
   Security Council Reform 3
   General Assembly Reform 8
   Peacekeeping Reform 12
   International Criminal Court 17

2. HISTORICAL BACKGROUND TO AN ICC 19
   Chronological Chart 21
   Brief Analysis of Practical Aspects: 27
      Composition 27
      Jurisdiction 30
      Enforcement 30
      International Law 31

3. BENEFITS 34
   Deterrent Value 34
   Issue of Impunity 36
   Assist U.N. with Maintaining Peace 39
   Strengthening the Rule of Law 43
   Assisting States that are Unable or Unwilling to Try Offenders 47

4. OBSTACLES 51
   Security Council as Trigger 51
      Mechanism for Chapter VII 52
   Violations and Aggression 52
   Independent Prosecutor as 69
      Third Trigger Mechanism 69
   High Ratification Rate 75

5. CONCLUSION 78
   Idealist Alternative 78
   Cynic Alternative 82
   Middle-of-the-Road Alternative 90
   Author's Conclusion 93

APPENDIX 96

BIBLIOGRAPHY 99

VITA AUCTORIS 110

vii
CHAPTER 1 - UNITED NATIONS REFORM MOVEMENT

The United Nations sits majestically along the East River in New York City; many writers refer to this location as "Turtle Bay". The United Nations began as the brain child of the Big Three: the United States of America (U.S.), the Union of Soviet Socialist Republics (U.S.S.R.), and Great Britain. Negotiations for this new organization began during the course of World War II, a war which ravaged much of Europe and threatened the stability of the entire world. The United Nations was established in 1945 (at the end of World War II) by allies against a common enemy, thus named, the United Nations Organization. This new organization was to replace the defunct League of Nations and the Big Three (U.S., U.S.S.R., Great Britain) became the Big Five with the addition of France and China. By the time the U.N. Charter was signed, there were 51 countries standing behind the principles of the organization.1

The Charter provides four purposes for the United Nations:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-

---

1 Although there were only 50 countries present at the Conference in San Francisco which established the United Nations, there were 51 signatories to the U.N. Charter with the inclusion of Poland.
determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.2

Of these, the purpose that stands out in most people's minds is "To maintain international peace and security".3 Since the U.N. was established at a time of great turbulence in the world and as the result of the most devastating war that countries had ever witnessed, peace and security was to be a cornerstone of the organization.

Over time, there has developed great controversy over the issue of whether the United Nations has been successful or not. At times, the organization has been applauded for such accomplishments as the virtual stamping out of the dreaded smallpox disease. At other times, the organization has been strongly criticized. One can find many different views surrounding the importance of and need for the organization. Some call for its dismantling, stating that it has had its day; others (idealists by nature) believe that the value of the U.N. goes far beyond a tallying of its successes, and still others


3 Ibid., 314
have strenuously called for a reforming of the organization, pointing out that the world today is very different from the world which existed at the time of the founding of the United Nations. Several sharp contrasts are apparent: the concept of allies against a common W.W.II enemy has changed to the concept of interdependence between states; the world has become smaller with advances in communication, transportation, and technology; decolonization has changed the international landscape with the addition of many independent states; and, the end of the Cold War has awakened a new era of greater co-operation and an increase in common interests, i.e. economic stability. The United Nations needs to be reformed in order to keep pace with the new realities of the world today.

As a result, many are convinced that it is past time to alter the international institutions attempting to deal with problems of peace and security in the world in a number of respects. For instance, with respect to the main political organs of the United Nations alone, several problems have been identified and a plethora of solutions suggested. It is instructive to look briefly at some of these.

One organ of the United Nations that many reformers agree needs to be changed is the Security Council. Under the U.N. Charter, the Security Council was established as one of the executive organs of the organization with the specific purpose of maintaining international peace and security. Originally, there were eleven members of the Security Council, including five
permanent ones (China, France, U.S.S.R., U.S., and Great Britain), with the other six being elected (according to a geographic formula) by the General Assembly as non-permanent members with two year terms. However, a 1965 Charter amendment increased the number of non-permanent members to ten, with five being selected each year.4

One of the most important benefits attached to being a permanent member of the Security Council is the veto power that comes with that status. When the United Nations was first established, the five allied powers insisted that any substantive decision by the organization would have to have the support of all of them. This was a safeguard against their being outvoted by less powerful but more numerous states. The veto was always controversial, but with the advent of the Cold War, it became a veritable albatross for the Security Council. By 1963, the U.S.S.R. had used its veto 94 times compared to the other four allies who, jointly, had only used the veto seven times.5 It should be noted, though, that some of these vetoes were repeat votes on the same issue. However, this constant use of the veto weakened the ability of the Security Council to deal with world issues for years and, during emergency situations like the Congo crisis, was only circumvented by the Uniting for Peace Resolution


of the General Assembly, which authorized that body to make
decisions on security issues when the Security Council was
weakened by its own veto power. This power to intervene has only
been used by the General Assembly in a few isolated cases.

In the five decades since, many reform proposals have been
set forth in relation to restricting the use of the veto as
well as to change the membership of the Security Council.
Table I (next page) illustrates some of the options available
which would reform the Security Council in both areas.

Most reform ideas surrounding changes to the Security
Council veto coalesce within the following reforms proposed
by Hanna Newcombe.

Various modifications of the veto, short of
its total abolition, have been proposed. These
include the following ways, or combinations
thereof: (1) restricting the veto to only some
of the enlarged number of permanent members,
perhaps only two, the USA and Russia; (2)
requiring two or more negative votes by veto-
possessing members to defeat a resolution, not
just one as at present; (3) imposing a quota
of only so many vetoes per year permitted to
any veto-possessing member; (4) requiring a
qualified majority (e.g., three-quarters of
the Security Council) to overcome the veto:
in a Security Council enlarged to 20 members,
5 members could in this example block the
passage of a resolution, and these might be
the present Big Five, if they were unanimous;
(5) using a bicameral arrangement with the
General Assembly: e.g., a four-fifths majority
in the General Assembly could override a Security
Council veto; and (6) limiting the application of
the veto to certain classes of issues, e.g.,
excluding membership applications (these have not
<table>
<thead>
<tr>
<th>CHANGES IN MEMBERSHIP</th>
<th>CHANGES IN VOTING</th>
<th>ADVANTAGES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increase number of permanent members by up to 5; likely candidates, Germany, Japan, Italy, India, Nigeria, Brazil</td>
<td>Veto for new permanent members</td>
<td>Gives equivalent power to new members; adds economic and geographic representation</td>
</tr>
<tr>
<td>Increase number of seats to 19 members by reserving 4 seats for regional powers: Egypt or Nigeria for Africa; Brazil or Argentina for the Americas; India or Japan for Asia, and Germany or Italy for Europe</td>
<td>No veto for new permanent members</td>
<td>No change in number of states with veto; power still with original permanent members; addition of geographic and economic representation</td>
</tr>
<tr>
<td>Make all members nonpermanent, elected by General Assembly for two years, requiring 2/3 majority</td>
<td>All equal votes, elimination of veto</td>
<td>Radical reform; meet needs for geographic representation and for democratic governance</td>
</tr>
</tbody>
</table>

been a problem lately, but used to be in the early years and could become so again) and conflict resolution.6

In addition to reforming the veto, Hanna Newcombe proposes changing the composition of the Security Council by way of regionalization. She compares having the Big Five guarding the peace and security of the world to "putting the foxes in charge of guarding the chicken coop"7 since the Big Five also "happen to be the five main nuclear weapons powers and the five top exporters of conventional arms"8; she categorically states her own preference for the regionalization of the Security Council.

It is conceivable that the permanent members of the Security Council might put their support behind some attempts at reform but other attempts would be nigh on impossible to achieve. The United States has already issued statements supporting the addition of both Germany and Japan as permanent members of the Security Council.9 In the 1965 amendment, there already exists a precedent for changing the composition of the Security Council but this did not add to the number of permanent members. And, even if all permanent members were to agree to the admission of these two states, other problems could


7 Ibid., 87

8 Ibid.

9 Adam Roberts and Benedict Kingsbury, Presiding Over a Divided World: Changing UN Roles, 1945-1993 (U.S.: Lynne Rienner, 1994) 53
result, for instance, opposition from the South on the admission of two more countries from the North or the problem of whether or not these two new members would also have veto power. Nonetheless, it is more likely that Germany and Japan might be added to the ranks of permanent members of the Security Council than the possibility that the Big Five would ever give up the power of the veto.

Another organ of the U.N. which many say is in need of reform is the General Assembly. Some of the many criticisms and thus targets for reform include: slow decision-making procedures, unwieldy process, and lack of democratization in what has been called the largest talk-shop in the world.

The first target of reform is the slow decision-making procedures of the largest organ of the United Nations. According to Peter Baehr and Leon Gordenker, "The way in which the General Assembly proceeds on resolutions and in general, causes delegates to complain about slow and cumbersome decision-making. Almost anyone who observes the process from a spectator's seat would agree." One reform suggestion includes changing the length of speeches. It must be noted that many delegates favour the present system though, because it enables them to spend time lobbying other delegates, developing amendments, and checking with home governments on important issues.


11 Ibid., 56
The second target for criticism and thus reform, is the unwieldy process inherent in the day-to-day running of the General Assembly. According to Baehr and Gordenker,

...paper descends on the desks of delegations in daily avalanches. Reports, minutes, proposals, draft proposals, amendments, texts of remarks, answers to assertions made earlier - all of which come out in six working languages: English, French, Spanish, Russian, Chinese as well as Arabic.12

This mountain of paperwork causes the process to become unwieldy. There have been calls for reform of this situation and the U.N. set up a committee "to design improvements in its working habits".13, however, nothing major was achieved.

The last target for reform of the General Assembly to be discussed is lack of democratization. Dieter Heinrich, a Canadian author and speaker on global justice and security issues, has written extensively on the issue of reforming the General Assembly by establishing a Parliamentary Assembly. The need for democratization of the General Assembly is best summed up in the following statement by Dieter Heinrich:

The UN Charter begins with the words, "We the Peoples of the United Nations..." In practice, the UN is a meeting place not of the peoples but of the governments - and only the executive branch of governments at that. One of the first reforms might best be to establish the citizen dimension at the UN, and give the UN, finally, to the world's people. This would help ensure that any expansion in the UN's authority will be accompanied by


13 Ibid.
an increase in democratic accountability. An equally important consideration is that introducing a citizen dimension to the UN may be essential to driving the reform process itself.14

The establishment of a Parliamentary Assembly would, according to Dieter Heinrich, serve several purposes:

1) strengthen the U.N.; more direct citizen representation is needed. The U.N. would become more effective by using the imagination and energy of all people to solve global problems.

2) reform the U.N.; citizen representation is essential to help propel a major reform and to strengthen the organization since experience shows that governments, preoccupied with national interest, cannot be relied upon to undertake this with real commitment.

3) replace the present estrangement of citizens; since the realm of global politics has been considered the domain of governments, the result has been an under-development among citizens of a sense of global responsibility, resulting in an inward-looking citizenry who may not be willing to support their governments global initiatives.

4) become a symbol of a new kind of world order for the future; replacing state-centric ideology which makes a virtue of national selfishness and exclusivity, to be replaced by the idea of an emerging democratic community of citizens who share common vital interests and values. This new earth- and

citizen-centred perception is needed because it provides the essential moral basis for any real political cooperation on the critical problems of our age.15

Mr. Heinrich states that the European Parliament of the European Union is a good example of how a Parliamentary Assembly could be organized. It also serves as a model of how the Parliamentary Assembly could develop from a consultative body to a citizen-elected parliament with a real role in international decision-making. Further discussions involve issues such as representation, selection of representatives, representation from non-democratic countries, size and composition, and financial issues. A Parliamentary Assembly could be established without U.N. Charter reform under Article 22 of the Charter as a consultative body.16

The issue of General Assembly reform is complicated by the sheer number of criticisms which create targets for reform, and the problem of differing solutions to each problem identified. Only three targets of reform have been discussed here and the proposed solutions have only been scantily covered. However, it is apparent that the following areas are seen as important


targets for reform: slow decision-making procedures, unwieldy process, and lack of democratization.

A discussion of United Nations' reform initiatives would not be complete without a brief analysis of peacekeeping problems and reform suggestions. United Nations' peacekeeping has been a long-standing target of criticism, a situation which has not improved in this decade, especially with "the embarrassment of the triple crisis of Somalia/Bosnia/Rwanda".17 Some targets of criticism and thus reform include: ad hoc nature of peacekeeping missions, unclear mandates including confusion over peacekeeping vs. peacemaking, disagreements between U.N. command and national commands, and the inevitable financial problems which have become concomitant with many U.N. initiatives. In order to analyze some of the above-mentioned criticisms, the author will discuss various suggested reforms, some of which would correct more than one of these shortcomings.

An important reform initiative is the establishment of a United Nations' standing force which could react quickly and decisively on the order of the Security Council. Although the United Nations' Charter called for the establishment of such a force under Chapter VII which deals with "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression"18, no such force was ever created.

17 Paul Kennedy and Bruce Russett, "Reforming the United Nations" in Foreign Affairs (Vol. 74, No. 5, 1995), 62
18 United Nations' Charter, Chapter VII subtitle.
In 1992, the Secretary-General of the United Nations prepared a document entitled *An Agenda for Peace* "pursuant to a request from the first and only Summit Meeting of the Security Council for an analysis of potential international capabilities in the fields of preventive diplomacy, peacemaking and peacekeeping".19 In this document, the Secretary-General "proposed that special forces - peace enforcement units - be constituted in situations of high risk".20 The wording of this proposal is rather vague and one could be forgiven for not knowing exactly what was meant by "peace enforcement units".21 Subsequently, the Secretary-General "clarified that he had in mind a standby quick reaction force composed of national elements, which in turn would be based on volunteers from the regular units of national military forces".22

Many believe that the creation of a United Nations' standby force is an important reform which could save the world from another crisis like Rwanda. Paul Kennedy and Bruce Russett state, "Had the world body been able to summon battle-ready troops as the tragedy in Rwanda unfolded, the swift interposition of peacekeeping units might have saved tens of thousands of


20 Ibid., 20

21 Ibid.

22 Ibid., 20-21
lives". 23 One could also speculate about Somalia; if a United Nations' standby force had accompanied humanitarian aid to Somalia on Dec. 9, 1992, then General Aidid might not have taken control of South Mogadishu and the debacle that followed (killing of some U.N. peacekeepers and U.S. military personnel as well as civilians caught in the cross-fire) might have been prevented. 24 Of course, all this is speculation, but reforms are being suggested in order to correct mistakes of the past and both Rwanda and Somalia illustrate serious errors on the part of the United Nations.

Since the Canadian government has long supported peacekeeping efforts worldwide and since "official Canadian statements have invariably emphasized the need for international action prior to the point where bloodshed hardens the attitudes of the parties", 25 the creation of "a UN quick reaction force and possible Canadian commitments thereto is a logical extension of the Canadian approach". 26 Not only does the Canadian government support the idea of a U.N. standby force, it also proposes that volunteers from the Canadian military be contributed to such

23 Paul Kennedy and Bruce Russett, "Reforming the United Nations" in Foreign Affairs (Vol. 74, No. 5, 1995), 63


26 Ibid.
a force if it is established.

One of the most important arguments against the establishment of a U.N. standby force is related to the issue of state sovereignty. There are many states that are strongly opposed to this reform initiative because they do not want to see the United Nations "have its own army of peacekeepers, making it appear to have acquired one of the attributes of statehood".27 Another argument against this proposal is that the United Nations is supposed to be the upholder of peace, and the very fact that the U.N. would possess military units goes against this core aim of the organization.

A second reform initiative is strengthening of the United Nations' military staff. In Chapter VII, Article 47 of the Charter, provision was made for the creation of a Military Staff Committee "to advise and assist the Security Council on all questions relating to the Security Council's military requirements".28 According to Karen Mingst and Margaret Karns "The Gulf War (and proposals from the former Soviet Union) revived interest in the moribund Military Staff Committee".29 They also state that "It was never activated."30

27 Paul Kennedy and Bruce Russett, "Reforming the United Nations" in Foreign Affairs (Vol. 74, No. 5, 1995), 63

28 United Nations' Charter, Chapter VII, Article 47.


30 Ibid.
Interestingly, Adam Roberts and Benedict Kingsbury give a different view of the Military Staff Committee, stating that,

Although the committee has met regularly, it has been notoriously ineffective. This ineffectiveness was often seen as a consequence of the Cold War but continued into the 1990s despite improvements in relations among the Permanent Members... There is little prospect at present of realizing the Charter vision of unified strategic direction of major military operations by the committee.31

Whether or not the Military Staff Committee was ever activated, one can agree that the Committee has been ineffective and needs to be reformed.

There are numerous other reform initiatives directly related to the issue of United Nations' peacekeeping, but, for the purpose of brevity, only two initiatives have been discussed. Some reformers are calling for the creation of a quick response U.N. standby force; and, others want to follow the Charter vision of an effective Military Staff Committee. Whichever reform initiatives are pursued, it must be remembered that,

Recent Canadian experience in the former Yugoslavia and in Somalia has brought home to Canadians, however, the risks and costs of UN intervention in conflict-ridden countries, providing a strong motive to press for measures that improve UN effectiveness and strengthen its authority.32

31 Adam Roberts and Benedict Kingsbury, Presiding Over a Divided World: Changing UN Roles, 1945-1993 (U.S.: Lynne Rienner, 1994), 50

32 Geoffrey Pearson, "Peacekeeping and Canadian Policy" in United Nations Reform: Looking Ahead After Fifty Years (Toronto: Dundurn Press, 1995), 113
In the view of many, peacekeeping in the classic sense of interposing U.N. forces between those of combatants, as occurred in Cyprus, is not enough. Efforts must be made both to make peace and to ensure that it is maintained. Some would argue that the way to do this would be to have in place an international judicial organ with the power to hold individuals, rather than states, responsible for international crimes. In doing so, many believe that possible offenders may be deterred from committing serious offenses. If such a judicial organ could ease some of the conflict in the world, then, the United Nations would conceivably be able to maintain peace more effectively. This reform initiative merits an indepth analysis because it is a cutting-edge reform which is in an advanced state of consideration by the U.N. at this time.

The present momentum for this reform began in 1989 and, in June, 1998, U.N. member states met at a Plenipotentiary Conference in Rome to consider the adoption of a Treaty to establish an International Criminal Court (ICC), a body which would become the first permanent mechanism for applying international standards of conduct to individuals instead of merely to states. In some international circles there has been great enthusiasm for this venture (including over 100 Nongovernmental Organizations); in other circles there has been significant scepticism; and, some have been determined to see that, if the birth of the court cannot be prevented, it at least arrives in the world in the weakest possible form.
The idea of establishing an ICC is rather different from, say, enlarging the Security Council, in that (1) it creates something entirely new; (2) it extends international organizational inroads into state sovereignty in new ways; and, (3) it heightens the importance of the rule of law in the context of the international landscape. For these reasons, examination of the idea of a permanent court seems merited. Certainly there are many questions which might be asked about it, for instance, who suggested this reform?; what would such a court look like?; would enough states support it?; and, why is such a court needed? All of these questions will be dealt with within the context of this thesis but, more specifically, the author will analyze the historical background to the court and practical aspects of the court itself; benefits to be derived from the court; and, possible obstacles to its establishment.

The purpose of this thesis is, therefore, to analyze the reform suggestion of establishing an International Criminal Court, with the view of determining whether this is a practical and useful reform initiative at this time.
CHAPTER 2 - HISTORICAL BACKGROUND

The best starting point for a discussion of the concept of an International Criminal Court (ICC) is an historical background followed by an analysis of practical aspects of the court such as: composition, jurisdiction, enforcement, and a brief discussion of the development of international law which would assist such a court.

Although many see the history of the ICC beginning with the 1989 General Assembly Resolution sponsored by Trinidad and Tobago, the history of this initiative actually dates back much further. According to Bryan MacPherson,

...the idea of an international court to try individuals accused of crimes that are international in scope is not new. The Treaty of Versailles which ended World War I contemplated war crimes trials by joint military tribunals. Although these trials never took place, war crimes trials were conducted by international tribunals at Nuremberg and Tokyo following World War II.33

Without such tribunals, individuals who break international law may be tried in national courts, a situation which has not always been satisfactory, partially due to the inability or unwillingness of some states to try offenders. "Nonetheless, these efforts to impose personal criminal liability for crimes arising out of the war formed a foundation for the war crimes trials that followed World War II a quarter-century later."34


34 Ibid., 4
Contemplation of war crimes trials after World War I and the tribunals which were conducted at Nuremberg and Tokyo certainly date the beginnings of the concept of an International Criminal Court to this century.

However, Bryan MacPherson has pinpointed a much earlier date for the initiation of the concept of trying individuals for international crimes.

In what may have been the first international tribunal, 22 judges of the Holy Roman Empire judged and condemned Peter von Hagenbach to death in 1474 for allowing his troops to commit crimes against civilians.35

Closer to this century, MacPherson cites another example of an individual being held accountable under international law.

In a more recent war crimes trial, Major Henry Wirz, the Confederate commander of the prison at Andersonville was tried for mistreating Union prisoners and was executed on November 10, 1865.36

Some would argue that these earlier examples of individuals being held accountable under international law cannot be seen as decisive initiatives for the creation of an International Criminal Court in this century. However, these examples do show that individuals were being held accountable for actions which contravened laws which were international in nature. Therefore, they do stand out as examples which could be dealt with by an international court rather than through national


36 Ibid.
courts. This is an important point in that some countries have been reluctant to try some individuals in their own jurisdictions for diverse reasons such as fear of future retaliation, political or military position held by an individual, or public sympathy for the individual's cause. The availability of an International Criminal Court could alleviate these problems.

Using negotiations after World War I as a starting point for the beginnings of the concept of an International Criminal Court, one can find specific references to the concept which give a clear historical background to the development of this initiative. For the purpose of brevity, the development of the idea for the creation of an ICC will be illustrated in chart form according to noteworthy chronological dates beginning at the end of World War I.

**CHRONOLOGY OF ICC DEVELOPMENT**

1919 A League of Nations' Commission recognized that individuals could be held accountable for violations of the laws and customs of war and of the laws of humanity and proposed that an international tribunal be set up to try criminals whose crimes were directed against more than one state (national courts could deal with acts against one state). Commission findings were incorporated into the Treaty of Versailles which provided that the Kaiser be tried by a court composed of judges appointed by the victorious powers, and that other Germans accused of war crimes be tried by joint military tribunals but these trials never took place. Some Germans were tried in national courts in Germany but the Netherlands never handed over the Kaiser for trial.37

The 1919 Commission also contemplated that Turkish officials be tried for killing over one-half million Armenians. The 1923 Treaty of Sevres was to form the basis for prosecuting these crimes against humanity, but it was never ratified.38

Additional efforts to formalize international law included a 1925 report by V.V. Pella to the Inter-Parliamentary Union urging the establishment of an international penal code (applicable to both states and individuals) that would be enforced through a special criminal chamber of the Permanent Court of International Justice. The Inter-Parliamentary Union adopted a resolution establishing a committee to study the causes of wars of aggression and to draft an international penal code. The resolution specifically called attention to the report prepared by Mr. Pella.39

A conference of the International Law Association urged the establishment of an international penal court as a division of the Permanent Court of International Justice that would have jurisdiction not only over crimes committed during time of war but other violations of international obligations of a penal character that are committed by the nationals of one state against the nationals of another. The report included a draft statute for the proposed international penal court.40

The 1927 Treaty of Lausanne which replaced the Treaty of Sevres contained no provision for prosecuting war criminals.41

The League of Nations adopted a Convention for the Prevention and Punishment of Terrorism together with a convention to establish a standing international criminal court with jurisdiction over the offenses specified in the Terrorism Convention. The Terrorism Convention received only one ratification before the outbreak of World War II halted these efforts to


39 Ibid., 5

40 Ibid.

41 Ibid., 4
combat international crimes.42

1945- The trials of national and military leaders that were conducted at Nuremberg and Tokyo following World War II were an important advance. They established the principle that individuals may under some circumstances be held personally accountable for violations of international law. However, the conduct for which the accused were convicted—war crimes, crimes against peace, and crimes against humanity—had not been expressly made criminal by any existing international instruments. As a result, the Nuremberg and Tokyo tribunals have been criticized as applying ex post facto laws. This criticism would not be applicable today.43 Today such crimes are punishable under international conventions.

1947 The General Assembly delegated to the International Law Commission (ILC) the responsibility for preparing a draft code of offenses against the peace and security of mankind and in 1948 it invited the Commission to study the possibility of establishing an international judicial organ for the trial of persons charged with genocide or other international crimes. The draft codes prepared by the Commission dealt primarily with major Nuremberg-type crimes.44

1948 The U.N. adopted the Genocide Convention in 1948 which made genocide a punishable crime. Subsequently, a number of additional international conventions have been adopted by the world community dealing with other international crimes.45 It is important to note that this convention prohibits any acts of genocide irrespective of whether they are committed in the conduct of war.46


43 Ibid.

44 Ibid., 5-6


1949 In 1949, the international community adopted the Geneva Conventions dealing with the conduct of war. Pursuant to these conventions, specified "grave breaches" constitute war crimes for which individuals can be held personally responsible.47

1951 The Committee on International Criminal Jurisdiction issued a draft statute for an international criminal court with jurisdiction not only over crimes in the draft code but over crimes generally recognized under international law.48

1953 The 1951 draft statute was revised (1953 Draft Statute). No action was taken on either the draft codes or the draft statutes in part because the international community could not agree on a definition of aggression.49 The onset of the Cold War slowed down further progress.

1986 The Omnibus Security and Terrorism Act (U.S.) requires the President to consider the possibility of establishing an international tribunal for the purpose of prosecuting terrorists.50

1988 The U.S. Congress included a provision in the Anti-Drug Abuse Act calling on the President to pursue negotiations toward the establishment of an international criminal court.51

1989 Trinidad and Tobago reintroduced the idea of a permanent court to the General Assembly. The idea received more attention this time with the end of the Cold War and the outbreak of violence in the former Yugoslavia. The General Assembly requested that the International Law Commission (ILC) prepare a draft statute for a permanent ICC.52


48 Ibid., 6

49 Ibid.

50 Ibid., 7

51 Ibid.

1990 The U.S. Senate endorsed the idea of trying Saddam Hussein before an international tribunal. In October, Congress included a provision in the Foreign Operations Appropriations Act expressing its sense that the United States should explore the need for an international criminal court and requiring the President to report to Congress on the results of his efforts to establish the court "to deal with criminal acts defined in international conventions".53

1993 U.N. Security Council established the ad hoc War Crimes Tribunal for the former Yugoslavia, and later one on genocide and crimes against humanity committed in Rwanda. The U.N. Security Council approved statutes and rules of procedure for both Tribunals, electing judges, appointing a registrar and prosecutor, initiating investigations.54

1994 In November, the ILC presented the final version of the draft statute to the Sixth Committee of the 49th session of the General Assembly, recommending that a conference of plenipotentiaries be called to draw up a treaty to enact the statute. The GA established an ad hoc Committee to review the draft statute. The UN Security Council created a second ad hoc Tribunal for Rwanda.55

1995 The Ad Hoc Committee met for two two-week sessions. Most countries favored the establishment of a permanent international criminal court while several major nations remain opposed or undecided. In December, the GA decided to create a Preparatory Committee (PrepCom) to meet twice in 1996 to draft text "with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries".56

1996 March 25 - April 12 The first session of the PrepCom was held in New York. Issues such as jurisdiction, definitions of crimes, trigger mechanisms, and general principles of international criminal law were discussed. Governments drafted texts to be included in the ILC draft statute.


55 Ibid.

56 Ibid.
August 12 - 30 The second session of the PrepCom convened in New York. Issues discussed include procedural questions, fair trial and rights of the accused, organizational questions, the relationship of the Court to the U.N. Security Council, and the establishment of the Court and its relationship to the United Nations.

December 17 The UN General Assembly adopted a resolution renewing the mandate of the Preparatory Committee, agreeing to nine additional weeks of PrepCom meetings, and deciding that a diplomatic conference should be held in 1998. Italy renewed its offer to host the treaty conference, proposing June 1998. 57

1997 February 10 - 21 The third session of the PrepCom was convened in New York. The development of a draft statute for the ICC was underway as the Committee began review of a court statute prepared and submitted by the ILC. The Committee concentrated on the definition of crimes to be adjudicated by the Court and the general principles of criminal law and penalties. Six draft texts were presented before the Committee by the Chairman dealing with the definitions of genocide, war crimes, aggression and crimes against humanity. A recommendation was made to the U.N. General Assembly to approve a diplomatic conference on the ICC, to be hosted by the Italian government in Rome in 1998.

August 4 - 15 At the fourth meeting of the PrepCom, the Committee concentrated on questions dealing with methods of initiating proceedings within the Court and the issue of complementarity (relationship) between the Court and national jurisdiction.

December 1 - 12 The fifth session of the PrepCom convened in New York and discussed the following topics: international cooperation, judicial assistance, penalties and general principles of criminal law. The Chairman, Adriaan Bos (Netherlands) announced that the committee would also take up questions concerning procedure of the court as well as definitions of war crimes. 58

1998 March 16 - April 3 The sixth and final PrepCom convened in New York. At the session the Committee discussed outstanding issues which will have to be decided at the plenipotentiary conference which is set for June 15 -


58 Ibid.
July 17 at Rome.

1998 June 15 - July 17 Treaty Conference held in Rome where the Treaty was passed which will create an International Criminal Court when ratified by 60 countries.

The history of the development of the idea for the creation of an International Criminal Court has been a lengthy one, dating back to 1919 at least. It is interesting to analyze the development, as illustrated in the above chart, in order to realize how involved the process has been to date.

An in-depth analysis of practical aspects of the court would go well-beyond the context of this thesis, but it would be instructive to analyze a limited number of practical aspects including composition, jurisdiction, enforcement, and a brief discussion of the development of international law which would assist the court.

The International Criminal Court would be a permanent court to try individuals for serious crimes of an international nature including genocide, crimes against humanity, war crimes, and aggression. This new court would differ from the International Court of Justice (ICJ) at the Hague in that it would have jurisdiction with respect to individuals rather than only states.

The composition of the International Criminal Court would likely follow the proposal set out in the 1994 Draft Statute by the International Law Commission. It states in Article 5 that,

The Court consists of the following organs:
(a) a Presidency, as provided in article 8;
(b) an Appeals Chamber, Trial Chambers, and
other chambers, as provided in article 9;
(c) a Procuracy, as provided in article 12; and
(d) a Registry, as provided in article 13.59

In the Draft Statute, Articles 5 through 19 define the
composition and administration of the court under the
following headings:

Article 5  Organs of the Court
Article 6  Qualifications and election of judges
Article 7  Judicial vacancies
Article 8  The Presidency
Article 9  Chambers
Article 10 Independence of the judges
Article 11 Excusing and disqualification of judges
Article 12 The Procuracy
Article 13 The Registry
Article 14 Solemn undertaking
Article 15 Loss of office
Article 16 Privileges and immunities
Article 17 Allowances and expenses
Article 18 Working languages
Article 19 Rules of the Court

Rather than discuss all of the above mentioned items concerning
the composition of the new court, one can highlight a few
important issues. There would be 18 judges elected from various
countries that were party to the ICC. Judges would elect the
Court Presidency, including one president and two vice-
presidents. The Presidency would be responsible for the court
and the review/approval of indictments presented by the
Prosecutor. An approved indictment would result in the issuance
of a warrant for the arrest of the accused. A Chamber of five

59 United Nations' International Law Commission's
1994 Draft Statute, Article 5.

60 Ibid.
judges would be convened to conduct a trial.61

Although the composition of the court appears to be noncontroversial, on the whole, the jurisdiction of the court brings forth numerous questions. Originally, it was proposed that the court have a wide jurisdiction over numerous crimes including: genocide, crimes against humanity, war crimes, aggression, and crimes which have been established by treaties. Bryan MacPherson gives a long list of Conventions which have established international crimes by treaties, including:

- the Genocide Convention,
- the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention),
- the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Crimes Against Civil Aviation Convention),
- the International Convention against the Taking of Hostages (Hostage Convention),
- the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (Crimes Against Diplomats Convention), and
- the Convention on Psychotropic Substances (Narcotics Trafficking Convention).62

When Trinidad and Tobago, along with seventeen other Caribbean and Latin American countries, put forth a resolution in 1989 requesting that "the International Law Commission address the issue of an international criminal court"63 it was the last convention which interested them. Since these countries have


63 Ibid.
a continuous problem with drug traffickers, they wanted this crime to be included in the list of crimes to be dealt with by an International Criminal Court. Ironically, drug trafficking has been dropped from the list of core crimes for which the court would have jurisdiction and only three clearly defined core crimes remain - genocide, crimes against humanity, and war crimes.64

Although the Preparatory Committee for the establishment of an ICC changed the jurisdiction of the new court from one of wide jurisdiction to a more narrowly defined one, it is important to note that there will likely be an opportunity for further crimes to be added to the jurisdiction of the court once it is up and running. Drug trafficking is one of the crimes that may well be added at a later date.

The issue of enforcement is one which brings forth much debate. As with the International Court of Justice at the Hague, the main enforcement tool is that of mutual agreement by treaty and the concomitant concept of world acceptance. The theory is that most countries that sign treaties will abide by them because not to do so would make them look bad in the eyes of the world. As seen most blatantly in the case of Adolph Hitler, the signing of treaties will not always hold a country under obligation.

64 The Treaty includes a fourth core crime - aggression - but there has been consistent opposition to its inclusion by the U.S., partially due to the fact that no universally accepted definition exists. A U.N. Commission dealing with the creation of the Court will attempt to define aggression.
However, on the whole, most countries do abide by treaties and this precedent bodes well for the enforcement capabilities of the new court. There will, undoubtedly, be exceptions to the rule. For example, it is hard to envision that Iraq would submit Sadam Hussein to the jurisdiction of an International Criminal Court, but there will probably be other cases where individuals will be successfully tried for crimes which fall under the jurisdiction of the ICC as has occurred with the International Tribunals in the former Yugoslavia and Rwanda.

It is important to include a brief discussion of the development of international law which would assist an ICC. One of the major criticisms concerning the Nuremberg and Tokyo Tribunals which followed World War II is that the crimes for which the accused were sentenced were *ex post facto*.

Critics of the Nuremberg trials have maintained that the aggressive war argument violates the basic legal principle that "there is no crime without law." At the time of the Nuremberg trials, there was no absolute prohibition of war, no legal definition of aggression, nor a total ban on the first use of violence, and thus the tribunal appeared to be applying *ex post facto* justice: the prosecution of people for crimes that were not crimes when committed.65

Although many have criticized the Nuremberg and Tokyo war crimes Tribunals for using *ex post facto* law in the prosecutions, it is extremely important to note that

this situation no longer exists. According to Bryan MacPherson,

This criticism would not be applicable today. In 1949, the international community adopted the Geneva Conventions dealing with the conduct of war. Pursuant to these conventions, specified "grave breaches" constitute war crimes for which individuals can be held personally responsible. The Convention on the Prevention and Punishment of the Crime of Genocide made genocide a punishable crime when it was adopted by the U.N. in 1948. In 1947 the General Assembly delegated to the International Law Commission the responsibility for preparing a draft code of offenses against the peace and security of mankind...The draft codes prepared by the Commission dealt primarily with major Nuremberg-type crimes. In 1951 the Committee on International Criminal Jurisdiction issued a draft statute for an international criminal court with jurisdiction, not only over crimes in the draft code, but over crimes generally recognized under international law.66

The underlined portion is important because any law which is international in character and which is covered under treaty could be subject to this international statute.

In other words, many international laws have been included within the context of numerous international treaties, thus, potentially becoming fair game for an international tribunal. MacPherson states in his article that "M. Cherif Bassiouni identifies 22 categories of international offenses which are already the subject of international criminal law."67


67 Ibid.
Therefore, critics would not be able to use the *ex post facto* law criticism today which was prevalent after the Nuremberg and Tokyo Tribunals. Existing international laws, many of which are found within the context of treaties, would assist an International Criminal Court by the mere existence of such laws.

Although it is important to analyze both the historical background to the establishment of an International Criminal Court, as well as practical aspects of the court itself, it would also be instructive to investigate the benefits that could be derived from a permanent International Criminal Court.
CHAPTER 3 - BENEFITS

The benefits claimed to be obtained from the establishment of a permanent International Criminal Court are many and varied, as are the parties who have lobbied for its creation. By analyzing why these parties have supported the establishment of the court, one can ascertain the expected benefits thereof. Not only United Nations' member states and International Jurists but also over 100 Nongovernmental Organizations (NGO's) worldwide have been lobbying for years to this end. Several of the reasons why these diverse groups have supported the creation of an ICC can be singled out as preeminent.

The first benefit of an International Criminal Court is claimed to be its deterrent value. It is believed that the mere existence of a permanent International Criminal Court with the power to try individuals for grave breaches of international law - genocide, crimes against humanity, war crimes, and aggression - would deter many individuals from committing these crimes. This benefit has been compared with the way in which the mere existence of national laws deter many individuals from committing more serious crimes.

William Pace, Director of the World Federalist Association, addressed the issue of deterrence as follows:

...very few would argue that the existence of institutions and law isn't a deterrent whether it's from your misdemeanor traffic violations up to murder and other kinds of serious violations of human beings. We don't eliminate murder by having it outlawed but very few people, I think, can argue rationally that the existence of courts and laws and
prisons don't deter people from committing murder. And even if they don't deter, which of course they do, they provide a security for the rest of the population so that when it does happen it gives you mechanisms for dealing with it and that's what we don't have at the international level.68

The deterrent value of the ICC has been important to the World Federalist movement for many years. According to Fergus Watt, Executive Director of the Canadian World Federalist Association, "the court will deter the worst crimes and, hopefully, by its very existence, prevent genocides of the future."69

One could speculate on the issue of whether or not Adolph Hitler would have committed the heinous crimes that he did if, at the time, there had existed a permanent International Criminal Court. Although one can only speculate, many strongly believe that the mere existence of such a court would have forced Hitler to think twice about his plans. In an article entitled, "The Establishment of an International Criminal Tribunal: Is the Time Ripe?", Sharon Williams asks the following question:

Would a real threat of prosecution perhaps have deterred leaders such as Adolf Hitler, Pol Pot, Saddam Hussein, the Bosnian Serb leaders in the former Yugoslavia or the leaders of the Hutu army in Rwanda from undertaking the actions they did in violation of inter-

68 Interview with William Pace, Director of World Federalist Association held at his office in New York, April 28, 1997.

69 Interview with Fergus Watt, Executive Director of Canadian World Federalist movement held at his office in Ottawa, April 24, 1997.
national law...70

Sharon Williams seems to believe that the question may not be the important one. She states that:

Deterrence must play a role in international criminal law. It was stated above that the ideologically motivated terrorist may not care one jot for personal safety or prosecution or punishment. In fact, the latter may be viewed as giving added publicity to the cause. However, with respect to other potential offenders, in cases of armed conflicts or other situations with an international dimension, this may not be the case.71

In other words, you can't deter everyone, but you may be able to deter some, and, in effect, its worth trying.

A second benefit, which is related to the first, is the issue of impunity. The definition of impunity is "exemption or freedom from punishment, harm, or loss".72 For years, Amnesty International has strongly argued for a permanent International Criminal Court "to prevent crimes against humanity in the future".73 Amnesty states that "Cycles of impunity cannot be allowed to continue. When perpetrators go unpunished, it supports a feeling of being above the law and worse crimes


71 Ibid.


73 Amnesty International, Activist (Toronto: October/November, 1996), 12
often follow".74 If political or military leaders believe that they are above the law and, if they see that others are not being prosecuted for atrocities, it stands to reason that these leaders may go ahead and commit heinous crimes as a result. Many ICC supporters believe that the world community must stand up and say no. When these leaders see that their crimes will not go unpunished, it is believed that the cycle of impunity will finally end.

Florence Martin, Deputy U.N. Representative for Amnesty International, stated that "Amnesty has worked extensively on the issue of impunity which we strongly believe is one of the major sources of human rights violations".75 Ms. Martin further stated that:

We believe that ad hoc tribunals will never be the solution to stopping human rights violations and stopping the pervasive impunity which allows human rights violations to be carried out again and again and again...we feel that a permanent court is the clearest and probably the best message to say impunity will not be accepted.76

On the other side of the issue, it is important to note that the court may not act as a deterrent (partly because the fear of punishment is not always an effective deterrent).

74 Amnesty International, Activist (Toronto: October/November, 1996), 12


Therefore, although a court could exist to punish individuals, the death and destruction of mankind might not be effectively terminated. If one follows the logic that national courts and prisons have not deterred many Canadians and Americans from killing and raping, although knowing they could be punished, then, the absence of impunity at the international level may not be effective either. One needs to look at motives behind some of these international crimes.

In some cases the motive is revenge and the absence of impunity may not be enough to stop these individuals from committing horrendous crimes. If a Serbian military officer ordered the killing of civilians and burning of homes in, say, Kosovo, as an act of revenge for previous killings of Serbian soldiers in the area, chances are that he/she would not be deterred by the absence of impunity. Likewise, chances are that the soldiers receiving the order would not hesitate to kill others to revenge the death of their comrades. Unfortunately, the history of war has been a history of revenge and senseless killings, and the existence of an ICC may not be enough to end an historically-rooted phenomenon. The existence of the Geneva Convention has not always been enough to stop violations of some of its provisions regarding war crimes.

Another motive may be historical animosity between nations such as the war between Israelis and Palestinians. Two nations believe that their ancestors owned the same land and both are willing to kill and maim in order to obtain permanent possession
of it. The absence of impunity, once again, would likely not be a strong enough deterrent to stop centuries of killings. In fact, at the Rome Conference, Israel voted against the Treaty because of a provision under the definition of war crimes:

The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.77

In the explanation of votes at the Rome Conference, Israel stated:

Israel has reluctantly cast a negative vote. It fails to comprehend why it has been considered necessary to insert into the list of the most heinous and grievous war crimes the action of transferring population into occupied territory.78

The fact that Israel voted against the entire Treaty due to one provision means that at least one state does not believe that the international community has the right to establish what it can and cannot do. The introduction of punishments will not likely change the view of the state of Israel.

A third benefit is that the court would be a forum for assisting the United Nations with one of its major goals - the maintenance of international peace and security as stated


in the U.N. Charter. Sharon Williams addresses this benefit when she states:

The permanent tribunal would act as a deterrent as well as a forum for prosecution of those offenders who breach the rules of conventional and customary international law and thereby impact on the peace and security of humankind. It would contribute thereby to the aims of the United Nations in preserving and keeping the peace.79

Some would argue that it is the purpose of the International Court of Justice (ICJ) at the Hague to perform this function, but it must be remembered that only states are subject to the court at the Hague, not individuals. The ICJ does fulfill an important function but it was not established to deal with the types of crimes or the type of offenders who would be tried at the new court. Supporters of the ICC would argue that the world community, at the present time, needs both courts because each would assist the United Nations with the important goal of maintaining peace and security at the international level in a different way.

A skeptic might still ask precisely what an ICC would contribute along these lines. The answer is two-fold. First, if individuals are in fact deterred from committing international crimes in the first place, then there might be less conflict to deal with, and peace would be easier to maintain. For example, when an airline hijacking occurs, tension is created between the

nationals who commit the crime and possibly their government as well as the governments of victims of the hijacking, as well as other governments that are involved (i.e. jurisdiction where crime occurs). This tension between governments makes it more difficult for the U.N. to maintain peace and security at the international level. The fear of retaliation is always a present and dangerous reality in these situations. Now, if the existence of an International Criminal Court to try these individuals deterred them from committing the crime in the first place, then the goal of maintaining peace and security by the U.N. would have been achieved without U.N. personnel lifting a finger.80

Secondly, the existence of a forum for trying individuals for international crimes would assist the United Nations in its primary task because countries would finally be able to see justice being served. When countries see that the world community is actually doing something to alleviate the high rate of international crime, it is argued that the stature of the court should be elevated as should the stature of the United Nations itself. As the stature of the U.N. improves, so should its ability to maintain peace and security worldwide.

In interviewing William Pace, the author asked, "Do you see the establishment of an ICC as helping the stature of the U.N."? His response was:

The answer is that it will help no matter what,

80 Note - hijacking is not one of the core crimes under the jurisdiction of the new court but it may be added at a later date.
I think. It's exactly the kind of negotiation that we've created the United Nations for and which could probably not have proceeded effectively without a United Nations' structure which is the most universal of all international political bodies.81

It is hoped that improved stature would mean improved confidence in this important international body which would translate into improved relations between states, and therefore, more ease in providing peace and security worldwide.

Conversely, it could be argued that the establishment of an ICC could actually hurt the stature of the U.N. and its ability to fulfill its major goal, if the court fails to deal appropriately with international crimes. A prime example would be the issue of Israel transferring population to an occupied territory. If Palestine were to bring this issue to the court, the first problem would be whether the court would have the jurisdiction to force Israel to comply with an investigation. Another potential problem, what if the U.S., as an ally of Israel and as another state which refused to accept the Treaty, used its veto power in the Security Council to stall the court from proceeding with an investigation?

Another scenario which could prove difficult for the court is how it would handle the problem of extradition. Specifically, what would the court do if another PanAm 103 situation occurred where the alleged offenders sought refuge in a state which does

81 Interview with William Pace, Director of World Federalist Association held at his office in New York, April 28, 1997.
not extradite? The international community and, more specifically, the United States and the United Kingdom, tried for years to have the PanAm suspects extradited in order to have them tried in their national courts. However, Libya refused to do so for many years. What if the newly established court encountered the same problem? How would this court be able to force a state to extradite which had no provision in its Constitution to accept the jurisdiction of such a court or its extradition order? Again, the court could be subject to constraints which would keep it from fulfilling its judicial role. If the stature of the court were negatively affected by such circumstances, the stature of the U.N. would certainly not be improved.

A fourth benefit of creating an ICC is strengthening the rule of law. According to Bryan MacPherson, the "establishment of an international criminal court would symbolize the world community's commitment to forging a new world order that is based upon the rule of law."82 This is in direct contrast to the rule of force which many argue is now in existence worldwide. MacPherson further argues that the establishment of an ICC would:

Illustrate the belief that international crimes are crimes against all peoples, and it would reflect the determination that international criminals be held accountable for their actions. Insofar as terrorists tend to view their disputes as being between them and a single, or a few, states, trying

---

them in an international court could demonstrate that their crime was against not only the target state, but against the entire world community. The community of nations would therefore underscore its rejection of violence as a means for political change.83

This quotation brings out two important points; one, that the rule of law needs to replace the rule of force and, two, that the world community needs to individualize guilt. This second point was underscored in an interview with Fergus Watt: "The ICC is about individualizing guilt by making individuals responsible for crimes; punishing individuals is important to break cycles of revenge and killing".84 Individualization of guilt should assist in a number of areas including impunity, deterrence, and strengthening the rule of law.

William Pace also emphasized the importance of strengthening the rule of law, replacing the rule of power and force, and the need to individualize guilt. When asked why the World Federalists are so strongly supporting the establishment of the ICC, he replied:

Well, one of our most important programs since the beginning of our movement was strengthening the rule of law and protection of human rights, and the establishment of a permanent international jurisdiction which would hold individuals responsible for international criminal actions would be one of the most important advances of international law. In fact, it would really be


84 Interview with Fergus Watt, Executive Director of the Canadian World Federalist Association held at his office in Ottawa, April 24, 1997.
the beginning of a world law, if you wish, because here you've had a court that's adjudicated between nation-states but the amount of international law that applied to individuals has always been in some controversy...So it's a fundamental advancement of the rule of law in international affairs...And, it would be a great step in the promotion of the concept that law with justice can replace the rule of power and force.85

Amnesty International addresses the same issue when analyzing benefits of an ICC. In an opinion paper entitled The Quest for International Justice: Time for a Permanent International Criminal Court, the organization stresses that, "Respect for the rule of law, national and international, cannot be maintained unless those who violate the most basic norms of civilized behaviour are brought to justice".86

Eric Stover supports this view when he states in an article regarding the pursuit of war criminals in the former Yugoslavia and Rwanda that "societies that fail to punish atrocious crimes committed by prior regimes run the risk of vitiating the authority of law itself".87 Throughout time, societies have stressed the importance of the rule of law and many have argued that society cannot exist without law. The inclusion of international

85 Interview with William Pace, Director of the World Federalist Association held at his office in New York, April 28, 1997.


87 Stover, Eric, "In the Shadow of Nuremberg: Pursuing War Criminals in the Former Yugoslavia and Rwanda" in Medicine & Global Survival (Vol. 2, No. 3, Sept. 1995), 146
law in the sphere of the rule of law is an important step in attaining peace and security worldwide. According to Fergus Watt:

An International Criminal Court represents a significant step in humanity's quest to bring international relations more fully under the rule of law. It is how we can civilize international relations, how the 'international community' can become a real community.88

It is evident that strengthening the rule of law is important to a variety of individuals for a variety of reasons. Even the United Nations' Commission on Global Governance:

Called for such a court in its proposals to strengthen the rule of law worldwide. In its report, Our Global Neighbourhood, it said the absence of such an institution "discredits the rule of law" and devotes a full section to arguing the case for an International Criminal Court".89

Although most individuals would agree that it is important to strengthen the rule of law, both nationally and internationally, one could argue that the establishment of an ICC is not necessarily the best way to achieve this goal. If one were absolutely certain that an International Criminal Court would be totally effective, and that such a court would completely eliminate the horrendous crimes for which it is given jurisdiction, then, one would have to agree that the establishment

88 Watt, Fergus, "Update on the International Criminal Court", Peace Magazine, (Toronto: March/April, 1997), 26

of such a court was the best way to strengthen the rule of law internationally. Unfortunately, one must admit to the reality that this court probably will not totally wipe out atrocious crimes such as genocide and crimes against humanity. It may act as a deterrent to some individuals but, more likely, many offenders will still perpetrate terrible crimes. Human nature being what it is, the mere existence of an ICC will not totally eliminate the reoccurrence of genocide and crimes against humanity. As previously stated, the mere existence of national courts and prisons has not deterred many offenders from continuing to kill and rape on almost a daily basis worldwide. So why would an ICC be any different?

A fifth benefit is that the establishment of an ICC could assist states that, for a variety of reasons, are either unwilling or unable to bring charges against offenders in their own national courts. There are many reasons for the lack of will or inability to press charges, including:

1) fear of retaliation – many Caribbean countries are afraid to try drug lords in their own national courts because the offenders are very powerful and possibly very vindictive. One of the reasons why Trinidad and Tobago, as well as seventeen other Caribbean and Latin American countries, reintroduced the issue of an ICC in 1989 was precisely because of drug trafficking; "a matter which overwhelms the judicial systems of many of these
2) political considerations - fear that the offender may become the next political or military leader or may indeed still hold an important post.

3) politically motivated crimes - many terrorist activities have occurred in the name of politics or religion and it would be unpopular with nationals to see one of their own convicted for a crime which was supposedly done to better their cause.

Proponents of an ICC believe that the existence of such a court would assist states who are unable or unwilling to try offenders in their own national courts for the above-stated reasons. They seem to believe that it would take the onus off national officials if an international court were to begin investigations and proceed with the prosecution of these offenders.

Conversely, one could argue that there is no proof that the establishment of such a court would alleviate the problem of states who are either unwilling or unable to try perpetrators in their own courts. The reasons for the lack of will to try offenders would still be present and may convince state officials to refrain from asking the ICC to begin investigations in the first place. Also, just because an international court


91 Although terrorism is not a core crime at this time, it could be added at a later date.
initiates an investigation and continues with a prosecution does not mean that the offenders would not feel animosity toward their own officials who were likely responsible for telling the court about the crime in the first place.

Proponents of the creation of an ICC to alleviate this problem, have often used the example of drug traffickers and terrorists to promote their side of the issue. However, since both drug trafficking and terrorism were dropped from the core crimes of the new court, these arguments lose some of their credibility. In fact, it was Trinidad and Tobago who introduced the 1989 General Assembly resolution to create the ICC but, at Rome, these proponents of the idea abstained during the voting process. In the explanation of votes, it was stated that:

Due to the non-inclusion of the death penalty, Trinidad and Tobago will not sign the Statute at this point, but only the Final Act, and will continue its efforts to have the death penalty included in the Statute and drug trafficking included in the list of core crimes under its jurisdiction.92

Although it would be beneficial to create a way of alleviating the problem of states which are either unwilling or unable to convict offenders for the previously stated reasons, it is not a convincing argument that the creation of an ICC will solve this problem.

As mentioned earlier, many diverse groups have lobbied

for years for the establishment of an International Criminal Court to try individuals for committing serious international crimes such as genocide. The reasons for supporting such an innovation in international relations can be translated into benefits that could be achieved by the existence of such a court. In this chapter, five benefits have been singled out for analysis including: deterrent value; the issue of impunity; ability to assist the United Nations with its major goal of maintaining international peace and security; strengthening the rule of law; and, assisting states that are either unwilling or unable to try offenders in national courts.

In addition to analyzing benefits associated with such an important innovation in international relations, one must also analyze problems or, in this case, obstacles to the establishment of such a court. In the next chapter, the issue of obstacles will be analyzed.
CHAPTER 4 - OBSTACLES

Most United Nations' reform initiatives have faced numerous obstacles and the creation of an International Criminal Court is no exception. Webster defines obstacle as "something that stands in the way or opposes"93 and in the case of this cutting-edge reform initiative, one can identify numerous obstacles which have stood in the way of developing this U.N. reform. A list of obstacles would include: state sovereignty; difference in law systems used worldwide, ie. adversarial common law vs. inquisitorial civil law; jurisdictional crimes and definitions of such crimes, ie. aggression, terrorism; trigger mechanisms; independence of both the court and the Prosecutor; enforcement; location; finances; provisions for opting in and opting out; high ratification number; the history (both past and present) of states that violate human rights and ignore international opposition, and therefore, may be inherently opposed to such a court, ie. China; and, political will or lack thereof. Due to space constraints, this thesis will only deal with three obstacles. This in no way diminishes the importance of the other obstacles. The chosen obstacles are the role of the Security Council triggering investigations, the role of an independent Prosecutor, and the high number needed to ratify the Treaty. These three obstacles were chosen for analysis because each

obstacle has the potential for becoming the decisive issue that stalls the creation of an International Criminal Court.

The first obstacle to be analyzed is the issue of trigger mechanisms and, more specifically, the role of the Security Council in triggering investigations. Before the Treaty Conference, there was much discussion and disagreement around the issue of trigger mechanisms. According to the original International Law Commission (ILC) Draft Statute, there would be two main trigger mechanisms for the investigation of crimes falling under the jurisdiction of the court: the Security Council under Article 23, and both states party to the Treaty and states which accept the jurisdiction of the court under Article 25.

Article 23 read as follows:

**Action by the Security Council**

1. Notwithstanding article 21, the Court may exercise its jurisdiction in accordance with this Statute in respect of a crime referred to in article 20 if the Security Council acting in accordance with Chapter VII of the Charter of the United Nations so determines.

2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

3. A complaint may not be brought or a prosecution commenced under this Statute in relation to a situation which the Security Council has determined to be a threat to or breach of the peace in accordance with Chapter VII of the Charter of the United Nations unless the Security Council so
determines.94

On the issue of the Security Council triggering investigations, paragraphs 1, 2, and 3 become extremely important. Article 23, paragraph 2 deals with triggering investigations pertaining to acts of aggression, an issue which will be addressed later in this chapter. At this point, Article 23, paragraphs 1 and 3, dealing with Chapter VII violations will be analyzed from both a positive and negative viewpoint. The author's interpretation of Clause 1 is that the court would have the jurisdiction to investigate a Chapter VII violation after a referral from the Security Council. In other words, the court would not have the power to initiate an investigation on its own without the permission of the Security Council, if it were considered to be a Chapter VII violation. Clause 3 supports this conclusion.

On the positive side, some would say (especially the five veto powers) that this is necessary because, according to the U.N. Charter, Article 24, United Nations' Members:

> Confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.95

---


Since this Article vests power in the Security Council to deal with issues pertaining to international peace and security, some would argue that only this body has the power to deal with threats to the peace or to vest that power in another body by triggering investigations to the new court. Furthermore, the U.N. Charter, Chapter VII, Article 39 states that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.96

As evident in this Article, not only does the Security Council have the power to identify Chapter VII violations but it is also empowered to take action to resolve such violations in a number of ways such as interruption of economic relations, interruption of communications, and severance of diplomatic relations under Article 41 or, under Article 42:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstration, blockade, and other operations by air, sea, or land forces of Members of the United Nations.97

Proponents of protecting Security Council Chapter VII jurisdiction fear that the court could become intrusive in an

97 Ibid., 19
area that is better handled by the U.N. body which was empowered for the task. They are concerned that, if the court is given the power to initiate investigations of Chapter VII violations, the court may work contrary to the provisions of the United Nation's Charter. Therefore, if the court were empowered to initiate the investigation of Chapter VII violations, the court could be working against one of the most important principles of the institution itself - the maintenance of peace and security which falls under the aegis of the Security Council. The new court would, in effect, be violating the U.N. Charter and diminishing the importance of the very institution which brought it into existence in the first place. The United States, in its explanation of its no vote on the Rome Statute stated that:

No State party can derogate from the power of the Security Council under the United Nations Charter, which has the responsibility for the maintenance of international peace and security.98

At a discussion on the role of the Security Council vis-a-vis the court, some delegates at the Rome Conference "stressed that the Statute could not add or subtract from the powers of the Council under the Charter".99

Stressing the importance of the Security Council triggering


investigations, the Australian delegate at the General Assembly's Sixth Committee (Legal) meeting in 1996 stated that, "The power of the Security Council to refer matters to the Court was fundamental, and would obviate the need for the Council to set up ad hoc tribunals".100 According to some, the delegate's statement still holds true today.

Another positive aspect related to Security Council initiation of investigations falling under Chapter VII violations is that, "Many believe that this would provide the Court with considerable strength".101 The premise on which this positive statement is based is that:

If, under Chapter VII of the United Nations Charter, the Security Council requests the Court to initiate proceedings, all Member States would be required to cooperate with the Court. Consent requirements would not be necessary.102

Advocates see Security Council referral of Chapter VII violations as a positive step which could provide the court with a stronger position, especially in the area of state co-operation. A United Nations' document states that:

Under the United Nations Charter, Member States have agreed to abide by Security Council decisions relating to the maintenance of international peace and security. They would therefore be required to accept


102 Ibid.
the jurisdiction of the Court in situations referred by the Security Council. It has consequently been suggested that in such situations no State consent would be required for the exercise of jurisdiction by the Court, and all States would be required to cooperate with the Court.103

On the other side of the issue, many states and NGO's were extremely upset that the Security Council could be in a position to undermine the power of the ICC by hindering the commencement of certain investigations. In the time leading up to the Rome Conference, the proposed use of the Security Council as a trigger mechanism became a very hot topic which elicited acrimonious debate. For example, a 1995 General Assembly report on the establishment of an ICC stated:

Several other delegations expressed serious reservations or opposition to the role envisaged for the Security Council, which, in their view, would reduce the credibility and moral authority of the court; excessively limit its role, undermine its independence, impartiality and autonomy; introduce an inappropriate political influence over the functioning of the institution; confer additional powers on the Security Council that were not provided for in the Charter; and enable the permanent members of the Security Council to exercise a veto with respect to the work of the court.104

Discussion of Article 23, paragraph 3, elicited even more discussion by some delegates:


Other delegations expressed serious reservations concerning paragraph 3 in relation to the prerogative conferred on the Security Council by article 23 of the draft statute as regards the activation of the court, bearing in mind the political character of the organ in question. It was observed in particular that the judicial functions of the court should not be subordinated to the action of a political body. Concern was also voiced that the court could be prevented from performing its functions through the mere placing of an item on the Council's agenda and could remain paralyzed for lengthy periods while the Security Council was actively dealing with a particular situation or retained the item on its agenda for possible future consideration.105

In 1996, further discussion of the issue of the Security Council triggering Chapter VII investigations brought forth more negative comments from various states. It is instructive to make note of some of the more vehement objections by United Nations' member states.

Syria stated:

The international criminal court should be fully independent, operating without pressure from the Security Council. The Council should not have the right to exercise a veto over whether an individual would be tried by the court, which should be on an equal footing with other international judicial bodies.106

Colombia stated:


While it is essential for the court to have a relationship with United Nations organs, and especially the Security Council, its independence must be maintained. It should never be subject to political interests. 107

Ireland stated:

The Council's role should not include control over whether to initiate individual criminal proceedings, which should remain within the exclusive domain of the court. Similarly, it should not have the power to veto any decision of the court or to terminate any of its proceedings. 108

Egypt stated:

While the Security Council has a role to play in some situations, it should not interfere with the court's freedom and independence. The Council should only refer some situations to the prosecutor, to avoid the need of establishing ad hoc tribunals. The Council should not be considered as the court's "triggering mechanisms". 109

Germany stated:

It is difficult to accept that the Security Council could control access to the court...
The court must remain independent and effective. 110

In 1998, the year of the Rome Conference, negative comments continued to be evident in United Nations' documents. On the issue of trigger mechanisms and the Security Council, a United Nations' document stated:


108 Ibid., 3

109 Ibid.

110 Ibid., 4
Referral by the Security Council

It has been proposed that in any situation with which the Security Council is involved, the Security Council should first grant permission to the Court before the Court could act. Some States have expressed concern regarding the political nature of the Security Council and the possible veto by one of the five permanent members to prevent the Court from taking action. Since most conflict situations in the world would likely be on the agenda of the Security Council, many believe that this provision could grant the Security Council tremendous control over the Court. This particular provision has been the subject of extensive debate.\textsuperscript{111}

The last point regarding the fact that most conflict situations would likely be on the Security Council's agenda already is a very important one. Since Chapter VII violations would likely already be on the agenda and since the court (under Article 23 paragraph 3) would not be able to commence an investigation without the permission of the Council, this point is extremely pertinent and worrisome.

At the Rome Conference in 1998, the issue of the Security Council triggering Chapter VII investigations again brought forth acrimonious debate, and state comments at the end of the Plenipotentiary Conference give a clear indication of problems inherent in the Rome Statute. Although the Rome Statute was accepted by a vote of 120 in favour, 7 against, and 21 abstentions, the Treaty will not take effect until it has been

ratified by 60 states. Therefore, the negative comments made by states at the end of the Conference still merit analysis because this obstacle may determine which states actually do ratify the Treaty at the end of the day.

In General Statements following the acceptance vote, Cuba stated that, "subordinating the Court to the Security Council would render the Court ineffective".112 Pakistan also voiced concerns: "some of the provisions of the Statute are reason for concern, including...the role of the Security Council in relation to the Court".113 Benin was also concerned about the role of the Security Council and added a poignant question: "Was it fair that the Council should be able to block investigations of the Court"?114 With all of these reservations on only one of the issues pertaining to the establishment of an ICC, it's a wonder that the Rome Statute was accepted at all.

It should be noted that, at the Rome Conference, a compromise solution was adopted regarding Chapter VII violations and the use of the Security Council as a triggering mechanism. However, some would say that this compromise did not go far enough. The new Statute states that:

A text on deferral of investigations or prosecution, provides that "no investigation or prosecution may be commenced or proceeded


113 Ibid., 7

114 Ibid.
with under the 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".115

This compromise does not change the fact that the Security Council is being given the power to control whether or not Chapter VII violations are referred to the court and the renewal provision makes the 12 month deadline a moot point.

If some United Nations' member states reacted negatively to the issue of the Security Council triggering Chapter VII investigations, the reaction of NGO's was even more vehement. Critics in the NGO community see the Security Council as a political body, in contrast to a judicial body, and believe that it has no business deciding which violations should be investigated by the new court. Many NGO's have feared the politicization of this new judicial body at an early stage in its development.

In an interview conducted with the Executive Director of an NGO, the question of the Security Council triggering investigations brought forth the following response:

The role of the Security Council will be a major obstacle. For the five countries who would like to be able to claim that because of the impact the presence of this court might have on situations affecting international peace and security they should have the ability to be a trigger mechanism

for the court, either to say to go ahead or not to go ahead. Of course, if they had that ability then they could veto an investigation which means that this court would apply to everyone but not to them or their friends and allies if they choose for it not to. So that's a big obstacle.116

Another member of the World Federalist Association was asked what he thought of the Security Council triggering investigations. He replied:

I think that that would be a disaster. The conceptual ground-breaking that goes on with the court has to do with more than just the fact of it being applicable to individuals which we have been talking about up until now. But there is another part to this and that is that the international system has to be moved to the rule of law and away from the rule of politics and if the Security Council decides when the law will apply and when it won't then you're not creating a legal mechanism at all, you're creating another tool of oligopoly on the part of the nation-states that now, through developments half a century ago, have preponderant influence around the U.N. and get their way. I think you could be sewing the seeds of a rejection for the court.117

It is an important point that this specific obstacle could lead to a rejection of the court because, as stated earlier, although the Rome Statute was accepted by a large majority of member states there is still the issue of whether or not a majority of those same states will, in fact, ratify the

116 Interview with William Pace, Director of World Federalist Association held at his office in New York, April 28, 1997.

117 Interview with Dieter Heinrich, Past President of Canadian World Federalist movement held at his office in Toronto, May 23, 1997.
Treaty. There is a possibility that this obstacle may become the deciding obstacle.

Another NGO spokesperson who was asked about the role of the Security Council in triggering investigations gave an even more acrimonious response:

It's a major problem and it's not acceptable. We're very strongly in favour of an independent Prosecutor. A court could not be effective without an independent Prosecutor. It's a judicial body, you know, a judicial organ - linked to the Security Council would simply make it a political organ. It would enable members of the Security Council which have the veto to simply veto the prosecution of individuals, not just of their own nationals but of their friends, in other words, we're looking at a political process. Beyond the issue of whether they would do that, is the issue how does it look? I mean, if I'm a country which hasn't got the veto, for example, I would be very worried of a court which can bring my nationals in front of the court but will not bring the French, the U.S., the British, the Chinese, the Russians or all their friends' nationals in front of the court.118

This brings to mind a problem associated with the conviction of war criminals at the Nuremberg and Tokyo Tribunals and the issue of "victor's justice"119 - the prosecution of perpetrators only from the losing side while "allied personnel who committed


comparable crimes went unpunished". 120 This is an important argument against the Security Council being, in any way, a trigger mechanism for the court.

On the issue of the Security Council being a trigger mechanism for the court, it is important to return to the issue of Article 23 paragraph 2 which states:

A complaint of or directly related to (sic) an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint. 121

In this context, the issue of aggression becomes an obstacle because the Security Council would once again be controlling whether or not an investigation could be brought before the court. Although aggression is listed as one of the core crimes over which the ICC would have jurisdiction, there has been prolonged debate about whether or not this crime should even be included, since there is no universally accepted definition of aggression. The United States has been one of the most vehement opponents of including aggression as a core crime.

The issue of the Security Council triggering investigations related to acts of aggression is similar to the issue of Chapter VII violations. Proponents argue that the Security Council was


the body chosen under the United Nations' Charter to deal with aggression under its mandate to protect international peace and security. They would submit that the establishment of an International Criminal Court "could not add or subtract to the powers of the Council under the Charter". At a 1995 General Assembly Ad Hoc Committee Meeting on the establishment of an ICC, proponents stated that:

The role envisaged for the Security Council was appropriate and necessary in view of Article 39 of the Charter. Emphasis was placed on the need to draw a clear distinction between a finding of aggression by the Council with respect to a State and a determination of individual criminal responsibility by the court and to keep in mind the difference between the mandates to be performed independently by the two bodies. In this regard, it was suggested that the court should not be able to question or contradict a finding of the Security Council.

The last statement about not questioning or contradicting a finding of the Security Council would likely set off alarms for many critics of this scheme.

Arguments put forward by permanent members of the Security Council are similar to the arguments already given regarding Chapter VII violations. In its explanation of its no vote on the Rome Statute, the United States clearly enunciated its position on the issue of the Security Council and aggression.


Any attempt to elaborate a definition of the crime of aggression must take into account the fact that most of the time it was not an individual act, instead wars of aggression existed. The Statute must also recognize the role of the Security Council in determining that aggression has been committed. No State party can derogate from the power of the Security Council under the United Nations Charter, which has the responsibility for the maintenance of international peace and security.124

At the end of the Rome Conference some states came out vehemently opposed to the relation between the Security Council and the triggering of investigations of acts of aggression. Sudan, speaking on behalf of the Arab Group of States, voiced concern:

The Arab States are not happy with the document. It was regrettable that just reference to aggression was included, as aggression is the "mother of all crimes"...The Prosecutor should also be under reasonable and logical control and not be ex-officio only. The Statute might even increase the power of the Security Council, and for that reason the Arab States have tried to have a role for the General Assembly under the Statute, but those hopes had been destroyed.125

Egypt was not pleased that a U.N. Commission, which was to be established after the Conference, would have as one of its tasks the responsibility for defining aggression. The delegate stated that, "It had hoped for a definition of


125 Ibid., 6
aggression which should conform to that of the General Assembly. The determination of aggression should be extended also to the General Assembly".126 This delegate obviously believes that the General Assembly should be defining aggression, not a Commission.

United Nations' officials and some states believe that the issue of initiation of investigations of crimes of aggression was dealt with at the Rome Conference, in the Statute itself, which states that:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 110 and 111 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.127

This provision appears to approve the court's having the power to initiate investigations of crimes of aggression but there are a few hitches. First, if the Security Council continues to believe that it has the power to decide whether an act of aggression has occurred, and the provision that the court's jurisdiction "shall be consistent with the relevant provisions of the Charter of the


127 Ibid., 9
United Nations'128 means that there could still be a jurisdictional clash between the two bodies. Second, there is no guarantee that the U.N. Commission will be able to formulate an acceptable definition of aggression. The lack of a definition has been a perpetual problem in international relations for decades and some may argue that this Commission may encounter the same problems that others have faced when attempting to define this illusive concept. In addition, any definition suggested clearly would have to have the approval of the Security Council in order to be viable.

Another issue that United Nations' officials and some states believe was dealt with in the Rome Statute, but which elicited much debate before the Conference and still merits analysis, is the issue of empowering an independent Prosecutor with the right to commence his/her own investigations based on information from non-state parties including U.N. bodies, NGO's, and/or victims. In other words, to be his/her own trigger mechanism.

Some states, such as the United States, believe it is advantageous to have either the Security Council or states triggering investigations of situations and that the role of the Prosecutor is to then investigate individual suspects. These states do not see any advantage in having the Prosecutor initiating his/her own investigations. In a Feb. 1998 speech,

Many are advocating that the prosecutor be empowered by the statute to launch investigations independently and seek indictments against anyone, anywhere in the world. They argue that there will be sufficient checks and balances built into the statute to prevent a prosecutor from running wild or abusing his or her powers. To take a different view, the United States has proposed that once the Court is seized with an overall situation, either by referral from a State Party or by referral from the Security Council, the ICC prosecutor should have the independence to investigate and seek indictments against any suspects who are believed to be perpetrators. 129

One of the difficulties with this is there would be no possibility that NGO's or other U.N. bodies or victims could go to the court with a complaint and ask for an investigation to be initiated. Only two bodies would be given the power to commence investigations, both being political entities.

Ambassador Scheffer provides a practical reason why it is in the best interest of the court to have investigations initiated by one of the two previously mentioned sources. He states:

It will be important for the ICC's prosecutor to have some political clout behind him when he launches into his investigative duties. That political clout can be attained through the referral by the State Party or the Security Council. Without it, the prosecutor is essentially on his own and may well encounter great resistance from States Parties which could view his efforts as political in intent.

or as simply responding to pressure by interest groups which have their own political agendas. Practically, the referral system we have proposed will be a powerful means to launch widespread investigations by the Court where the prosecutor can exercise significant independence.130

This does not bode well for the strength of the Treaty itself in acquiring state co-operation. One would think that states party to the Treaty would be duty-bound to co-operate but possibly this is an idealistic hope and perhaps the United States has a better perspective on the possibility that states may become uncooperative in the future.

Despite arguments against changing the Statute regarding who could trigger investigations, the original ILC Draft Statute was changed. In the original document, there were only two trigger mechanisms for the court: the Security Council, and states both party to the Treaty and states who accepted the jurisdiction of the court. At the Rome Conference, Article 12 was added which gave the Prosecutor the power to initiate investigations. It reads,

The Prosecutor [may] [shall] initiate investigations [ex officio] [proprio motu] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and inter-governmental and non-governmental organizations]. The Prosecutor shall assess the information received or obtained and decide whether there is

sufficient basis to proceed.131

This addition to the Statute brought forth even more acrimonious
debate at the Conference. The United States "called for deletion
of language in article 6 allowing the Prosecutor to initiate
investigations and also of article 12, which refers to the
Prosecutors proprio motu powers".132 For clarification,
Article 6 covers the triggering mechanisms for the court
which was changed from two to three, adding a third trigger
mechanism - the court itself - through the Prosecutor.

Partly due to this change in the Statute, the United States
voted against the establishment of an ICC and stated in the
explanation of votes that "the United States does not accept
the concept of jurisdiction in the Statute and its application
over non-States parties".133 They rejected the notion that
non-states parties could bring a complaint before the Prosecutor
and that he/she could then initiate an investigation without
the consent of either a state or the Security Council.

During deliberations at the Rome Conference, two other
states joined the United States in denouncing the option of

131 United Nations, Rome Statute for the International
org/icc/docs.htm, October, 1998), 37 Note - bracketed text still
appears in the Rome Statute, to be dealt with by Committee.

132 United Nations, Press Release 097 (New York:
dsum.htm, October, 1998), 2

133 United Nations, Press Release L/ROM/22 (New York:
htm, July 17, 1998), 3
granting the Prosecutor the power to initiate his/her own investigations. China made its position very clear:

China stressed the importance of the principle of State consent, could not accept proprio motu power for the Prosecutor, and stated that the Security Council should be empowered to refer a case to the Court, and existing language in the proposals should be revised to reflect that position.134

Another state echoed the views of the United States and China. The Russian Federation stated that:

It was against proprio motu power for the Prosecutor and also against any language in the Statute that would modify the obligations of the Council under the Charter, including by imposing a time limit for its actions.135

It is not surprising that three of the permanent members of the Security Council rejected the idea of limiting the power of that U.N. body.

Permanent members of the Security Council, however, were not the only states to oppose allowing the Prosecutor to be a third triggering mechanism for the court. Uruguay stated that, "Powers have been given to the Prosecutor without sufficient checks".136 Egypt stated that, "The Prosecutor should not


135 Ibid.

be able to initiate investigations ex officio".\textsuperscript{137} Another state was not pleased with the third triggering mechanism; Pakistan stated its position clearly:

The sovereignty of States should not be infringed upon. In that respect, some of the provisions of the Statute are reason for concern, including the issue of proprio motu powers of the Prosecutor.\textsuperscript{138}

On the other side of this debate, many states and NGO's were strongly in favour of empowering the Prosecutor to initiate his/her own investigations from information received from any source, thus, becoming a third trigger mechanism. In 1996, New Zealand stated that:

Individuals, not States, were killed, raped and tortured. It was individuals whose complaints must have standing before the prosecutor of the court. The prosecutor must also be able to initiate investigations, so the court might ensure justice for such individuals.\textsuperscript{139}

In sum, the issue of an independent Prosecutor merits analysis even though the Rome Statute was changed to give the Prosecutor the power to commence investigations based on information from numerous sources. This issue is important because it shows that the states who arrived at Rome were

\begin{footnotesize}
\begin{itemize}
\item[138] \textit{Ibid.}, 7
\end{itemize}
\end{footnotesize}
willing to compromise even on important issues. The fact that the Rome Treaty is in fact a compromise Treaty could be worrisome. On the one hand, it could bode well for an international community which is willing to co-operate but it could also mean that 120 states voted in favour of a document which includes clauses that their home governments may take issue with. Although the Rome Treaty was changed to accommodate states on one side of this debate, this provision may still become a deciding one when the time comes for states to ratify the Treaty.

None of these issues is settled in any final way, of course, since there is still the necessity of ratifying the Treaty as approved in Rome. Although 120 states voted in favour of adopting the Rome Statute for the establishment of an International Criminal Court, the court will not come into existence until 60 states ratify it. This means that national governments have to agree with the content of the Statute and vote to make it a binding Treaty. This will not likely be an easy or quick process.

At a Conference in Toronto, William Pace, who attended the Rome Conference as an NGO observer, explained briefly how the ratification process will likely proceed.

Some governments have to amend their Constitution to ratify this Statute and are going to do it; the Netherlands has to, Sweden probably has to. Some governments are worried that it's going to take them a couple of years to get it translated properly into their national language so their parliament-
There are several problems that may arise which could ruin the chances of achieving enough ratifications. One problem is that the U.S. has come out strongly against the Treaty and the one remaining superpower has many friends who may hesitate to annoy this great power. Secondly, some governments may decide that they do not agree with substantive sections of the Treaty and may refuse to ratify it. Thirdly, some governments who need to amend their Constitutions in order to ratify this Treaty, may find opposition within their ranks to such a process. Fourthly, if it takes a number of years for some states to have the document translated into their national languages, the impetus for establishing an ICC may have waned considerably. One must remember that just because 120 states voted in favour of the Rome Statute, this does not mean that their home governments will automatically vote in favour of ratification.

In conclusion, there are many obstacles to the establishment of an International Criminal Court. Due to space constraints, only some of these obstacles were analyzed and this is not meant to take away from the importance of any of the other obstacles, many of which were listed at the beginning of this Chapter. The obstacles that were analyzed in this Chapter were the role of the Security Council in triggering Chapter VII investigations and the role of the Security Council in relation

140 Speech by William Pace, Director of World Federalist Association held at the University of Toronto, August 28, 1998.
to acts of aggression (a crime which will be included as a core crime if the U.N. Commission can establish an acceptable definition); the role of an independent Prosecutor with the power to initiate his/her own investigations; and, the high ratification number needed to make the court a reality. According to William Pace, this is the highest ratification number for any recent international Treaty, even higher than the Land Mines Treaty.141

In sum, the author believes that these three obstacles merit analysis because any one of them could become the deciding obstacle that makes the establishment of an International Criminal Court an impossibility at this time.

141 Speech by William Pace, Director of World Federalist Association held at the University of Toronto, August 28, 1998.
CHAPTER 5 - CONCLUSION

Attempting to reform an institution as complex as the United Nations is a very complicated undertaking. The brief analysis in Chapter 1 of other targets for reform, including the Security Council, the General Assembly, and peacekeeping, serve to highlight some of the difficulties associated with United Nations' reform. The United Nations began as an association of 51 countries in 1945, but has now escalated to a membership of 185 states, an increase which has brought a plethora of problems to the surface. Many individuals who have viewed the United Nations critically have been calling for reform of this giant organization for years; however, reforming a giant is not an easy task.

When one analyzes one of the latest attempts at reforming the United Nations, the establishment of an International Criminal Court, one realizes just how complicated the issue of reform can become. When one considers a question such as whether or not United Nations' reform is a practical idea, it quickly becomes apparent that there are many sides to this issue. Even when one narrows the question by analyzing one specific reform initiative such as this, one still encounters major complications because initiating a reform of such magnitude is a complicated undertaking. When one analyzes the specific question of whether or not the establishment of an ICC is a practical reform idea, several alternative positions come to the fore.

First, a viewpoint which could be labelled the Idealist
Alternative would see value in the establishment of an ICC no matter what. According to this point of view, the court would be an important reform for the U.N. even if it only succeeded in deterring some individuals from committing serious international crimes such as genocide, crimes against humanity, war crimes, and aggression. Proponents of this viewpoint would see value in the mere existence of such an international judicial organ.

The Idealist Alternative would be supported by arguments which are found in Chapter 3 under the heading of benefits. These arguments would include deterrent value, ending the cycle of impunity, assisting the U.N. with its Charter goal of maintaining international peace and security, strengthening the rule of law, and assisting states that are unwilling or unable to bring charges against offenders in their own national courts. Although some supporters of the Idealist Alternative may not agree with all of these supposed benefits, one can submit that all of these benefits would be supported, to some degree, if one were to consolidate proponents' views. In other words, within the idealist camp, some supporters would see strengthening the rule of law as more important than assisting states that are unwilling or unable to bring charges against offenders in their own national courts. Others, such as Amnesty International, would see ending the cycle of impunity as an extremely important justification for the establishment of an ICC. However, generally-speaking, one can submit that those supporting the
Idealist Alternative would argue that the benefits which could be accrued through the establishment of an ICC far outweigh any negative effects of its creation. When discussing an issue such as this, it is important to distinguish between desirability and practicability. It is apparent that the idealist camp see the desirability of creating this new judicial organ, but one must also look at the practicability of such an undertaking.

Several obstacles to the establishment of an ICC were analyzed in Chapter 4 and, although the idealist camp might view these as significant, one could argue that they would not see them as insurmountable. The first obstacle discussed was the issue of trigger mechanisms and more specifically the role of the Security Council in triggering both Chapter VII violations and aggression. In the idealist camp, two views become significant. On the one hand, some idealists would see the Security Council triggering investigations as a positive manifestation because it would give the new judicial organ more clout, thus assisting with state cooperation. On the other hand, some idealists who disagree with a political organ such as the Security Council possibly being in a position to control a judicial body, may still see merit in establishing an ICC under these conditions because even a less effective court would be better than no court at all. Of course, there are also idealists who perceive the idea of the Security Council possibly controlling the initiation of investigations by this new judicial body
as "a disaster"142 and do not want to see an ineffective court established.

Another significant obstacle to the establishment of an ICC is the issue of an independent Prosecutor who could initiate his/her own investigations. As discussed in Chapter 4, the original text was changed to give the Prosecutor this power but numerous states reacted negatively to this change, which may make ratification of the Rome Treaty more difficult. Although many idealists would strongly support an independent Prosecutor, others might argue that this issue could have been dealt with later and that it is not worth risking the ultimate rejection of the entire Treaty, during the ratification process, in order to secure an independent Prosecutor. In other words, it would be better to have an independent Prosecutor, but it might not be worth taking the risk that too many states may choose not to ratify due to this one issue.

Ratification is an obstacle which may ultimately become the most significant because the ratification number was set at 60 states which, according to one source, is the highest of any recent international Treaty. Some idealists would see this number in a positive light because the more states standing behind this new court, the better its chances of becoming viable on the international stage. However, others may fear that the high ratification number may stall or even lead to an ultimate

142 See page 63 quotation from interview with Dieter Heinrich, Past President of Canadian World Federalist movement.
rejection of an important reform initiative.

Those who support the Idealist Alternative see the establishment of an ICC as an important U.N. reform initiative. Some proponents of this Idealist Alternative include the World Federalist Association, Amnesty International, and states such as Canada whose current Minister of Foreign Affairs, Lloyd Axworthy, has publicly supported this U.N. reform. Other states which have strongly supported this reform include Italy, France, Australia, New Zealand, and the United Kingdom. One could assert that proponents of this viewpoint see the establishment of an International Criminal Court as the most important new institution of this millennium.

A second viewpoint, which could be labelled the Cynic Alternative, becomes more complicated because it encompasses the type I cynic who believes there is no value in the creation of an ICC; the type II cynic who believes that, although there may be merit in one or two supposed benefits, there are too many obstacles to be overcome; and, the type III cynic who believes that it is possible that the court may come into existence, but there are serious flaws that could ultimately hamper the effectiveness of such a court.

Upon analyzing the aforementioned supposed benefits of an ICC, the type I cynic would argue that these espoused benefits are nothing but mere rhetoric. On the issue of deterrence, the type I cynic would argue that there is no concrete proof that the existence of an ICC would deter any individuals who are
bent on breaking any of the designated crimes. They would argue that the motives which drive some individuals are so great that the mere existence of such a court would not deter them. They could cite as examples individuals such as Saddam Hussein, Adolph Hitler, Idi Amin, and Pol Pot and give a strong argument that none of them would have been deterred by such a court.

On the issue of impunity, once again, the type I cynic would argue that there is no proof that the cycle of impunity would cease with the existence of such a court. Several arguments that might be put forward to support this viewpoint include:

1) if the new court were established, and if the existence of the court did not deter individuals from committing crimes, then, the cycle of impunity would continue;

2) if the newly established court were not given enough enforcement powers, such as absolute global state cooperation, then, it is conceivable that the court could be less effective and consequently, the cycle of impunity would continue;

3) if the Security Council is able to stall investigations of either Chapter VII violations or acts of aggression, then the court could once again be less effective, therefore, the cycle of impunity would not end.

The type I cynic could argue convincingly that the creation of an ICC would not necessarily end the cycle of impunity. They would likely mention that the use of Ad Hoc Tribunals has not assisted in this area, so there really is no proof that a permanent court would end the cycle of impunity.
As far as a new International Criminal Court assisting the United Nations with its goal of maintaining international peace and security, the type I cynic would argue that it is the role of the Security Council to deal with this goal, not a judicial body. Once again, proponents of this viewpoint would cite the lack of evidence that a new international judicial body would assist the U.N. with this task anyway. A cynic wants proof not rhetoric and would argue that the justification for this benefit is not substantiated by fact.

Although it would seem churlish for anyone to publicly denigrate the idea of strengthening the rule of law, a type I cynic could effectively argue that the establishment of an ICC may not assist in strengthening the rule of law at all. First, if the new court did not act as a deterrent, then, the rule of law would not be strengthened. Second, if the court were created but was not an effective judicial organ, then, once again, the rule of law would not be strengthened. It is conceivable that many proponents of the court are ideistically believing that this new organ would solve the problem of serious international crimes, without giving the new court the means with which to do this, i.e. enforcement capabilities.

The last benefit discussed was the issue of assisting states that are either unwilling or unable to bring charges against offenders in their own national courts. In Chapter 4, the type I cynic's viewpoint was put forward in the argument that the motives for not bringing charges at home could still exist, such
as fear of retaliation and political considerations. It is conceivable that perpetrators who were investigated and possibly tried and convicted by an ICC would still harbour animosity toward national officials who were likely responsible for telling the court about the crime in the first place. Another argument that the type I cynic would espouse is the point that the problem of states being unwilling or unable to convict perpetrators in national courts stems from the issue of drug trafficking, a crime which was dropped from the list of core crimes, thus making this benefit a bit of a moot point.

Regarding the issue of obstacles to the establishment of an ICC, the type I cynic would submit that these are significant obstacles and that it is unlikely that the new court will ever come into existence. When discussing the issue of trigger mechanisms in relation to the Security Council, the type I cynic would argue that too many states have publicly announced opposition to the perceived role of a political organ in the initiation of investigations for this Treaty to pass easily through state capitals. Further, several sources have verbalized the possibility that Security Council permanent members could use their veto to protect their own nationals as well as friends' nationals. This type of announcement could make some states and especially non-aligned states very nervous, partly due to an unkind history regarding powerful states.

Further, many states reacted negatively to changing the Rome Treaty in order to give the Prosecutor the power to
initiate his/her own investigations. This does not bode well for ratification, any more than the problem of Security Council triggering of investigations did. It has been stated that the Rome Treaty was a compromise solution but the type I cynic would argue that the compromises made at Rome may well have set the groundwork for an ultimate rejection of the Treaty.

Due to the high ratification number needed in order for the new court to come into existence, the type I cynic could argue that ratification will never occur. Not only did seven states vote against the Treaty, 21 states abstained which means that it is probable that these 28 states will never ratify it. Significantly, many states which voted in favour of the Treaty, publicly announced displeasure with different aspects of the Treaty, which means that their national governments may also oppose sections of the Treaty and may ultimately reject the creation of an International Criminal Court. Another significant aspect is the fact that the one remaining superpower, the United States, voted against the Treaty. Pressure may be brought to bear on friends of the U.S. to reject the Treaty. If this occurs, the chances of ratification become even slimmer. Another important point is that many will argue that an ICC without U.S. support may encounter some of the same problems that the defunct League of Nations unsuccessfully attempted to overcome.

In sum, the type I cynic would submit that there is no merit in establishing an International Criminal Court. Under
the Cynic Alternative, a second type would argue that although there may be some merit in the creation of an ICC, there are too many obstacles to overcome.

This type II cynic would argue that there does appear to be convincing arguments for one or two of the supposed benefits and that there appears to be some merit in establishing an ICC, possibly citing that, human nature being what it is, international crime will likely increase and that the perpetration of crimes may actually become more heinous than states have thus far witnessed. Proponents of this view could cite examples from history which show that not only have crimes increased, the number of civil wars has increased, and human-kind's ability to use more atrocious weapons, such as biological weapons, has also increased. This being the case, these proponents could argue that it may be necessary to have a solution in place to deal with more horrendous crimes, since Ad Hoc Tribunals have not alleviated the problem, but that the creation of an ICC appears to have too many obstacles standing in its way.

This type II cynic would argue that when one stacks up the benefits versus the obstacles to the establishment of an ICC, the obstacles side would overshadow the benefits. Even though only a few obstacles were analyzed in Chapter 4, this cynic would submit that these are evidence enough of the unlikelihood of the Treaty ever being ratified by enough states. Many of the same arguments which were put forth by the type I cynic would be reiterated by proponents of this viewpoint. The sheer number of
states who spoke out against having the Security Council acting as a trigger mechanism; against giving the Prosecutor the power to initiate investigations; and, against even having aggression included as a core crime in the first place, give a strong indication that even the 120 states that voted in favour of the Rome Treaty may well have second thoughts when it comes to ratification.

Under the Cynic Alternative, there is a final type III cynic who believes that it is possible that the court may come into existence but that there are serious flaws that could ultimately hamper the effectiveness of the court. In Chapter 4, the issue of trigger mechanisms was analyzed in depth and many opponents of Security Council triggering of investigations fear that this proviso could seriously hamper the effectiveness of the court. The type III cynic would agree with this assertion. He/she would argue that no judicial organ should be under the control of any political organ. If the Security Council has the ability to stall an investigation of a Chapter VII violation because it is already on the agenda of the Council, then, this automatically hampers the effectiveness of the court. If the Security Council refuses to define an act as an act of aggression, therefore stopping the court from initiating an investigation, then the court's effectiveness has been hindered once again.

The type III cynic would also state that giving the Prosecutor the power to initiate his/her own investigations
could prove to be a stumbling block for the court because some states may not agree to cooperate with the investigation of a national, especially if that state argued against giving this right to the Prosecutor in the first place. This issue is an example of how the Cynic Alternative becomes complicated because there are also some type III cynics who believe that it was important that the Prosecutor be given this right to initiate investigations to distance the court from political organs such as the Security Council. Others would argue that the court needs the extra clout that the Security Council could provide, as was mentioned in a previous argument.

It is apparent that the Cynic Alternative becomes complicated by different types of cynics with diverse views even on whether or not the creation of an ICC is a practical idea. Whereas advocates of the Idealist Alternative are drawn to the idea of desirability, proponents of the Cynic Alternative (with its more factually-based beliefs) find practicability to be more important. Since no state came out publicly against the creation of an ICC before the Rome Conference, it is difficult to give examples of states that fall under the category of Cynic Alternative. However, one can speculate on possible states that would fall under this category based on stalling tactics. In 1995, a Matrix143 was developed by NGO's that showed which states voted in favour of setting up a Preparatory Committee (PrepCom) to develop the groundwork for the

143 See Appendix for copy of Matrix.
creation of an ICC and for setting a definite date for a Plenipotentiary Conference to establish an ICC. It could be argued that states which voted against setting a definite date for a Treaty Conference or for setting up a PrepCom were attempting to stall the process. Some of these states include Algeria, China, India, Israel, and the United States. It is interesting to note that of these five states, only Algeria voted in favour of the Rome Treaty. Therefore, one could assume that the 1995 Matrix is an early indication of stalling tactics by four states which did not come out publicly against the creation of an ICC, but did vote against the Treaty at Rome. Consequently, one could argue that China, India, Israel, and the United States fall under the category of Cynic Alternative.

The final viewpoint to be discussed could be labelled the Middle-of-the-Road Alternative. Proponents of this view are convinced of the importance of a majority of the benefits and see merit in the establishment of an ICC, but on analyzing the obstacles to its creation, have to admit that the chances of this court coming into existence are very slim. The difference between this view and the type II cynic relates specifically to the higher number of benefits accepted by this Alternative. The type II cynic only finds one or two benefits convincing, whereas, the Middle-of-the-Road Alternative finds a majority of the benefits to be important. When comparing the desirability of having a judicial body to deal with serious international
crimes versus the practicability of whether states can agree on a reform of this magnitude, proponents of the Middle-of-the-Road Alternative would have to come to the stark realization that, in all probability, this Treaty will never be ratified.

As with the other two Alternatives, the Middle-of-the-Road Alternative encompasses diverse views on differing issues related to both the supposed benefits and obstacles to the creation of an ICC. Some proponents would agree to the desirability of an ICC based on all of the supposed benefits, therefore, appearing to fall under the category of Idealist Alternative, but part company on the issue of obstacles, having to conclude that ratification will never occur. Others would not agree with all of the supposed benefits, believing that some are indeed mere rhetoric, but seeing merit in most of the supposed benefits such as strengthening the rule of law or even assisting the U.N. with its goal of maintaining international peace and security. Proponents of this viewpoint see merit in most of the proposed benefits.

On the issue of obstacles, the Middle-of-the-Road Alternative encompasses diverse views once again. Some would argue that practically-speaking all of the obstacles discussed in Chapter 4 are significant and that ratification will not occur because of all of them. Others would argue that some of these obstacles are not that significant, but that there is one significant obstacle which will ultimately lead to a rejection of the Treaty, such as the high ratification
number.

On specific obstacles such as the role of the Security Council triggering investigations of Chapter VII violations, one could find Middle-of-the-Road supporters on each side of the issue. Some would say that it would actually be beneficial to the court to have the extra clout that would accompany an initiation by the Security Council. Others would argue that it is imperative that a judicial organ not be under the control of a political body such as the Security Council.

Likewise, regarding the issue of empowering the Prosecutor to initiate his/her own investigations, there would be support on either side of the issue. Some would see merit in giving the Prosecutor the power to initiate investigations because this would allow non-state actors, as well as victims, to bring situations before the Prosecutor which need to be investigated. NGO's strongly believe that parties other than states must be able to bring situations before the court, for justice to prevail. On the other side of this issue, some would argue that it was not necessary for the Prosecutor to be empowered to initiate investigations and that changing the original document may needlessly lead to an ultimate rejection of the court, at ratification time.

The issue of ratification is another obstacle which would elicit both support and opposition in the Middle-of-the-Road Alternative. Some would see the high ratification number as
the significant obstacle to the establishment of an ICC which will likely lead to a rejection of the Treaty. Others in this camp would argue that 60 is not that high a ratification number when one considers that 120 states voted in favour of the Rome Treaty. They would cite a different obstacle as the significant one which will lead to a rejection of the court.

As with the Idealist Alternative and the Cynic Alternative, the Middle-of-the-Road Alternative becomes complicated by the sheer number of diverse views existing within this one viewpoint. It is very difficult to speculate on which states would fall under the category of Middle-of-the-Road Alternative because no state has verbalized a belief that the Treaty will never be ratified. However, one could speculate that those states which abstained during the vote on the Rome Treaty might fall under this category rather than under the Cynic Alternative. One source who does fall under this category, however, is the author of this thesis. It is with regret that the author has concluded that although it would be beneficial from an idealistic standpoint for the world community to create a judicial body which would hold individuals accountable for serious international crimes, there are too many serious obstacles which will prevent the ultimate creation of such a body, at this time. Since one needs to justify such a statement, the author will explain this conclusion.

On analyzing the supposed benefits of an ICC, the author concludes that most of these benefits are convincing and that
the creation of an ICC seems merited. The most convincing benefits include strengthening the rule of law, deterrent value (although not being totally convinced that this court would deter potential offenders when one looks at motivation), ending the cycle of impunity (although not totally convinced as this relates back to deterrence), and assisting the U.N. with its goal of maintaining peace and security. The author is not convinced by the argument regarding assisting states that are either unwilling or unable to bring charges against its own nationals, partly because the prime example, drug trafficking, was dropped from the list of core crimes and because animosity would still exist for national officials even with the referral to the ICC. Therefore, the author concludes that the creation of an ICC does seem merited, having accepted a majority of the proposed benefits.

However, on analyzing obstacles to the establishment of an ICC, the author believes that ratification of the Treaty will not occur. The obstacles discussed in depth in Chapter 4 are all significant enough to convince states to withdraw support for the ICC. If one obstacle had to be chosen as the deciding obstacle, it would be the role of the Security Council triggering investigations of both Chapter VII violations and acts of aggression. The reason for this conclusion is that too many states verbally opposed these articles, both before the Rome Conference and at the Conference itself. Also, many NGO's have verbalized opposition and may have inadvertently alerted states to possible
problems such as veto members being in a position to stall or even stop investigations of their nationals, as well as friend's nationals. The author does not see the empowering of the Prosecutor with the ability to initiate his/her own investigations as too significant, but it is possible that some states that spoke out against this change may choose not to ratify for this reason. However, the issue of the high ratification number is another significant obstacle and would be the second deciding obstacle in the author's view, partly because many of the 120 states who voted in favour of the Treaty at Rome nevertheless voiced serious concerns and national governments will have more time with which to critically dissect the Rome Treaty.

In conclusion, the author falls under the category of the Middle-of-the-Road Alternative and believes that, after careful consideration, the Rome Treaty will not be ratified, therefore, the International Criminal Court will not come into existence. Consequently, the creation of an ICC is not a practical reform initiative. Although idealistically-speaking, the author believes that there is merit in establishing such a court and that a majority of proposed benefits are convincing, there are too many obstacles to its creation, at the present time.
APPENDIX

NGO Coalition for an International Criminal Court
Key to Matrix of Country Positions
on Prepcom and Conference Issues

This matrix is based upon the statements of representatives of
governments to the Sixth Committee during the debate on the report of
the Ad Hoc Committee on Establishing an International Criminal
Court October 30 to November 6, 1995. Please note that this
matrix is not intended to be an official record, but was compiled
by consultation among NGO members. We welcome any additional
information, corrections or amendments. An "n/a"
denotes that the delegation's position was unclear.

The two issues on this matrix are: (1) the issue of a Preparatory
Committee and (2) the date of a plenipotentiary conference. A
more expanded version of this matrix which includes seven other
fields is available from the Coalition via email or fax, if email
is not feasible. The other fields are Draft and Discussion or
Discussion Only, Core Crimes, Inherent Jurisdiction, Aggression,
Treaty Crimes, Court Decides Jurisdiction, and Independence of the
Prosecutor.

We have the expanded matrix in Word Perfect for Windows 6.0 and
Word 5.1 for the Macintosh.

<table>
<thead>
<tr>
<th>Prepcom</th>
<th>Date for Conference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country</th>
<th>Prepcom</th>
<th>Date for conference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Algeria</td>
<td>no</td>
<td></td>
</tr>
<tr>
<td>Argentina</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Australia</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Austria</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Azerbaijan</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Belarus</td>
<td>n/a</td>
<td>no</td>
</tr>
<tr>
<td>Country</td>
<td>1997</td>
<td>1997</td>
</tr>
<tr>
<td>-------------------------</td>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>Belgium</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Brazil</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Canada</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Chile</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>China</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>D.P.R. of Korea</td>
<td>n/a</td>
<td>no</td>
</tr>
<tr>
<td>Denmark</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Egypt</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>European Union</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Finland</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>France</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Gabon</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Georgia</td>
<td></td>
<td>1997</td>
</tr>
<tr>
<td>Germany</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Ghana</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Greece</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Guatemala</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>India</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Indonesia</td>
<td></td>
<td>no</td>
</tr>
<tr>
<td>Iran</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Ireland</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Israel</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Italy</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Japan</td>
<td>no</td>
<td></td>
</tr>
<tr>
<td>Jordan</td>
<td>no</td>
<td></td>
</tr>
<tr>
<td>Kenya</td>
<td>no</td>
<td>1997</td>
</tr>
<tr>
<td>Kuwait</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lebanon</td>
<td></td>
<td>1997</td>
</tr>
<tr>
<td>Lesotho</td>
<td></td>
<td>1997</td>
</tr>
<tr>
<td>Libyan Arab Jamahiriya</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Liechtenstein</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Malaysia</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Mali</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Mexico</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Mozambique</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Myanmar</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nepal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Netherlands</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>New Zealand</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Nigeria</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Norway</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Poland</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Portugal</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Republic of Korea</td>
<td>n/a</td>
<td>no</td>
</tr>
<tr>
<td>Romania</td>
<td></td>
<td>other</td>
</tr>
<tr>
<td>Russian Federation</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Rwanda</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Singapore</td>
<td>no</td>
<td></td>
</tr>
<tr>
<td>South Africa</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Spain</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Swaziland</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Sweden</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Thailand</td>
<td></td>
<td>other</td>
</tr>
<tr>
<td>Country</td>
<td>Value</td>
<td>Year</td>
</tr>
<tr>
<td>-------------</td>
<td>-------</td>
<td>------</td>
</tr>
<tr>
<td>Trinidad and Tobago</td>
<td>yes</td>
<td>1997</td>
</tr>
<tr>
<td>Uganda</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>Ukraine</td>
<td>other</td>
<td></td>
</tr>
<tr>
<td>United Kingdom</td>
<td>yes</td>
<td>other</td>
</tr>
<tr>
<td>United States</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Uruguay</td>
<td>no</td>
<td></td>
</tr>
<tr>
<td>Venezuela</td>
<td>yes</td>
<td>1997</td>
</tr>
</tbody>
</table>

This matrix created by:
NGO Coalition for an International Criminal Court
---

c/o WFM-IGP, 777 UN Plaza, 12th Floor
New York, New York, 10017, USA
T: 1-212-599-1320  F: 1-212-599-1332
e-mail: wfm@nywork2.undp.org  cdil@igc.apc.org
BIBLIOGRAPHY

BOOKS


Commission on Global Governance, Our Global Neighborhood (New York: Oxford University Press, 1995)


Lewin, Dr. Isaac, War On War, (New York: Shengold Publishers, 1969)


Manly, Chesly, The UN Record: Ten Fateful Years For America (Chicago: Henry Regnery Co., 1955)


Rae, Heather & Chris Reus-Smit eds., The United Nations: Between Sovereignty and Global Governance? (Australia: La Trobe University, 1996)


Walker, Barbara ed., Uniting the Peoples and Nations: Readings in
ARTICLES


Carlsson, Ingvar, "The U.N. at 50: A Time to Reform" in *Foreign Policy*, No. 100 (Fall, 1995), p. 3-19


Rosenberg, Tina, "Tipping the Scales of Justice" in *World Policy Journal*, (Fall, 1995), p. 55-64


Stowe, Kenneth, "Good Piano Won't Play Bad Music: Administrative


UNITED NATIONS DOCUMENTS


INTERVIEWS

Heinrich, Dieter, Past President of the Canadian World Federalist Association, held at his office in Toronto, May 23, 1997

Martin, Florence, Amnesty International's Deputy Representative to the United Nations, held at her office in New York, April 29, 1997

Newcombe, Hanna, Director of the Peace Research Institute, held at her office in Dundas, May 29, 1997

Pace, William, Executive Director of the World Federalist Association, held at his office in New York, April 28, 1997

Watt, Fergus, Executive Director of the Canadian World Federalist Association, held at his office in Ottawa, April 24, 1997

Wilson, Dr. Lois, President of the Canadian World Federalist Association, held at a meeting in Toronto, April 18, 1997

INTERNET - 1997

"Amnesty International's The ICC: Making the Right Choices" (AI Index: IOR40/01/97 Part I & II) http://www.amnesty.htm


"Canada's Speech to the Sixth Committee on the Establishment of an ICC" http://www.wagingpeace.org/icc_canada.html


"NGO Coalition for an ICC: Key to Matrix of Country Positions on Prepcom and Conference Issues" gopher://gopher.igc.apc.org:7030/0./icc/matrix.txt

"Preparatory Committee for International Criminal Court Concludes Session: To Meet Again in March 1998" http://www.wagingpeace.org/icc_prepcomm_9712.html

"United States Speech to the Sixth Committee on the Establishment of an ICC" http://www.wagingpeace.org/icc_usa.html


INTERNET - 1998

"Amnesty International's The ICC: Making the Right Choices" (AI Index: IOR40/01/97 Part III) http://www.amnesty.htm


"China's Speech to the Sixth Committee on the Establishment of an ICC" http://www.wagingpeace.org/icc_china.html

"Crimes within the Court's Jurisdiction" http://www.un.org/icc/crimes.htm


"International Court for Genocide and Major Human Rights Violations" http://www.wagingpeace.org/internationcourt.html

"International Criminal Court" http://www.brazil.emb.nw.dc.us/fppp16in.htm

"International Criminal Court Timeline" http://www.wagingpeace.org/icc_timeline.html

"Italy's Speech to Preparatory Committee on the Establishment of an ICC" http://www.wagingpeace.org/icc_italy.html

"Mozambique's Speech to Sixth Committee on the Establishment of an ICC" http://www.wagingpeace.org/icc_mozambique.html

"Nuclear Weapons, the International Court of Justice, and the Proposed International Criminal Court" http://www.wagingpeace.org/nuclearweapons.html

"Overview" http://www.un.org/icc/overview.htm


"Statement of H.E. Mr. Lamberto Dini Minister of Foreign Affairs of Italy" http://www.un.org/icc/speeches/718ita.htm


"Trigger Mechanisms and the Exercise of the Court's Jurisdiction" 


"Washington Working Group on the ICC: Q's & A's on the ICC" 
http://www.unausa.org/programs/qaicc.htm

MONOGRAPHS, NEWSPAPERS, PAPERS, AND PAMPHLETS

Amnesty International, Activist (Toronto: Published for AI Members in Canada, October/November, 1996)

Amnesty International, Rwanda and Burundi: A Call for Action by the International Community (United Kingdom: International Secretariat, AI Index: AFR 02/24/95, September, 1995)


Canadian Network for an ICC, Action Alert: Canadian Support for an Independent and Effective International Criminal Court (Ottawa: Canadian Network for an ICC, March, 1996)

Canadian Network for an ICC, An International Criminal Court: Creating a Permanent Court for Crimes Against Humanity (Ottawa: Canadian Network for an ICC, 1993)

Canadian Network for an ICC, CICC Update Prepcomm I (Ottawa: Canadian Network for an ICC, April 12, 1996)

Canadian Network for an ICC, CICC Update Prepcomm II (Ottawa: Canadian Network for an ICC, September, 1996)

Canadian Network for an ICC, CICC Update Prepcomm III (Ottawa: Canadian Network for an ICC, March, 1997)

Canadian Network for an ICC, Recent Developments in the Establishment of a Permanent International Criminal Court: Briefing Notes from Foreign Affairs and International Trade Meeting (Ottawa: Canadian Network for an ICC, September, 12, 1995)
Canadian Network for an ICC, Report from the Briefing on the First Preparatory Committee Meeting on the Establishment of an ICC: Briefing Notes from Foreign Affairs and International Trade Meeting (Ottawa: Canadian Network for an ICC, May 23, 1996)


Canadian World Federalist Association, Canadian World Federalist (Ottawa: Canadian World Federalist Assoc., January, 1997)

Canadian World Federalist Association, Canadian World Federalist (Ottawa: Canadian World Federalist Assoc., July, 1997)

Canadian World Federalist Association, Canadian World Federalist (Ottawa: Canadian World Federalist Assoc., March, 1998)

Canadian World Federalist Association, Canadian World Federalist (Ottawa: Canadian World Federalist Assoc., June, 1998)


NGO Coalition for an ICC, Matrix of Country Positions on the ICC for Nov. 1995 UN Sixth Committee Meetings (New York: NGO Coalition for an ICC, 1995)

NGO Coalition for an ICC, NGO Press Conference on ICC (New York: NGO Coalition for an ICC, August, 1996)

NGO Coalition for an ICC, The International Criminal Court: Information Sheet (New York: NGO Coalition for an ICC,
January, 1997)

NGO Coalition for an ICC, The International Criminal Court Monitor (New York: NGO Coalition for an ICC, Issue 1, July/August, 1996)


NGO Coalition for an ICC, Update (New York: NGO Coalition for an ICC, November 17, 1995)


Thompson, Allan, "War Crimes Tribunal is a Go", The Saturday Star (Toronto: The Toronto Star, July 18, 1998)

Watt, Fergus, "Update on the International Criminal Court" in Peace Magazine (Toronto: Canadian Disarmament Information Services, March/April, 1997)


VITA AUCTORIS

NAME: Jill F. Blake (née Krantz)

BIRTHPLACE: Brantford, Ontario

EDUCATION: BCI & VS Brantford Collegiate Institute & Vocational School, 1970 - 1975

University of Windsor, 1991 - 1995
Joint Honours Degree in Political Science & History, B.A. (Hons.)

Queen's University, Kingston, 1995 - 1996
Law School (6 months)

University of Windsor, 1996 - 1999
Masters Degree in Political Science, M.A.