International Mechanisms Dealing with Gross Violations of Human Rights: Opportunities and Challenges for the International Criminal Court

By Abadir Mohamed Ibrahim

(Adv.) Professor Khushal Vibhute
Addis Ababa University Faculty of Law
March 2009

Approved by the Board of Examiners

International Mechanisms Dealing with Gross Violations of Human Rights:

Opportunities and Challenges for the International Criminal Court

Submitted in partial fulfillment of the requirements of the LLM degree (International Law)

By

Abadir Mohamed Ibrahim

Professor Khushal Vibhute
Advisor Sign.

Dr. Fikremarkos Merso
Internal Examiner Sign.

Dr. Girmachew Alemu
Internal Examiner Sign.

International Mechanisms Dealing with Gross Violations of Human Rights:

Opportunities and Challenges for the International Criminal Court

Submitted in partial fulfillment of the requirements of the LLM degree (International Law)

By

Abadir Mohamed Ibrahim

Advisor

Professor Khushal Vibhute

At the Faculty of Law of the

Addis Ababa University

Submitted on March 2009

ACKNOWLEDGEMENTS

This thesis would not have been completed without the support of many individuals who directly or indirectly supported my endeavors. Particular thanks goes to Professor Khushal Vibhute, Kalkidan Negash, Dr. Alexander Mohamed and my colleagues in the Ministry of Justice.

I would like to express immeasurable gratitude and admiration to my wife Nawal Ahmed for her serene endurance as well as her incalculable support in editing and critically commenting on the many drafts of the study. I am indebted to my parents Dr. Ruslana Barkovskaya and Dr. Mohamed Ibrahim for their support and encouragement that brought me to writing this paper in the first place.

Abadir Mohamed
March 15, 2009
Addis Ababa, Ethiopia

CONTENTS

ABBREVIATONS

African Commission	African Commission on Human and Peoples' Rights
Art. / Arts.	Article / Articles
ASPA	American Service-Members' Protection Act
AU	African Union
Banjul Charter	African (Banjul) Charter on Human and People's Rights
CAT	Committee against Torture
ECA	United Nations Economic Commission for Africa
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	United Nations Economic and Social Council
ECPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ed. / eds.	Editor / Editors
EIDHR	European Initiative for Democracy and Human Rights
EU	European Union
G.A. Res.	General Assembly Resolution
IBRD	International Bank for Reconstruction and Development
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCPR Committee	The Human Rights Committee established by the International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMF	International Monetary Fund
NATO	North Atlantic Treaty Organization
NGO	Non Governmental Organization
OAS	Organization of American States
OAU	Organization of African Unity
OHCHR	United Nations Office of the High Commissioner for Human Rights
Racial Discrimination Committee	Committee on the Elimination of Racial Discrimination established by the International Convention on the Elimination of All Forms of Racial Discrimination
Racial Discrimination Convention	Convention on the Elimination of All Forms of Racial Discrimination (1966)

RPE	Rules of Procedure and Evidence of the International Criminal Court
S.C. Res.	Security Council Resolution
Subcommittee on Prevention	Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture established by the Optional Protocol to the UNCAT
TRC	Truth and Reconciliation Commission
U.N. Doc.	United Nations Documents
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
UNCTAD	UN Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
US/ USA	United States of America
WHO	World Health Organization
WTO	World Trade Organization

Chapter 1: RESEARCH PROPOSAL

1. Title

International Mechanisms Dealing with Gross Violations of Human Rights: Opportunities and Challenges for the International Criminal Court.

2. Background

The advent of the Nuremberg and Tokyo tribunals after the end of the Second World War was taken to imply that the world had found a solution to the question of how to respond to gross violations of human rights and humanitarian law. The optimism evoked by the presumed effectiveness of individual criminal prosecution would not however be seen in practice until the formation of the International Criminal Tribunal for the former Yugoslavia in 1993 and the formation of the International Criminal Tribunal for Rwanda the following year. In the years between the military and ad hoc tribunals the international community had to content itself with numerous but less enthusiastic institutions and mechanisms. The ad hoc tribunals for Yugoslavia and Rwanda inspired and paved the way for the establishment of a permanent International Criminal Court on July 2002.

Despite post war optimism by the time the Nuremberg and Tokyo trials were concluded it was clear that the major players in the war were already in disagreement about the basic meaning and significance of human rights. Even when they agreed about meaning or significance they were least enthusiastic about promoting let alone enforcing whatever they agreed upon. Therefore; we can see that it was because of this that neither the United Nations Charter nor the Universal Declaration of Human Rights gave human rights monitoring in general or collective international response to gross violations in particular any attention whatsoever. That is also why the United Nations and its human rights organs were primarily concerned with standard setting up until the 1960's.

The United Nations General Assembly was the first to show its frustration with the continued passivity of the United Nations and the international community concerning gross and systematic

violation of human rights. This frustration culminated in the General Assembly's choice, in 1962, to cross over into the turf of the Security Council in order to impose what could in effect be characterized as an embargo against South Africa. Following the lead of the General Assembly the United Nations Economic and Social Council ushered in the first international mechanisms dealing with gross violations of human rights. The United Nations Human Rights Commission (established by the United Nations Economic and Social Council in 1946) later developed the 'country specific' and 'thematic' mechanisms some of which dealt with gross violations issues. Although the Security Council followed suit soon after it did so only where it believed that the violations had some nexus to 'international peace and security'. Though it dealt with the same issues the Special Committee on Israeli Practices in occupied Territories had a limited geographical coverage.

In 1976 the International Covenant on Civil and Political Rights came into the scene of international human rights law. Not only did this covenant, together with the Economic, Social and Cultural Covenant complete the normative circle of international human rights law but it also introduced an innovative mechanism for human rights enforcement. The procedural innovation of the covenant was later repeated in five specific normative fields of human rights.[1]

While international mechanisms for human rights implementation evolved under the United Nations distinct but complementary systems were also evolving on three of the continents of the world. Although with salient differences, the 'regional' or 'continental' human rights regimes are characterized by the possession of a commission and later a court of human rights. These systems first evolved in Europe and later in the Americas and in Africa.

Although the evaluation of the accomplishment of international human rights enforcing mechanisms is of mixed results, no one could have failed to appreciate that the mechanisms were phenomenal when looked at relative to what prevailed just before or even at the time of the formation of the United Nations. Good offices, state reporting, interstate complaints, individual/group complaints, fact-finding, investigative reporting, on-site visits, technical advice,

[1] These were the Conventions on; the Elimination of All Forms of Racial Discrimination, the Elimination of all Forms of Discrimination Against Women, Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and on the Rights of the Child. The monitoring organ of the International Covenant on Economic Social and Cultural Rights was created on a later date.

country reports and thematic reports, judicial determinations and enforcement action were all types of procedures associated with the success of the internationalization of human rights. But if the international community was to content itself by thinking that these procedures were sufficient the incidents in the former Yugoslavia and Rwanda served as an unfortunate wake up call. The atrocities in the former Yugoslavia and Rwanda once again reignited the call for international criminal prosecution. A call thought to have gone into oblivion with the memory of Nuremberg and Tokyo. The rekindled interest in international criminal prosecution and the belief that it is the best deterrent against gross violations of human rights and humanitarian law culminated in the establishment of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, and finally the permanent International Criminal Court (ICC).

The Rome Statute of the International Criminal Court (re)introduced a prosecutorial approach to the existing mechanisms in that it seeks to bring to justice perpetrators of gross violations of human rights and humanitarian law. The types of serious violations that the court would deal with are defined in the Rome statute as including; the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[2] Although its name might indicate otherwise the Court does not therefore deal with all international crimes but with those that are defined in its statute. As far as the study area of this dissertation goes the spotlight will be turned on genocide and crimes against humanity and not on war crimes and the crime of aggression as the later are of interest to international humanitarian law rather than international human rights law proper.

The cold war out of the way, the international community has set its sight on exercising international jurisdiction over individuals suspected of committing gross violations as defined by the Rome Statute. The basic aspiration behind the International Criminal Court's establishment seems to be the weariness of the international community over the culture of impunity that continues throughout the world. Thus the logic is that prosecuting individual perpetrators will serve as a deterrent to would be violators. And even if deterrence is not achieved prosecution would still serve the interests of justice and that of ensuring an end to impunity.

[2] Articles 5-8 of ICC Statute.

3. Objectives

The general objective of this research is to evaluate the prospects and impact of the judicial or prosecutorial approach on the contemporary mechanisms of human rights enforcement. International mechanisms that are designed to respond to gross violations of human rights have to take into consideration the political and legal circumstances into which they are launched. This should be done both at the time of their planning and after they begin their work. The latest state of the art human rights mechanism; the International Criminal Court, focuses on prosecuting individual perpetrators of gross violations with the view to instilling a sense of justice in victims and to deter would be violators. The advantage of the International Criminal Court is that it is coming at a time when other response mechanisms have been tested in the field and it therefore has much to learn from them.

Therefore the objective of the paper is to study the strengths and flaws of structural and operational mechanisms dealing with gross violations in order to solicit a set of criteria with which to measure to what extent the International Criminal Court will make a difference to the victims or potential victims of gross violations of human rights.

4. Statement of the Problem

Article 49 of the International Law Commission's (ILC) draft articles on state responsibility[3] pronounces that a state whose international legal right has been infringed may take countermeasures in order to compel the infringing state to redress its wrongs. A cumulative reading of articles 48 and 54 of the Draft envisages that countermeasures may be appropriate in circumstances where these are taken against a fellow signatory of a human rights treaty where the later has violated the human rights of its own citizens. The ILC draft puts the situation in

[3] Responsibility of States for Internationally Wrongful Acts 2001, Official Records of the General Assembly, Fifty-sixth Secession, Suppliment No.10 (A/56/10).

which a 'normal'[4] international obligation is infringed in parallel with a situation in which international human rights obligations are violated. But the reality on the ground seems to indicate that this 'horizontal' enforcement mechanism does not respond even to gross and systematic violation of obligations under human rights treaties as it does to other international legal obligations.

One should not of course, be surprised by such a reaction by states since in the first situation the state taking the countermeasure has presumably been injured in the sense that it has been denied some concession, its property has been expropriated, its citizen injured and so on. In the second situation, despite the violation of a treaty obligation, the state that is supposed to take a countermeasure has incurred no loss whatsoever. It is in fact being asked to sacrifice concessions that may be important to its citizens for the benefit of the citizens of a violating state. Thus the incentive for the implementation of the international law proper does not work in affording respect for human rights law.[5] It is in this sense that we can see the inevitability of an enforcement mechanism specially designed for the enforcement of human rights. But even if human rights enforcement mechanisms and institutions are explained in terms of a collective effort of states that wish to enforce human rights without resorting to countermeasures one may still wonder as to why perfectly rational state actors should want to create semi-autonomous institutions that not only cost them their tax payer's money but also cost them a chunk of their sovereignty. Knowing the motivations behind state parties should help us in understanding why international institutions and mechanisms are structured or empowered in a certain way.

Different states may agree to the creation of an institution or a mechanism for different reasons. But it is also important to note that once the institution has been created it takes up a life of its own and may merit analysis of its own right. Surrounding circumstances such as the powers given to the organ in charge of the mechanism, the power and role given to political actors, the involvement and role of professional actors, the role of nongovernmental organizations (NGOs) the kinds of violations it is set to deal with and so on will be important factors that will determine

[4] **PETER MALANCZUK (ED.), AKEHURST`S MODERN INTRODUCTION TO INTERNATIONAL LAW** 3, 271 (7th ed, 1997).

[5] The situation becomes even more complicated if the concerned states are members of the World Trade Organization (WTO). In this case the anti-discriminatory principles of the organization will make it even more difficult to impose human rights related trade sanctions.

the effectiveness of the mechanism in the protection of human rights. The way the institution evolves and the factors influencing its evolution will also be important in analyzing that mechanism.

In assessing the opportunities and risks facing the International Criminal Court in its dealing with gross violations of human rights this research will consider the factors that have been considered above plus some additional factors. Since the inception of the '1503' mechanism by the United Nations Economic and Social Council there have emerged varying mechanisms dealing with what can be described as 'gross violations of human rights'. Therefore the research is dealing with a system of distinct and yet inter-related mechanisms to which the International Criminal Court is just a new addition. For instance if an act that falls under the jurisdiction of the International Criminal Court is committed it is very likely that the United Nations' Secretary General, Security Council, General Assembly, Human Rights Council; at least one treaty organ and possibly a regional institution will make it their business to respond to such an atrocity. In such a situation it is probable for these institutions and their respective mechanisms to work together in dealing with the situation while it is also possible for them to compete with each other and have conflicting interests. Therefore not only the experience of the time honored mechanisms dealing with gross violations of human rights but also their interaction with the International Criminal Court will be studied in the research so that the contribution and future prospect of the court is better understood.

5. Research Questions

The research questions that will guide the research are:

1. What are gross human rights violations and when is it that they are considered to constitute an international crime? What constitutes the defining thresholds of 'gross violations' and those violations that are deemed 'international crimes'?

2. What motivates states to relinquish their sovereignty in favor of establishing institutions that monitor gross violations of human rights? Does their motivation affect the eventual effectiveness of these institutions?

3. What are the circumstances under which a certain mechanism dealing with gross human rights violations is considered to be effective or otherwise? What is the health of the current mechanisms dealing with gross human rights violations? What are the respective strengths and weaknesses of UN and regional human rights mechanisms dealing with gross violations?

4. How does the establishment of the International Criminal Court affect the status quo of the mechanisms dealing with gross violations? What are the apparent or ulterior objectives for the establishment of the International Criminal Court? What is the likelihood of the International Criminal Court achieving those ends?

6. Methods

The research as a whole and every chapter will set the groundwork with a thorough study of academic literature on the subject at hand. Once the groundwork is set an analysis of relevant cases from which inferences can be drawn will be made. Analysis of treaties and other documents such as resolutions and preparatory documents will also be widely employed.

7. Significance of the Study

All the notable names in international human rights law and practice have at one time or another written comments on the effectiveness of international institutions and mechanisms dealing with human rights enforcement. Authors such Jack Donnelly,[6] Louis Henkin,[7] Henry Steiner,[8]

[6] Donnelly Jack, Human Rights at the United Nations 1955-85: The Question of Bias, *International Studies Quarterly*, Vol. 32, No. 3. (Sep., 1988), pp. 275-303., Donnelly Jack, International Human Rights: A Regime Analysis, International Organization Vol 40 No. 3, The MIT Press., (Summer 1986) pp 599-642

Ramcharan ,[9] Philip Alston,[10] Toney Evans,[11] James Flood,[12] Thomas Buergenthal[13] and plenty other writers have spilled lots of ink on the subject and issues related to it. What is characteristic of these writings is that all of them are concerned with human rights enforcement mechanisms in general (i.e. not with gross violations as such) and most focus only on the United Nations system. Furthermore most of the literature written by these authorities does not seem to have brought about any consensus as to what the general and specific principles for assessing the effectiveness of international human rights mechanisms are. No systematic attempt has of course been made to such end. This study shall attempt to systematically analyze the criteria employed by these authors. It shall also study the history of the mechanisms dealing specifically with gross violations and come up with common denominators that can be reasonably used to assess these institutions in general and the International Criminal Court in particular.

Another set of authors on the other hand focus on specific UN[14] or regional[15] mechanisms dealing with gross violations of human rights. While these authors also analyze their subject in a

---

[7] Louis Henkin, The United Nations and Human Rights, *International Organization*, Vol. 19, No. 3, The United Nations: Accomplishments and Prospects. (Summer, 1965).

[8] Steiner Henry J., "International Protection of Human Rights" in Malcolm Evans (ed.) International Law 757-787 (Oxford University Press, 2003).

[9] Ramcharan, B. G., *Strategies for the International Protection of Human Rights in the 1990s*, Human Rights Quarterly, Vol. 13, No. 2. Johns Hopkins University Press (May, 1991), pp. 155-169., B. G. Ramcharan, The Role *of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts*; Conference-The American Red Cross-Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts April 12-13, 198333 American University Law Review 99 (Fall, 1983)

[10] Philip Alston, *The UN's Human Rights Record: From San Francisco to Vienna and Beyond*, 16 Human Rights Quarterly 375-390 (May, 1994).

[11] Tony Evans (ed.) Human Rights Fifty Years On: A Reappraisal (1998) Manchester University Press, Manchester.

[12] James P. Flood, The Effectiveness of UN Human Rights Institutions (1998).

[13] Thomas Buergenthal, *The Evolving International Human Rights System*, 100 The American Journal of International Law 783-807 (Oct., 2006).

[14] For example Ron Wheeler, *The United Nations Commission on Human Rights, 1982-1997: A Study of "Targeted" Resolutions*, 32 Canadian Journal of Political Science (Mar., 1999), B.G. Ramcharan, *The Good Offices of The United Nations Secretary-General in the Field of Human Rights*, 76 American Journal of International Law, (January, 1982).

[15] Tittemore Brian D., *Ending Impunity in The Americas: The Role of The Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law*, 12 Southwestern Journal of Law and Trade

way that is helpful to this dissertation they do not attempt to generalize these in a way that their work could be used to analyze other mechanisms. The writings on specific mechanisms are no different from those mentioned in the preceding paragraph in not developing systematic and agreed upon principles. Furthermore both types of writings seem to have generally been written before the establishment of the International Criminal Court therefore leaving a lot of space for research in the area.

A third set of authors focus directly on and the International Criminal Court.[16] Although many of these discuss the opportunities and challenges for the International Criminal Court, none of them discusses the issue directly and substantially in connection to gross violations of human rights. Furthermore none of these authors have attempted to make a comparative analysis of the International Criminal Court with the older institutions. Thus this study has ample opportunity to fill in the gaps in research by studying the international court as an institution concerned not only with humanitarian law but also with gross disregard to human rights law.

The significance of this study lies first in that it is going to cover familiar ground albeit with a fresh and comprehensive perspective. That is, it is going to study international mechanisms dealing with gross violations of human rights in a comprehensive manner and with a view to identifying and evaluating criteria that can be employed to assess what the prospects and challenges for the International Criminal Court are going to be. Second the study will concentrate on the International Criminal Court thus covering new ground on the subject. Not only has the knowledge gathered about mechanisms dealing with gross violations of international human rights law has not so far been used to evaluate the prospects and risks of the International Criminal Court but the Court has also been seldom studied as a human rights institution.

in the Americas (2006), Grossman Claudio, *Strengthening the Inter-American Human Rights System*: *The Current Debate, The Future of the Inter-American System for the Promotion and Protection of Human Rights*, 92 American Society of International Law Proceedings, (April 1-4, 1998); Pasqualucci Jo M., *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 University of Miami Inter-American Law Review (Winter 1994-1995); Adjami Mirna E., *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?* 24 Michigan Journal of International Law (Fall 2002); David P. Forsythe, *The United Nations and Human Rights, 1945-1985*, 100 Political Science Quarterly (Summer, 1985); Welch Claude E. Jr., *The Organisation of African Unity and the Promotion of Human Rights*, 29 The Journal of Modern African Studies (Dec., 1991), Heyns Christof, *The African Regional Human Rights System: The African Charter*, 108 Penn State Law Review (Winter 2004); Odinkalu Anselm Chidi, *Proposals for Review of the Rules of Procedure of the African Commission of Human and Peoples' Rights*, 15 Human Rights Quarterly (Aug., 1993).

[16] Note that most of the material in the bibliography is on this subject.

Therefore, at its least, the paper will contribute to the knowledge of international institutions and mechanisms in their role as responders to gross violations of human rights. This is particularly true for the main attraction of the study: the International Criminal Court. The study will most certainly analyze the prospects and risks facing the Court and suggest ways in which it should handle these.

The paper may at its best contribute objective and widely applicable criteria of evaluating the effectiveness of international mechanisms for dealing with violations of human rights in general and to gross violations in particular. If such criteria were to be found and applied to a range of different situations and at different times the contribution of this study will be immense. Although a "silver bullet" solution is unlikely to be found, the study may identify the pertinent institutional concerns and come up with an objective checklist that ought to be considered in evaluating any international institution (and especially new ones) dealing with gross violations of human rights.

8. Limitations of the Study

The term 'gross violations of human rights' has been widely used in international legal academic and practical discourse. Even so; there appears to be no legally binding or otherwise authoritative definition of the term. Nevertheless the second chapter will define the term based on the meaning that it implies as expressed in the declarations of different organs of the United Nations. The meaning of the term will also be gleaned from what kinds of violations have been considered as gross violations and dealt with accordingly. Scholarly writings will also be considered in as much as they may be useful.

Another limitation is that factors influencing human rights mechanisms dealing with gross violations of human rights may not always be accessible to the public. Not only will some facts be confidential by operation of the laws of states and the rules of international institutions, some of the factors could be contained in the unpublished observations of individuals who have worked in these institutions. This study is limited to information that has been released to the media or published in scholarly articles.

9. Organization of the Study

The research is divided into six chapters. The first chapter, the research proposal, outlines the background of the study, explains the objectives, states the research problem, lists the research questions, outlines the method to be used in the research, justifies the significance of the study, outlines the limitations of the study and contains a brief literature review.

The second chapter defines the substantive and conceptual framework of the study. The chapter looks into the meaning of "gross violations of human rights" in relation to the jurisdiction of the International Criminal Court. It also places international mechanisms that deal with gross violations in their typological and historical perspective.

Chapter three introduces us to mechanisms that are based on the Charter of the United Nations. It begins with how the United Nations Organization came to deal with gross violations of human rights and which institutions were involved in this regard. It specifically looks into the mechanisms of the Security Council, the General Assembly, the Secretary-General, the Commission on Human Rights and the Human Rights Council. The chapter ends with an analysis of the factors that have contributed to making the Charter based mechanisms more or less effective.

The fourth chapter deals with mechanisms established by independent treaties signed under the auspices of the United Nations. Rather than looking at all treaty based mechanisms the chapter focuses only on those that are directly related to gross violations of human rights. After the treaty based mechanisms described lessons for the effectiveness of mechanisms dealing with gross violations are sought. The mechanisms discussed under the chapter are those established by the International Covenants: on Civil and Political Rights, against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, on the Elimination of All Forms of Racial Discrimination and on the Suppression and Punishment of the Crime of Apartheid.

The fifth chapter introduces the experiences of the three regional mechanisms. It draws from the experiences of the European, Inter-American and African systems and assesses the factors that have aided or hindered these institutions from their tasks in the fight against gross violations.

The sixth chapter begins with a bird's eye view of the International Criminal Court. It then goes directly into organizing and drawing from the experiences of the mechanisms discussed in the body of the paper. The last part briefly recaps the conclusions that can be drawn about the strengths and weaknesses of the International Criminal Court based from the knowledge gained from the structure and practice of the mechanisms that have been in existence before the Court. The conclusion and recommendation part recaps the lessons drawn and makes recommendations that might help minimize the drawbacks of the International Criminal Court and capitalize on its strengths.

Chapter 2: DEFINITION OF THE SUBSTANTIVE AND CONCEPTUAL FRAMEWORK

Introduction

This study delineates the substantive and conceptual framework of the study so that a coherent sense of direction and scope is maintained throughout the study. Accordingly, the concept of gross violations is taken up first wherein it is shown that a qualitative and quantitative method for the definition of the concept is discerned from mainly legal documents and also from scholarly writings. The second section relates the concept of gross violations with that of international crimes and provides a working definition for the benefit of the study. The last section explains what mechanisms dealing with gross violations are and gives a brief account of the evolution of mechanisms dealing with gross violations.

2.1 The Concept of Gross Violations of Human Rights

Not unlike many concepts in law and most in international law, the concept of gross violations of human rights does not have a single meaning or a definition which is uncontroversial. A word such as this is even more elusive because it is widely used besides lawyers by politicians, diplomats, international organizations and journalists. But despite its elusiveness we are going to have to pin it down to a workable definition for the purpose of this study. This is indispensable in view of the fact that the rest of the paper studies mechanisms that deal with gross violations. It is only with a clear understanding of the concept that the study can continue while maintaining a sense for direction and scope.

The lexical definitions of the words constituting the term 'gross violations of human rights' gives us a very good idea of the connotation of the concept. 'Gross' according to Encarta dictionaries is something that is '**obviously wrong:** flagrantly wrong or unmitigated"[1] and the Black's law dictionary uses the words "out of all measure", "beyond allowance", "not to be excused" and "flagrant" to describe the word "gross".[2] The word 'violation' on the contrary, has an

[1] Microsoft® Encarta® 2007. 1993-2006 Microsoft Corporation.
[2] Henry Campbell Black (The Pub. Editorial Staff, Rev.), Black's Law Dictionary (1968).

unambiguous denotation in everyday use and more so in international law. According to Encarta dictionaries a violation is 'a crime or infringement of a law or rules' while the New Webster's Dictionary uses the words 'infringe or transgress'[3] to give meaning to the word. To violate could also be taken to mean to disturb or interfere with one's right or honor in a way that is morally unacceptable.[4] Although both meanings are used when describing the violation of human rights we will take the first of the two meanings in this paper as it is more suitable for a study of legal perspective as opposed to a moral or a political one. The word breach, which is defined by Encarta dictionaries as meaning 'a failure to obey, keep, or preserve something such as a law …' is the closest in meaning to and is interchangeably used with the word 'violation' in international law.[5] The International Law Commission's (ILC) draft articles on the Responsibility of States for Internationally Wrongful Acts[6] while defining the objective element of 'internationally wrongful acts' states that '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.'[7] Thus we can take 'violations' of human rights to refer simply to acts that are not in conformity with international human rights obligations of a state. We should however note that although the ILC draft does not deal with issues related with the violation of international law by individuals[8] this does not diminish its utility of supplying insight to the issue at hand.

And the most slippery of the tree words constituting the concept of gross violations is 'human rights'. Although the definition and meaning of this term is more controversial than both the previous terms combined, its meaning and definition should not cause us much concern as the study is interested only with their conventional meaning in international law. For the purpose of this paper we shall define human rights as those entitlements or claims[9] of human beings that

[3] The New Webster's Dictionary of the English Language College Edition, Surjeet Publications (Fifth Reprint 1989) Delhi, India.
[4] Ibid, 'desecrate; to treat with irreverence; to profane or profanely meddle with; to ravish or rape; to do injury to; to outrage'.
[5] The Rome Statute of the International Criminal Court (see in particular how article 8 (1) (a) and (b) use the two words interchangeably) available at <www.un.org/law/icc/statute/romefra.htm.> accessed on 19/06/08. The ICCPR and both its Optional protocols also use the word 'violation'.
[6] *Supra note* 4 (of Chapter 1) Responsibility of States for Internationally Wrongful Acts 2001,
[7] Ibid Article 12.
[8] Ibid Article 58.
[9] Note that the emphasis is not on what kinds of entitlements or claims they are as this issue itself is subject to doctrinal debate. Thus we are using words such as entitlement or claims only to avoid a circular definition which adds nothing by defining 'human rights as those rights' and so on. For the most comprehensive widely regarded exposition of the concept of legal rights see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as*

emanate from or are guaranteed by international law. Simply put, human rights are the entitlements or claims of human beings that are defined as such in international law. We are thus not concerned with the foundational source of human rights; whether that foundation is the nature or dignity of mankind, the command of the sovereign, class or gender domination or culture. One has to admit that the definition might be oriented towards a positivistic definition of human rights. Nevertheless such inclination is not due to a deliberate choice of doctrine as the definition is taken up only for utilitarian reasons. This definition is clear and it defines the scope of the paper in a way that allows the discussion of the main issue regarding the mechanisms without having to worry about the debate on the meaning of human rights.

We can see from the lexical definition of the constituent words of the concept of gross violations of human rights that not only is the word 'gross' less precise than the other two but also that as the qualifier of the term it specifies the kinds of violations which can be contrasted to human rights violations that are not 'gross'. We can deduce from the discussion on the lexical approach that gross violations are different from the generic 'human rights violations' in that they are more serious than violations that are not gross. The ILC draft defines the concept of 'gross violations' in this sense where it defines 'serious breaches' of international law. It defines a serious violation as one which is 'gross or systematic'.[10] This 'genus and difference' method of defining the concept is inadequate for the purposes of this paper as it is rather circular and tells us no more than that gross violations are more serious than non-gross or minor violations.

Now we will turn to the definitions of different organizations and scholars for more precise attempts to clarify the meaning of gross violations of human rights. Before beginning the discussion a word of caution is in order. One has to be very careful in weighing the value of these definitions not only because none of the individuals or organizations issuing them are authoritative or have the authority to issue a binding definition but also because most of them

Applied in Judicial Reasoning, 23 The Yale Law Journal 16-59 (Nov., 1913); Walter Wheeler Cook, *Hohfeld's Contributions to the Science of Law*, 28 The Yale Law Journal 721-738 (Jun., 1919); L. H. LaRue, *Hohfeldian Rights and Fundamental Rights*, 35 The University of Toronto Law Journal 86-93 (Winter, 1985).

[10] Article 40 (2) of ILC Draft rules on the Responsibility of States for Internationally Wrongful Acts (2001) *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10).

define the concept with a specific interest or aim at hand. We will raise such and other similar concerns as we carry on with a detailed discussion of each.

Probably amongst the more authoritative and certainly the most widely used definitions of the concept is found in the Restatement (Third) of The Foreign Relations Law of the United States issued by the American Law Institute (1987) [Hereinafter referred to as 'the Third Restatement' or 'the Restatement'].[11] According to this document a human rights violation is gross 'if it is particularly shocking because of the importance of the right or the gravity of the violation.'[12] We can see that this definition assumes, as we did in the lexical discussion, that gross violations are different from other violations in that they are more serious and shocking.

But what is at the essence of the definition is that it hinges upon two key but mutually exclusive and alternative pillars. A human right violation is gross owing to either the importance of the violated right or because of the magnitude, persistence or consistence of the violations. The Third Restatement is quite clear as to which rights are important enough to have their single violation considered as shocking and gross. These are: genocide; slavery and slave trade; murder or disappearance; torture or cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination.[13] Since this pillar as a method of definition requires the violation of a clearly defined list of rights let us name it, for the purpose of this paper, the 'importance doctrine' or the 'qualitative doctrine'.

The second pillar depends on the degree of seriousness of the violations which the restatement sets the floor at 'consistent violations' that are 'conducted as a state policy'. The second pillar seems to be devoid of a qualitative assessment of which right(s) to designate as important like that of the first pillar. Nevertheless a closer reading of the Restatement reveals that the violations of economic, social and cultural rights cannot qualify as gross violations. The Restatement states that the violation of rights in the UDHR can qualify as gross only if some 'fundamental and

[11] Note that the statements of the American Law Institute are not binding even on the US. Never the less since the members of the Institute and the smaller committees or working groups that draft these statements are renowned practitioners and scholars whose work could be seen as a potential source under article 38 (1) (d) of the statute of the International Court of Justice (ICJ) See Wikipedia, American Law Institute, From Wikipedia, the free encyclopedia available at <http://en.wikipedia.org/wiki/American_Law_Institute> accessed on 26/05/08; Stiener & Alston at 234-35.

[12] Ibid, Wikipedia.

[13] STEINER AND ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT, LAW POLITICS AND MORALS 234-35 (2000).

intrinsic' rights are consistently violated as a state policy. It lists systematic harassment, invasion of privacy, arbitrary arrest and prolonged detention, denial of a fair criminal trial, grossly disproportionate punishment, mass uprooting of populations, denial of freedom of conscience and religion, denial of personality before the law and individual racial or religious discrimination as violations against 'fundamental and intrinsic' rights.[14] Since it is only civil and political rights that are listed as examples of the kinds of rights that have to be violated systematically and as a state policy in order to qualify as gross violations it can be deduced that there can be, according to the Restatement, no such thing as gross violations of economic, social and cultural rights. In comparison to the 'importance doctrine' this pillar involves the measurement of the magnitude, persistence or consistence of violations. Thus we shall call it the 'magnitude doctrine' or the 'quantitative doctrine' which is meant to refer to the magnitude or seriousness of the violations.[15]

The definition adopted by the International Law Commission's (ILC) 'Draft Code of Crimes against the Peace and Security of Mankind'[16] is different from the Restatement's in that it uses both the qualitative (importance) and quantitative (magnitude) doctrines cumulatively.[17] Although the draft is not binding its strength comes from the fact that it is one of the drafts issued by the ILC. Not only has the ILC prepared or codified a good many prominent treaties in existence today[18] but its un-ratified drafts can also be seen as an authoritative opinion of the substance of customary international law. Accordingly Article 21 of the ILC Draft defines gross violations as '*any violation of the following human rights: murder; torture; establishing or maintaining over persons the status of slavery, servitude or forced labor; persecution on social,*

[14] Ibid

[15] Note that the description of the methods of definition as the importance vs. magnitude is not very meticulous since for instance genocide and systematic racial discrimination are most likely to be committed on a large magnitude. Never the less what the distinction is meant to point toward is the difference in approach. That is; while the importance doctrine might incidentally identify or point to violations that are by necessary implication committed on a large scale this fact is not the reason why they fell in that category. And the magnitude doctrine is meant to point to categorization based on the scale of the violation without having regard as to the nature or importance of a particular right in point.

[16] LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 350 Annex 1 (1997). Also available at <http://untreaty.un.org/ilc/texts.7_4.htm> accessed on 04/03/08.

[17] As opposed to the Restatement which uses them alternatively or independently of one another.

[18] The Rome Statute of the International Criminal Court (1998); The 1958 Conventions on: the Territorial Sea and Contiguous Zone, the High Seas, Fishing and Conservation of Living Resources, the Continental Shelf; Vienna Convention on the Law of Treaties (1969), Vienna Convention on Diplomatic Relations (1961), Vienna Convention on Consular Relations (1963) are good examples.

political, racial, religious or cultural grounds in a systematic manner or on a mass scale'. It also adds the 'deportation or forcible transfer of population' without qualifying it as systematic or on a mass scale. One can of course guess that deportation of a population need not be qualified as it is, by definition, an act that can be undertaken on a mass scale and systematically.[19] Thus according to this definition in order for there to be a gross violation not only does a list of important set of rights have to be violated but the violation has to be of mass proportions and conducted systematically.

South Africa's Promotion of National Unity and Reconciliation Act of 1995[20] contains its own definition of gross violations of human rights. This law was passed by the South Africa's first democratic government in order to bring the nation to grips with its history of apartheid by, among other things, studying and documenting what had happened in the past (so that it may not forgotten by future generations) and the determination of who should be amnestied or prosecuted for past violations.[21] According to this law gross violation of human rights are '*the violation of human rights through- (a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit'* the aforementioned acts.[22]

If we compare this definition to that of the Third Restatement we can notice that this one has only one pillar. It only lists a set of human rights violations that if committed would qualify as gross violations of human rights. As the definition clearly lays down acts the commission, attempt, conspiracy, incitement, instigation, command or procurement of which constitutes gross violations we can say that its definitional method is the importance doctrine. This conclusion is affirmed by Article 2 (4)(a)(i) of the Act which classifies gross violations into those that are part of a 'systematic pattern' and those that are not.[23] Thus for South Africa's National Unity and

[19] Although the same might be said of genocide and apartheid the 1991 draft does not treat the two as gross violations of human rights. The two are rather categorized into the generic group of 'crimes against the peace and security of mankind'.

[20] Promotion of National Unity and Reconciliation Act of 1995, Law No. 34 (July 26, 1995) available at <http://www.doj.gov.za/trc/legal/act9534.htm> accessed on 8/04/2008.

[21] Ibid, The act established a Truth and Reconciliation Commission, a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation for this purpose.

[22] Ibid, Article 1 (1) (ix).

[23] The Truth and Reconciliation Commission has (despite article2 (4)(a)(i) which allows it to examine gross violations irrespective of their magnitude) interpreted its powers restrictively to allow it to consider only specific

Reconciliation Act gross violations themselves can be divided based on the magnitude of violations.

There is little agreement among scholars of international law or human rights law on the definition of gross violations. While most writers prefer to adopt the definitions of either the 'Promotion of National Unity and Reconciliation Act' of South Africa or that of the 'Third Restatement' of the American Law Institute, some have attempted to craft definitions of their own. Thomas Buergenthal for example takes up the quantity doctrine by characterizing gross violations as 'large scale and systematic denials' of rights.[24] Juan Méndez also subscribes to this definition by maintaining individual cases of violation matter only as far as they are a part of a larger and systematic violation of the same right.[25] Hilde Hey on the other hand takes up the importance doctrine by limiting gross violations to 'acts of torture, disappearances and extra judicial executions'.[26] Ronald Slye also points out that several authors and institutions define gross violations in terms of their being fundamental or their being non-derogable.[27]

From our discussion so far we can notice a certain trend in the definitions of 'gross violations of human rights'. As organizing ideas or trends from the definitions we have noted that the definitions use either or both the qualitative (importance) or the quantitative (magnitude) methods. Nevertheless definitions such as that of the 1991 ILC Draft use both methods in a way that makes it difficult to distinguish between the two methods. Having said this much about the definitions it should be noted that we are at liberty to either choose any of those definitions or to formulate one appropriate for the study. Nonetheless such a task will be delayed in order to accommodate another concept that is related to gross violations per se and is particularly relevant to the study. Since the research focuses on the International Criminal Court as its ultimate object of study it is necessary to consider how the court is interrelated with the concept of gross

---

acts of individuals and not those that occurred on a wide scale such through legislation of the state. See Erin Daly, Transformative Justice: Charting a Path to Reconciliation, 12 International Legal Perspectives (Fall, 2001/Spring, 2002) at 143.

[24] THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS: IN A NUTSHELL 92 (West Nutshell Series).

[25] Juan E. Méndez, *Accountability for Past Abuses*, 19 Human Rights Quarterly 270 (May 1997).

[26] HILDE HEY, GROSS HUMAN RIGHTS VIOLATIONS: A SEARCH FOR CAUSES A STUDY GUATEMALA AND COSTA RICA 18 (1995).

[27] Ronald C. Slye, *The Legitimacy of Amnesties under International Law and General Principles Of Anglo-American Law: Is a Legitimate Amnesty Possible?* 43 Virginia Journal of International Law 247, n.2 (Fall 2002); See article 4 (2) of the ICCPR for a list of non-derogable rights.

violations. In other words we will consider the relation of the concept of gross violations with international crimes thus relating it to the jurisdiction of the International Criminal Court.

2.2 International Crimes and Gross Violations

Defining what international crimes are, similar to the concept of gross violations, not an easy task. Nevertheless our interest in the issue is limited to studying the International Criminal Court as a human rights mechanism dealing with gross violations. Therefore we will only test the waters of international criminal law before going back to the main topic.

Put simply international crimes are acts that are proscribed by exceptional rules of international law that provide for the criminal liability of individuals. They are just like crimes of the domestic legal order except that they are prohibited at the international level. Although we will hold on to this simple understanding of international crimes it should be pointed out that the doctrinal analysis of the concept is a Pandora's Box of differing views. The 1976 version of the ILC Draft Articles on State Responsibility[28] could be a good indicator of the complexity of the matter. Article 19 of the Draft when distinguishing 'international delicts' from the more specific 'international crimes' states:

> *An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime ... an international crime may result, inter alia, from … a serious breach … such as … aggression … colonial domination … slavery … genocide … apartheid … massive pollution of the atmosphere or of the seas.*

This definition highlights that it is from the international community's need to protect its fundamental interests and from its consensus that the notion of international crimes emerges. Although these elements are important components of the meaning of international crimes as it is used in this paper, it is to be noted that the claim of article 19 is a far cry from settled doctrine.

[28] See Yearbook of the International Law Commission (1976); Shaw, infra *note* 42, at 544.

This is because the article is claiming that states rather than individuals would be criminally liable for international crimes. Such a crime was of course a progressive proposal on the part of the ILC (in 1976) as the whole notion was scraped in the 2001 version of the Draft.

Irrespective of the ILC's use of the term 'international crime' as a concept of state responsibility the meaning given to the term in this paper relates to the criminal responsibility of individuals in international law. Even in this sense, it might be difficult to find consensus on an exact definition. Antonio Cassese for example argues that the mere recognition of a crime in international law is not enough to qualify it as an international crime. He maintains that the proscription must additionally: aspire to guard important values of the international community, be a violation of customary international law, be binding on all states and individuals, and override rules laying down sovereign immunity to officials.[29] Ratner and Abrams on the other hand (while agreeing that the mere recognition of a crime in international law does not suffice to qualify it as an international crime) elucidate the concept adding only that international crime imposes an obligation on states to prosecute perpetrators and that it authorizes all states to prosecute them.[30] While these doctrinal differences are important the difference they make to the list of international crimes is small.[31] And since the interest of this study is focused on the ICC we shall set the doctrinal debate aside to look at the court's list of international crimes which is not all too different from that of the aforementioned scholars.

The Rome Statute which established the International Criminal Court does not purport to give a concise definition international crimes. It lists what it calls the most serious international crimes that delineate its jurisdiction. These are the crime of genocide; crimes against humanity; war crimes and the crime of aggression. We can see from the list that not only does the Rome Statute

[29] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 23 (2003).

[30] STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW BEYOND THE NUREMBERG LEGACY 10 (1997); An even more liberal definition is given by Bassiouni who argues that aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture can be considered as international crimes that have attained the status of jus cognes; M. Cherif Bassiouni, *International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"*, Law and Contemporary Problems, Vol. 59, No. 4, *passim* (Autumn, 1996).

[31] See Cassesse, *supra note* 29, at 24; and Ratner & Abrams, *supra note* 30, at 12; respectively. Cassese lists war crimes, crimes against humanity, genocide, torture, aggression and extreme terrorism as international crimes. While Ratner and Abrams add slavery and forced labor, apartheid and forced disappearance and exclude terrorism to the same list.

focus on the most serious international crimes but it also singles out the most uncontroversial. The same approach is followed by the International Law Commission's 1996 Draft Code on the Crimes against the Peace and Security of Mankind with the addition of 'crimes against United Nations and associated personnel' as an international crime.[32] The 1991 ILC Draft on the other hand offers the longest list which in addition to the aforementioned adds: threats of aggression, intervention, colonial (alien) domination, apartheid, use of mercenaries, international terrorism, drug trafficking and willful and severe damage to the environment.[33]

A closer look at the Rome Statute's and 1996 ILC Draft's list of international crimes that are, at the same time, also violations of human rights one sees how profoundly similar they are to the concept of gross violations of human rights. The qualitative and quantitative doctrines that we extrapolated from the definitions of gross violations are also present in the two documents. The qualitative approach of the Rome Statute and the 1996 Draft[34] is different from those of the Restatement and the South African Reconciliation Act. And the later two are also quite different from each other. According to the Rome Statute and the 1996 Draft the only act that constitutes an international crime without being qualified by an indicator of magnitude is genocide which is, because of its nature, conducted systematically. For the Restatement and the South African Reconciliation Act the list is much wider although some of the violations listed by the restatement (like genocide, slave trade, systematic racial discrimination) are by definition or almost always conducted in a systematic manner and on a massive scale.

Coming to the magnitude or quantitative method we can see that the violations that constitute international crimes and gross violations are even more alike both in terms of the indicator of the magnitude and the list of acts. Both the Rome Statute and the 1996 Draft use 'widespread OR systematic' as a qualifier indicating the magnitude of human rights violations that is needed to reach the point where the violation becomes a crime against humanity.[35] The 1991 ILC Draft uses the 'widespread OR systematic' standard while defining gross violations and not

[32] Note that the 1996 draft is the last of such drafts issued by the ILC. The first one was the 'Draft Code of Offences against the Peace and Security of Mankind' issued in 1954 followed by the 1991 draft and the 1996 draft 'on the peace and security of mankind', available at <http://untreaty.un.org/ilc/texts/7_4.htm> accessed on 16/08/08.
[33] Ibid
[34] Which is by the way the same with the Rome Statute to the last word.
[35] See article 7 of the Rome Statute and article 18 of the 1996 Draft.

international crimes.[36] The restatement uses 'consistent violation as a state policy' as its standard while the Inter-American Commission on Human Rights uses the words 'large scale violations'.

The kinds of violations that if carried out on a scale which is beyond the line drawn by the magnitude indicator would qualify as gross violations or international crimes are also incredibly similar.[37] A comparison of the Rome Statute's list of international crimes to the list of the acts that constitute gross violations in the Restatement shows how much they overlap. The overlapping acts are: genocide, murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity, enforced disappearance and apartheid.[38]

From the foregoing discussion one can notice that the concept of international crime (in relation to human rights) and that of gross violations overlie one another and where differences do exist such difference cannot be articulated primarily because of the imprecision of the concept and definition of 'gross violations of human rights' and to some extent that of 'international crime'. For the purpose of this paper we shall take what is obvious and clearly identified as constituting both a gross violation and an international crime as the perimeter of the study. Both because of the pursuit of what is clearly defined and because this paper focuses on the International Criminal Court we shall define gross violations in reference to international crime. Thus for the purpose of this paper we shall take gross violations of human rights to mean acts that qualify as international crimes that make up the jurisdiction of the International Criminal Court and other serious violations such as torture. If we were to explain this by using the definitional tools chiseled in the previous section two categories of violations would be apparent. Under the qualitative or importance doctrine we can identify genocide and torture while under the quantitative or magnitude doctrine we can identify widespread or systematic violations of rights that fall under the rubric of crimes against humanity.

[36] Article 21 of the 1991 Draft.
[37] The violations of qualitatively chosen rights on a massive magnitude would not of course change the fact that those violations would still be gross violations or international crimes.
[38] See article 7(2) or Rome Statute and the discussion on the Restatement in the previous section.

The definition pieced together for the purpose of this study is nearly identical to that of the ICC definition the only difference laying in that our definition adds torture to the qualitative crimes list. The reason for this is that torture is recognized both as an international crime and a gross violation of human rights. Even though torture is proscribed by the Rome Statute where it is carried out as a part of a widespread and systematic attack (then a crime against humanity) or as a serious breach in an armed conflict (a war crime) it is not prohibited per se as is genocide. [39] This nevertheless is not because it is not an international crime when considered in isolation from conditions qualifying it as a crime against humanity or an international crime. Torture is considered to be an international crime independent of the systematic nature of its commission (magnitude doctrine) or the existence of an armed conflict. This conclusion is indicated by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which imposes on states the duty to prosecute or extradite (Art. 7 and 5), makes it an extraditable offense and allows states to prosecute even where they do not have territorial jurisdiction (Art.8).[40] But even beyond the Torture Convention there is increasing evidence showing that an international crime of torture has attained the status of customary or even a jus cogens norm.[41] Therefore it should be noted that the exclusion of torture from the ICC's jurisdiction is due to the fact that the Court's jurisdiction is meant to cover the most serious of international crimes and not the whole lot.

2.3 Mechanisms Dealing with Gross Violations

For the purposes of this study mechanisms dealing with gross violations are defined as broadly to include institutions and procedures established to or do in fact purport to enforce rules of international law that prohibit the perpetration of gross violations of human rights. The enforcement of the rules of human rights law is conducted at two levels: domestic and

[39] See articles 6, 7 and 8 of the Rome Statute.

[40] Torture Convention available at <http://www.hrweb.org/legal/cat.html> accessed on 22/04/08. But also see William T. D'Zurilla, *Individual Responsibility for Torture under International Law*, 56 Tulane Law Review, 186, 210-14 (1981) for an argument that the Torture Convention does not incorporate a concept of an international crime.

[41] ICTY, Kunarac and others, ICTY Trial Chamber III, judgement of 22 Feb 2001 (case no. IT-96-23-T) available at <http://www.un.org/icty/foca/trialc2/judgement/index.htm> accessed on 06/02/09; Furundzija (case no. IT-95-17/1-A) / European Court of Human Rights, Press release issued by the Registrar, JUDGMENT IN The Case of Selmouni V. France, available at <http://www.echr.coe.int/Eng/Press/1999/Jul_Aug/Selmouni.eng.htm> accessed on accessed on 06/02/09.

international. As a consequence the mechanisms dealing with violations can also be divided into those at the domestic and at the international level. When it comes to dealing with gross violations as with any violation of human rights domestic mechanisms are the first in line and are also more important in terms of the volume of cases handled throughout the world. Three major reasons can be put forward for this state of affairs.

From a historic point of view one can point to the fact that the domestic enforcement of human rights and the mechanisms necessary for such enforcement have existed before the internationalization of human rights.[42] Since domestic mechanisms have evolved way before international ones the former are more developed and entrenched in every society while the later have gradually developed and usually under exceptional circumstances where the former have failed to deliver. As a matter of fact domestic mechanisms used to be the only ones available before the Second World War when domestic sovereignty used to be the dominant ideology in international law.[43]

As a result of the antecedence of the domestic system and from a practical point of view domestic mechanisms are at the brunt of and carry much of the volume of human rights litigation. This is because the domestic system is physically closer to the matter, can deal with the volume of work connected with everyday life and it henceforth extinguishes the need for any international mechanism as long as it is functioning properly. In the section that follows we will briefly discuss domestic mechanisms so as to place international mechanisms in within a bigger picture in which they are but a small part.

2.3.1 Domestic Mechanisms

Because of the two above mentioned reasons the legal point of view on the place and role of domestic mechanisms has evolved in a way that favors the use of domestic mechanisms before international ones are resorted to. For example the International Covenant on Civil and Political

[42] M.N. SHAW, INTERNATIONAL LAW 200 (Fourth Ed. 1997); Burns H. Weston, *Human Rights*, 6 Human Rights Quarterly 259-262 (Aug., 1984).
[43] See, Id., Shaw, at 200.

Rights' (hereinafter ICCPR)[44] classic formulation (in article 2) is that it is the state's duty to 'respect and ensure' human rights 'to all individuals within its territory and subject to its jurisdiction.' States are also expected to 'take the necessary steps' and to 'adopt such legislative or other measures' for the protection of human rights. The ICCPR provides in particular that:[45]

> *Each State Party to the present Covenant undertakes:*
> *a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
> *b. To ensure that any person claiming such a remedy shall have his right thereto determined by the competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
> *c. To ensure that the competent authorities shall enforce such remedies when granted.*

Even though domestic mechanisms carry most of the burden in dealing with human rights violations (gross or otherwise) the scope of this study is limited to international mechanisms. Therefore we will only have the luxury of looking at domestic mechanisms from a bird's eye view. What follows is a brief summary of the domestic mechanisms.

As was noted above it is only where the domestic system has, for one reason or another, failed or is unable to deal with gross violations of human rights that international mechanisms are resorted to. Domestic systems having easy access to and power over the accused, witnesses and evidence therefore provide the primary and most often used mechanisms for dealing with gross violations. The most commonly used domestic mechanism for dealing with gross violations of rights is the prosecution of those allegedly responsible for the crimes. A domestic court can either try gross violations cases committed in the forum state's territory or even those outside of its territory. Land mark cases such as the prosecution of German and Japanese war criminals before domestic courts after the Second World War, prosecution of Greek military leaders in 1974, prosecution of Khmer Rouge leaders of Cambodia, the Pinochet case (in Chile after 1999), Argentine

[44] International Covenant on Civil and Political Rights, available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> accessed on 23/9/08, See Arts. 2(2)-(3), 9(5), 14(6).
[45] Similar pronouncements are found in the Universal Declaration of Human Rights, Art.8; European Convention for the Protection of Human Rights and Fundamental Freedoms, Arts. , 5(5), 13 American Convention on Human Rights 1, 2, 7(6), 25, Torture Conv. Arts. 4-9.

prosecutions in the 1980's, Ethiopian prosecution of Derg officials, South Africa's apartheid trials and the domestic prosecutions in Yugoslavia and Rwanda were justified under the territoriality principle which allows states to prosecute crimes committed on their territories.[46] Although less frequently, the nationality and universality principles have also been used to prosecute suspects in front of the courts of states other than those in whose territory the crimes were committed.[47] While the Alfredo Astiz and Javor cases in France and the Eichmann case in Israel have been cited as examples of successful prosecutions in front of a court other than that of the territorial state,[48] cases against Pinochet (in Belgium), Ariel Sharon, Yasir Arafat, Fidel Castro, George H. W. Bush, Richard Cheny and Colin Powell have failed due to political reasons.[49]

Associated closely with the criminal prosecution of offenders is their extra contractual liability under domestic laws. Civil action against perpetrators is easier than criminal ones as not only is the burden of proof less stringent but courts can also assume jurisdiction more easily.[50] The more difficult civil cases are those involving defendants beyond the reach of civil litigation by virtue of the laws of the territorial state. But even where the civil liability of offenders could not be established by using private international law principles there is a possibility where xivil liability can be invoked based on international law The 'Alien Tort Claims Act' and the 'Torture Victim

[46] Shaw, *supra note* 42, at 458-462, Ratner and Abrams, *supra note* 30, at 146-156, Cassese, *supra note* 29, at 6, 277-280; see also George Wendell Berge, *The Case of the S. S. "Lotus"*, Michigan Law Review, Vol. 26, No. 4 (Feb., 1928), at 361-382; Okechukwu Oko, *Confronting Transgressions of Prior Military Regimes Towards a More Pragmatic Approach*, 11 Cardozo Journal of International and Comparative Law *passim* (Spring 2003); See also, Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice In East Germany and South Africa*, 40 Columbia Journal of Transnational Law *passim* (2001).

[47] Although the principle of universal jurisdiction is controversial, 'treaty based' or 'conditional' universality has established itself through treaties such as the 1949 Geneva Conventions (Ex. Art. 50 Condition of Wounded) and Art.7 of Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, available at <http://www.hrweb.org/legal/cat.html> accessed on 30/08/08.

[48] Cassese, *supra note* 29, at 284-292.

[49] Anita Fröhlich, *Reconciling Peace with Justice: A Cooperative Division of Labor*, 30 Suffolk Transnational Law Review 293-294 (Summer 2007); Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 The American Journal of International Law 888-897 (Oct., 2003).

[50] See Jonathan Harris, *Choice of Law in Tort – Blending in with the Landscape of Conflict of Laws?* 61 The Modern Law Review 33-55 (1998); Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 The American Journal of Comparative Law 305-311 (Summer, 1953); L. I. De Winter, *Excessive Jurisdiction in Private International Law*, 17 The International and Comparative Law Quarterly 706-720 (Jul., 1968); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 The American Journal of International Law 280-320 (Apr., 1982).

Protection Act' are the most cited laws of the United States of America that allow its courts to apply civil remedies for violations of international law.[51]

Another mechanism of the domestic systems is the use of truth commissions. Truth commissions are non-judicial investigatory or truth finding mechanisms that may be combined with prosecutions, civil compensation, amnesties or pardons.[52] The truth commissions of South Africa, Chile, Argentina, El Salvador, Colombia, Indonesia and Germany are the more cited examples.[53]

2.3.2 International Mechanisms

Throughout the previous section it was reiterated that international mechanisms come into play only where domestic mechanisms have failed or are unable to deal with a situation. Paradoxically though that does not mean that domestic mechanisms have always been or will be able to fare as well as they are expected to. Have they been able to, the mechanisms studied in this paper would not have come into being. Nor would have they been necessary. Furthermore since gross violations of human rights take place in circumstances of chaos, anarchy, war or dictatorship there is abundant likelihood for domestic systems to be totally absent or not to be willing or able to mete out justice. That is why many of the landmarks in the evolution of international mechanisms have occurred following the darkest moments of human history.

The first international mechanism designed to deal with gross violations was envisaged by he Treaty of Versailles which was imposed on Germany after the end of the First World War. Articles 227-230 of this treaty provided that persons responsible for war crimes including

[51] Beth Stephens, Conceptualizing Violence Under International Law: Do Tort Remedies Fit The Crime?, Panel I: Human Rights & Civil Wrongs at Home and Abroad: Old Problems and New Paradigms, 60 Albany Law Review (1997) at 594-603; M. Cherif Bassiouni, International Recognition of Victims' Rights, 6 Human Rights Law Review (2006).
[52] Kristin Bohl, *Breaking The Rules of Transitional Justice*, 24 Wisconsin International Law Journal 571 (Spring 2006).
[53] Id, 576-584; Fröhlich, *supra note* 49, 303-314; John M. Czarnetzky and Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 Notre Dame Law Review 72-84 (December, 2003); Kamali, *supra note* 46; Oko, *supra note* 46, at 138-142.

Emperor Wilhelm II of Germany would be put on trial.[54] The treaty also envisaged the types of tribunals to be established for the same purpose.[55] This early attempt to establish an international mechanism was seen as a failure for two main reasons. First; the Allies were not able to have the emperor extradited from Holland where he was in exile to because Holland was neutral in the war. And second; after the Allied powers consented to Germany's offer to prosecute the other suspects Germany tried only twelve and convicted six out of about nine hundred suspects.[56]

Following the First World War two failed attempts to establish a permanent international criminal court were made under the auspices of the League of Nations. The first (1920) was a proposal by what used to be known as the Advisory Committee of Jurists to establish a 'High Court of International Justice' and was rejected by the League as 'premature'.[57] The second (1937) attempt saw the drafting of a 'Convention for the Creation of an International Criminal Court' which went into oblivion after it was ratified by only one state.[58]

The next attempt was made immediately following the end of the Second World War which to would be an understatement to describe as successful. After being subjected to the shockwaves of the Second World War, which put the western world and its civilization at risk, the international community embarked on a process of change which has not so far abated. The establishment of the United Nations Organization, the near absolute prohibition of the use of force and the internationalization of human rights and democracy were set to be the order of the day. The establishment of different international mechanisms was only a small component of this

[54] The Versailles Treaty (June 28, 1919) available at <http://history.sandiego.edu/gen/text/versaillestreaty/all440.html> accessed on 13/9/2007; See also: Treaty of Versailles, From Wikipedia, the free encyclopedia; available at <http://en.wikipedia.org/wiki/Treaty_of_Versailles> accessed on 13/9/2007.

[55] Id, A 'special tribunal' composed of five judges would be established to try the Emperor while the others would be tried by the military tribunal of the state against which they have committed a crime or by a military tribunal composed of members of the military tribunals of more than one state if the crime was committed against more than one state.

[56] Cassese, *supra note* 29, at 328; Sunga, *supra note* 16, at 280.

[57] Cassese, id. Manley O. Hudson, *The Proposed International Criminal Court***,** 32 The American Journal of International Law 549-554 (Jul., 1938); M. A. Caloyanni, *An International Criminal Court,* 14 Transactions of the Grotius Society 69-85 (1928).

[58] Ratner and Abrams, *supra note* 29, at 177; Quincy Wright, *Proposal for an International Criminal Court,* 46 The American Journal of International Law 60-72 (Jan., 1952); John W. Bridge, *The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law,* 13 The International and Comparative Law Quarterly 1255-1268 (Oct., 1964); Philip Marshall Brown, *International Criminal Justice,* 35 The American Journal of International Law 119-120 (Jan., 1941).

massive change instigated by the establishment of the Nuremberg and Tokyo Tribunals. In addition to documenting history and bringing justice to the war tarnished world[59] the tribunals signified the break from the sovereignty-centric international order in which states had a monopoly on the jurisdiction over international crime, set in motion the subsequent astronomical growth in the substance, procedure and jurisprudence of human rights and humanitarian law, making individuals subjects of international law and most important of all they set a legacy of international justice from which contemporary efforts derive inspiration.[60]

The horrors of the Second World War were grave enough to have the heavy weights of international politics to agree to the establishment of the Nuremberg Tribunals and the United Nations Organization. But post-war apprehension was soon supplanted by cold war pragmatism and the international community was restrained to norm building until the 1970's. Although the General Assembly of the UN had asked the International Law Commission to consider the establishment of an international criminal court and the later went as far as proposing a draft statute the initiative lost its momentum in the early 1950s.[61] Neither were the international courts envisaged by the Genocide Convention (article 6) and the Apartheid Convention (article 5) realized.[62] When the United Nations began to set up human rights mechanisms in the 70's it was merely taking baby steps and the grandiose prospects of the late 40's had dissipated. Nevertheless these baby steps grew bigger and bigger over the years and saw the establishment of numerous charter based, treaty based and regional institutions whose arsenal of mechanisms consisted of: good offices, state reporting, interstate complaints, individual/group complaints,

[59] On why the Allies preferred to put upon themselves extra time and expenses of establishing and running international criminal trials rather than settling accounts with the Nazis without any sort of processes see; Justice Lawrence, *The Nuremberg Trial***,** 23 International Affairs 151-154 (Apr., 1947); Richard Overy, "The Nuremberg Trials: International Law in the Making" in PHILIPPE SANDS (ED.) FROM NUREMBERG TO THE HAGUE THE FUTURE OF INTERNATIONAL JUSTICE, (2003) at 3-6, Cassese, *supra note* 29, at 330-331.

[60] Cassese, *supra note* 29, at 332-333, Ratner and Abrams, *supra note* 29, at 165, Peggy E. Rancilio, *From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation*, 77 University of Detroit Mercy Law Review 160 (Fall 1999); Nicholas Doman, *Political Consequences of the Nuremberg Trial*, 246 Annals of the American Academy of Political and Social Science 81-90 (Jul., 1946); Andrew Clapham, *Issues of Complexity, Complicity and Complimentarity: From the Nuremberg Trials to the Dawn of the New International Court*, in Philippe Sands (ed.), *supra note* 58, at 33-50.

[61] David Matas, *From Nuremberg to the International Criminal Court*, AIUSA Lawyers' Conference, University of Washington School of Law (February 18, 2006); Wright (1952), *supra note* 58 ; Cassese, *supra note* 29, at 334, Ratner and Abrams, *supra note* 29, at 177; Vespasian V. Pella, *Towards an International Criminal Court***,** The American Journal of International Law, Vol. 44, No. 1. (Jan., 1950), at 37-68.

[62] For a commentary of the contemplated court in the Genocide Convention see: *Genocide: A Commentary on the Convention*, 58 The Yale Law Journal 1147-1150 (Jun., 1949).

fact-finding, investigative reporting, on-site visits, technical advice, country reports and thematic reports, judicial determinations and enforcement action.

But it was only after the Yugoslav and Rwandan atrocities rekindled Second World War memories that the International community established International tribunals that matched the Nuremberg precedent. It looks as if the international community did not want to wait for the next tragedy to unfold to establish the next international tribunal when it negotiated the statute of the ICC in Rome in 1998.[63]The establishment of ICC could be seen as the culmination of all the attempts to establish international courts and the most the international community has gone so far in order to ensure that perpetrators of gross violations are brought to justice and would be offenders deterred.

But it has to be remembered that the proliferation of these international mechanisms does not amount to the replacement of the domestic mechanisms. Domestic mechanisms remain to be the most important mechanisms for the prevention and punishment of gross violations of human rights. The mechanisms that are discussed in this paper interfere with domestic systems where the later are not functioning properly. The interference may range from making recommendations, putting moral or political pressure, reviewing the final decisions of the domestic system and replacing the domestic system to assume the administration of justice. The international mechanisms of most relevance to this study are considered in detail in the chapters that follow; therefore, precluding the need for their description in any detail in this introductory chapter.

[63] James Crawford, *The ILC Adopts a Statute for an International Criminal Court***,** 89 The American Journal of International Law 404-416 (Apr., 1995); Philippe Kirsch; John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process***,** 93 The American Journal of International Law (Jan., 1999); at. 2-12; Christopher Keith Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court,* 91 The American Journal of International Law 177-187 (Jan., 1997); Christopher Keith Hall, *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court,* 92 The American Journal of International Law 124-133 (Jan., 1998); Christopher Keith Hall, *The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court,* 92 The American Journal of International Law 548-556 (Jul., 1998); *Slow Progress on Establishing the International Criminal Court,* 45 Journal of African Law 135-136 (2001); also see Anne E. Mahle, The International Criminal Court, Justice and the Generals: Around the World, available at <http://www.pbs.org/wnet/justice/world_issues_int.html> accessed on 08/02/09.

Chapter 3: CHARTER BASED MECHANISMS

Introduction

Although the achievement of international cooperation in promoting and encouraging respect for human rights is listed as one of the purposes of the United Nations Organization one would find it surprising that the drafters of the document were not all that interested in human rights as they omitted the institutions and mechanisms necessary for this end.[1] The United Nations itself was designed as institution concerned with the security of the international community, and particularly that of the two ideological camps with their respective great powers, and not as a human rights enforcement organ.[2] But in retrospect the drafters had apparently incorporated enough provisions that later laid the foundation for the International human rights movement.

The preamble of the Charter sets the tone for human rights by reiterating the faith of the peoples of the United Nations in "fundamental human rights" and "the inherent dignity and worth of the human person." It also declares that one of the purposes of the United Nations is the achievement of international cooperation in promoting respect for human rights and fundamental freedoms.[3] A cumulative reading of articles 56 and 55 also conveys that all members of the United Nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of"[4] inter alia, "universal respect for, and observance of, human rights and

---

[1] Writing at a time when state sovereignty reigned supreme and the full impact of the human rights movement was not yet apparent (in 1950) Kelsen stated that not only could the UN Charter (or even the UDHR) not be interpreted as imposing any duty to respect the rights of their subjects but the function of the UN regarding human rights is inconsistently set forth. He extensively quotes the sub-committee that drafted article 1(3) which explained that "assuring or protecting such fundamental rights is the primary concern of each state." HANS KELSEN, THE LAW OF THE UNITED NATIONS, A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS, Fredrick A. Praeger Inc., Publishers, New York; USA (5th Printing 1966) at 23-50, 24 (fn. 8).

[2] Thomas Buergenthal explains that sponsors of the Charter might have had to come to terms with their own human rights abuses if they were to allow a human rights enforcing organization to emerge from the San Francisco Conference. He sites the Gulag of the USSR, the racial discrimination against Afro-Americans in the USA and the vast colonial empire of the UK as evidence for the reluctance of the masters of the Conference. Thomas Buergenthal, International Human Rights: in a Nutshell, West Nutshell Series, at 23. See also Tom J. Farer, *The United Nations and Human Rights: More than a Whimper Less than a Roar*, 9 Human Rights Quarterly 553-555 (Nov., 1987); Susan Koshy, *From Cold War to Trade War: Neocolonialism and Human Rights*, Social Text, No. 58., 1-32 (Spring, 1999).

[3] Article 1(3) of The United Nations Charter [Hereinafter the "UN Charter"], available at <http://www.un.org/aboutun/charter.htm> accessed on 05/03/08.

[4] Article 56 of UN Charter.

fundamental freedoms."[5] It is from this general mandate that the human rights enforcement activities of the United Nations arose and have subsequently developed.

This chapter discusses the role of the United Nations in responding to gross violations of human rights throughout the world. We shall take the institutions and mechanisms created by the charter itself and those institutions and mechanisms set up by these institutions as constituting charter based mechanisms. The discussion starts with the role of the UN's most important political organs; the Security Council, the General Assembly and the Secretary-General. As the primary role of these organs is not connected to human rights protection their legal competence to deal with human rights violations will be demonstrated through legal construction and their connection to the issue will also be traced in the practice of the organization. The chapter then goes on to consider organs of the UN that have a direct mandate to respond to gross violations of human rights. While there are many UN organs that deal with human rights the chapter focuses only on those that are directly relevant to gross violations of human rights and not those that are concerned only incidentally or those which possess the mandate but have nevertheless practiced such mandate infrequently.[6]

3.1 The Security Council

The Security Council is the all powerful executive branch of the United Nations in the maintenance of international peace and security. For this reason it was designed as an organ of

[5] Article 55 of UN Charter.

[6] The exclusion of the ICJ was cause for some pause since in addition to the possibility of assuming jurisdiction based on consent (outstandingly pertinent examples of this are found in Art 48(1) of the ICCPR and Art 30 of the Convention against Torture) it has mandatory jurisdiction over disputes arising from a few human rights treaties. For instance it has mandatory jurisdiction by virtue of: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (see art 9), the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (see art 22), the 1954 Convention relating to the Status of Stateless Persons (see art 34), the 1956 Supplementary Convention of the Abolition of Slavery (see art 10), the 1957 Convention on the Nationality of Married Woman (see art 10), the 1960 Convention against Discrimination in Education (see art 8), the 1961 Convention on the Reduction of Statelessness (see art 14). Nevertheless the ICJ was excluded from the purview of the chapter as its involvement in gross violations was minimal. Except for some exceptional cases concerning some Balkan and African states (Croatia v. Yugoslavia, Yugoslavia v. NATO, Croatia v. Serbia, DRC v. Rwanda) the ICJ's involvement in gross violations situations is almost absent. See; Jeffrey S. Morton, *The International Legal Adjudication of the Crime of Genocide*, 7 International Law Students Association Journal of International and Comparative Law International Law Weekend Proceedings 348-350 (Spring, 2001); William A. Schabas, *Preventing Genocide and Mass Killing: The Challenge for the United Nations*, Minority Rights Group International, UK (2006) at 19.

limited membership, with a narrow but important field of responsibility and with all the power it needs to achieve its responsibilities. The Security Council consists of 15 members five of whom (China, France, the Russian Federation, the United Kingdom and the United States) are permanent veto wielding members.[7] The other ten members are elected by the General Assembly for a term of two years, and may not be immediately re-elected.[8] This arrangement is clearly meant to let the five permanent members to dominate Council via their permanent membership and their veto[9] in return for which they would guarantee international peace and security.[10] In return for bearing member states' burden of securing international peace and security the Council gets a pledge of member states that they would carry out its decisions.[11] Thus the maintenance of international peace and security being the leading objective of the United Nations[12] the Security Council, as the main executive branch of the Organization, bears the responsibility of taking 'prompt and effective' measures to ensure that the UN does not fail in this front.[13]

The attention of the Security Council toward a certain situation or dispute is, as a rule, prompted either by the UN's General Assembly,[14] the Secretary-General[15] or by member states.[16] Once the Security Council sets itself on a situation or dispute it can take preventive or remedial actions falling under either chapter VI or VII of the Charter. While the former types of resolutions are not binding upon addressees the later are. The Security Council can, under these two sections, investigate disputes,[17] make recommendations upon its own initiative[18] or that of the parties to a dispute,[19] determine the existence of any threat to the peace, breach of the peace or act of aggression,[20] call upon parties to comply with provisional measures,[21] take measures not

[7] Article 23(1) of the UN Charter.
[8] Article 23 of the UN Charter.
[9] Article 27 of the UN Charter.
[10] John G. Stoessinger, The United Nations and the Superpowers 4 (1966); See also Articles 23, 24, 25 and 28 of the UN Charter.
[11] Article 25 of the UN Charter.
[12] Article 1(1) of the UN Charter.
[13] Article 24(1) of the UN Charter.
[14] Article 11(2) and (3) of the UN Charter.
[15] Article 99 of the UN Charter.
[16] Article 35 of the UN Charter.
[17] Article 34 of the UN Charter.
[18] Article 36 of the UN Charter.
[19] Article 38 of the UN Charter.
[20] Article 39 of the UN Charter.
[21] Article 40 of the UN Charter.

involving or involving the use of armed force,[22] and call upon other Members to assist it by complying with such measures and by providing armed forces and other resources.[23]

As it will be shown in this section it is always in connection with international peace and security that the Security Council managed to act in the defense of human rights. Since the United Nations Charter did not specifically authorize the Security Council to use its enforcement powers to react to gross violations of international human rights standards its actions in the defense of human rights were justified by recourse to the principle of the defense of international peace and security. Although most of the gross violations took place in the context of internal armed conflicts that might be tied to international peace and security[24] there are instances in which the Security Council resorted to enforcement measures without such threat.

3.1.1 The First Steps in Human Rights Protection

As was mentioned earlier in the chapter the United Nations was created as an institution to deal with the concern of the international community with international peace and security. And as the chief enforcer of the peace, the Security Council is ~~also~~ mandated to ensure the peaceful settlement of international disputes. It was for this reason that India, the first state to complain to the Security Council and the General Assembly about the situation in South Africa, had to argue that the actions of the racist regime jeopardized international peace and security.[25] Thus it was despite the lack of a mandate to enforce international human rights that the Security Council took up the cause of human rights in Southern Rhodesia and South Africa.

Under immense pressure from a General Assembly (that was at that time falling under the domination of third world countries) that the Security Council took its first measures against

[22] Article 41 and 42 of the UN Charter.
[23] Article 43 of the UN Charter.
[24] Steiner explains that all such conflicts involve excessive, organized, atrocious and massive violations of rights and especially including violations of the right to life. And thus he reasons that as such violations will involve huge refugee flows and/or the provocation of ethnically related groups (to those who are being oppressed) the risk of escalation and threatening of International Peace and security is real. Henry Steiner, 'International Protection of Human Rights' in Malcolm Evans (ed.) International Law (Oxford University Press, 2003) at 763.
[25] See STEINER AND ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT, LAW POLITICS AND MORALS 649 (2000); See also JAMES FREDERICK GREEN, THE UNITED NATIONS AND HUMAN RIGHTS 779-793 (1958).

gross violations of human rights in 1963 when it declared that conditions created by the racist regime of Rhodesia were "seriously disturbing international peace and security."[26] Although this resolution called for an arms embargo it fell short of imposing one.[27] Another non binding call for the cessation of trade with the same 'government'[28] was made in 1965.[29] The Security Council did however impose its first binding decision in the form of a trade embargo under article 41 of the United Nations Charter against Rhodesia in 1966.[30] The second ever such binding decision was also taken after a decade but under similar circumstances against South Africa.[31]

What is common about the Rhodesian and South African situations was not only that they were the first two cases in which Chapter VII measures were taken by the Security Council but also that both cases did not present a case in which international peace and security was threatened. Some have asserted that the raciest policies could be seen as a far sighted policy of the Security Council which envisaged that if white minorities were to be revolted against in any of the countries in the Southern Cone the violence could spread throughout the region.[32] Never the less it was clear that the Security Council's actions were directed toward the abolition of the injustices of Apartheid as evidenced from the description of the systems themselves as a threat to international security even though the regimes could not have been guilty of upsetting the peace of any other country.[33] But for the purpose of overcoming the peace and security threshold the Charter was widely interpreted and argued that the Security Council could take enforcement

[26] Steiner and Alston, *supra note* 25, at 650.
[27] Ibid.
[28] The Rhodesian government could not have been recognized as such because the Security Council had declared the declaration of independence as void; see SC Res. 217 (1965) also on American Journal of International Law 60 (1966) *"Condemns* the usurpation of power by a racist settler minority in Southern Rhodesia and regards the declaration of independence by it as having no legal validity".
[29] SC Res. 217(1965); A similar resolution was made in the same year authorizing the United Kingdom to search ships to ascertain if they are transporting oil to Rhodesia, see SC Res. 221 (1966) also on American Journal of International Law 60 (1966).
[30] Security Council Resolution 232 (1966), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/227/55/IMG/NR022755.pdf?OpenElement> accessed on 11/07/2008. See Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years, The United Nations At Fifty*, 89 American Journal of International Law 512 (July, 1995).
[31] Security Council Resolution 418 (1977) available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/297/01/IMG/NR029701.pdf?OpenElement> accessed on 11/07/2008.
[32] PETER MALANCZUK (ed.), AKEHURST`S MODERN INTRODUCTION TO INTERNATIONAL LAW 394 (7th ed, 1997).
[33] See Vera Gowland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility***,** 43 The International and Comparative Law Quarterly 64-65 (Jan., 1994); Charles G. Fenwick, *When Is There a Threat to the Peace?-Rhodesia*, 61 American Journal of International Law 753 (1967).

action if there is a threat to international peace and security irrespective of the source of the threat.[34] In other words the Security Council could take enforcement action against Rhodesia or South Africa even if the threat came from their neighbors.

3.1.2 Post Cold War Actions of the Council

Although the Security Council was disinclined to take up human rights matters until after the end of the cold war the trend had changed since. Beginning from the time the Council started its work it was entangled in the power struggle of the then bi-polar international rivalry between 'East' and 'West'. This in practice resulted in a long array of direct vetoes, double-vetoes, 'hidden vetoes' and 'financial vetoes' that crippled the Council right from the beginning.[35] Therefore it was only after the cold war that the Security Council began to be active in attending to its responsibilities. This meant that except for its aforementioned actions against the Rhodesian and South African regimes in the 60s the period from the early days of the United Nations' establishment to the early 90s was characterized by Security Council inaction on any matter not least in the human rights field.

The first significant Security Council action after the cold war stalemate was resolved was taken against Iraq after its invasion of Kuwait. While the Iraq incident was not a human rights concern as such[36] it was significant in that it heralded a time in which the permanent members of the Security Council and most notably the USA and Russia could take the same side in the same conflict.[37] After the Gulf precedent we see increased activity of the Security Council in its

[34] John Carey, UN Protection of Civil and Political Rights, Volume 8, Procedural Aspects of International Law Series, 25 (1st ed. 1970).
[35] See Stoessinger, *supra note* 10, for an account of the types and effect of vetoes in the early days of the Security Council**.**
[36] Note however that although the Iraqi situation presets one in which a threat to international peace and security was certainly involved the Security Council's actions under Resolution 688 (1991) were justified by the flow of Kurdish refugees across international borders as a result of Iraqi repression. The refugees were seen as a destabilizing factor in the region which in turn could lead to threatening international peace and security.
[37] Jack Donnelly, International Human Rights, (1993) at 139; See also, Detlev F. Vagts, *Repealing the Cold War*, 88 The American Journal of International Law 506-511 (Jul., 1994) (for an explanation of the "Friendship Act" declared by the US Congress with the aim of normalizing relations with the former Soviet bloc.) But see William A. Schabas (2006), *supra note* 6, at 12 (who argues that human rights considerations had some place in the security council's decision regarding Iraq); see also Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 The American Journal of International Law 823-842 (Oct., 2003); See also; Peter R. Baehr, The

response to gross violations of human rights. The reactions of the Security Council to gross violations can be classified into two for the purpose of this paper. The Council first of all used its enforcement powers to try to put an end to situations of gross violations and second to prosecute perpetrators of such violations by establishing ad hoc international criminal tribunals.

Actions of the Security Council to put an end to gross violations of human rights are not easily discernable although some cases present clear instances. The reason for the lack of clarity as to whether the Council was motivated entirely by human rights concerns is twofold. First the Security Council hardly ever takes enforcement action without justifying its actions on the grounds of international peace and security. And second, since most of the situations handled by the Council involved gross violation of human rights it is difficult to distinguish if the Security Council's actions were typically motivated by human rights concerns or from those that involved an indisputable threat to international peace and security. Therefore one has to go into the context of and the actual phraseology of the resolution in order to decide whether the Security Council action was taken to stop gross violations lacking a genuine threat to the peace of the world community. Thus the cases that are discussed in any such analysis are bound to involve the writer's subjective determination as to the motivation of the Security Council and the attendant circumstances.

The first and probably the clearest instance of Security Council action in defense of human rights is presented by the United Nation's involvement in Haiti. The matter arose when the first democratically elected president of the country, Jean-Bertrand Aristide, was deposed by a military coup d'état in September 1991.[38] Although the Security Council was not keen to take up the matter because of the lack of a threat to international peace and security, [39] it eventually joined the effort to return the democratically elected government as the human rights situation of the country deteriorated. The first measure taken by the Security Council under Chapter VII of the Charter was the imposition of a binding embargo on oil products and arms and the freezing

Security Council and Human Rights, in RICK LAWSON AND MATTHIJS DE BLOIS (EDS.), THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE: ESSAYS IN HONOUR OF HENRY G. SCHERMERS 16 (1994) (who argues that human rights violations have always been a cause and consequence of armed conflict.); See also Security Council Resolution 688 (1991) which was passed because of the flow of Kurdish refugees across international borders as a result of Iraqi repression. The refugees it seems were seen as a destabilizing factor in the region which could lead to regional pressures.

[38] Peter Malanczuk, *supra note* 32, at 407.

[39] Ibid.

the accounts of the government and its leadership.[40] The Security Council later authorized all states to take any action (including military force) to ensure the implementation of its embargo[41] and a little later authorized member states to 'form a multilateral force' and to 'use all necessary means' to facilitate the return of democratic governance.[42] Although all of the Resolutions of the Security Council concerning Haiti did in fact refer to the situation's being a threat to international peace and security such an assertion is easily stated than proven.[43]

The actions of the Security Council regarding the situations in Rwanda and East Timor could also be seen as instances of Security Council action in response to gross violations of human rights. The determination of the Council that the situation in Rwanda constituted a threat to international peace and security in Resolution 918 (1994)[44] is inconclusive as to the influence of human rights in that the situation in the country was probably of a regional nature owing to the overlap of the ethnic makeup with neighboring states. Never the less the Council's Resolution 929 (1994) openly authorizes the use of force under Chapter VII for the protection of Rwandan civilians. [45] The situation in East Timor was also another instance in which the Security Council intervened without a clear evidence of a threat to international peace and security. In Resolution 1264 (1999) the Council acting under Chapter VII declared that it "condemns all acts of violence in East Timor, calls for their immediate end and demands that those responsible for such acts be

[40] Resolution 841 (1993), Adopted by the Security Council at its 3259st meeting, on 16 June 1993, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/523/41/PDF/N935341.pdf?OpenElement> accessed on 13/07/2008. The same measures were taken against Haiti by the Security Council when the military leadership attempted to thwart an agreement with the UN to deploy the United Nations Mission in Haiti (UNMIH); See Resolution 873 (1993), Adopted by the Security Council at its 3291st meeting, on 13 October 1993, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/555/41/PDF/N9355541.pdf?OpenElement> accessed on 13/07/2008.

[41] Resolution 875 (1993) Adopted by the Security Council at its 3293rd meeting, on 16 October 1993 available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/560/55/PDF/N9356055.pdf?OpenElement> accessed on 13/07/2008.

[42] Resolution 940 (1994) Adopted by the Security Council at its 3413th meeting, on 31 July 1994; available at <http://daccessdds.un.org/doc/UNDOC/GEN/N94/312/22/PDF/N9431222.pdf?OpenElement> accessed on 13/07/2008.

[43] W. Michael Reisman, *Haiti and the Validity of International Action*, 89 The American Journal of International Law 82-83 (Jan., 1995); (Mariano argues that the practice of the Council in which it establishes the existence of a threat to international peace and security before taking a human rights protecting action is based on a fear that it might establish a precedent which might put it under pressure in similar future circumstances.); See Aznar-Gomez Mariano, *A Decade of Human Rights Protection by the Security Council: A Sketch of Deregulation?* 13 European Journal of International Law 223 (2002); available at < http://www.ejil.org/journal/Vol13/No1/ab14.html> accessed on 10/07/08.

[44] Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N94/218/36/PDF/N9421836.pdf?OpenElement> accessed on 13/07/2008.

[45] Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N94/260/27/PDF/N9426027.pdf?OpenElement> accessed on 13/07/2008. See article 3.

brought to justice."[46] The Timor incident did not of course escalate because the Indonesian government eventually cooperated with the UN and the situation was settled with the establishment of the United Nations Transitional Administration in East Timor (UNTAET).[47] All other post cold-war actions of the Security Council have in fact dealt with situations that involved gross violations of human rights, gross violations of humanitarian law or at least some form of exaggerated humanitarian crisis. But these were dealt with by the Security Council as concerns for international peace and security and therefore making it impossible to study them as part of the Security Council's efforts to protect human rights.[48]

In addition to its attempts to put an end to gross violations situations, the Security Council has used its Chapter VII powers to have perpetrators of such violations tried before the ad hoc international tribunals of Yugoslavia and Rwanda.[49] Not only did the creation of both tribunals follow the most heinous human rights violations since the Second World War[50] but the reaction of the Security Council in both cases was similar. The tribunals were created by Chapter VII Resolutions after the Security Council failed to prevent two of the worst atrocities since the Second World War. The process began with the Security Council's declaration that the situation in the former Yugoslavia and that of Rwanda posed a threat to international peace and security.[51]

---

[46] Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N99/264/81/PDF/N9926481.pdf?OpenElement> accessed on 13/07/2008.

[47] Resolution 1272 (1999) Adopted by the Security Council at its 4057th meeting on 25 October 1999; available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/TL%20SRES1272.pdf> accessed on 28/07/08. Also see generally: Matthias Ruffert, *The Administration of Kosovo and East-Timor by the International Community*, 50 The International and Comparative Law Quarterly 613-631 (Jul., 2001).

[48] Aznar-Gomez notes that the Security Council is meticulous when it comes to setting precedents by putting forward as evidence the fact that it labels the gross violations situations as 'exceptional', 'without precedent' and 'extraordinary' just so as t avoid the precedent, Mariano J. Aznar-Gomez, *supra note* 43, *at* 226.

[49] The mandate of the Security Council to so act under Chapter VII of the UN Charter has been challenged by scholars and by defendants and their council in theses tribunals; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 337 (2003); Anita Fröhlich, *Reconciling Peace with Justice: A Cooperative Division of Labor*, 30 Suffolk Transnational Law Review 296 (Summer 2007); But see; Peggy E. Rancilio, *From Nuremberg to Rome: Establishing an International Criminal Court and The Need For U.S. Participation*, 77 University of Detroit Mercy Law Review 167 (Fall 1999).

[50] Cassese, *supra note* 49, at 335; It is estimated that a million people must have died in the Rwandan genocide, Jeffrey S. Morton, *The International Legal Adjudication of the Crime of Genocide*, 7 International Law Students Association Journal of International and Comparative Law International Law Weekend Proceedings (Spring, 2001) Timothy Longman, *Church Politics and the Genocide in Rwanda*, 31 Journal of Religion in Africa, 163 & ff (May, 2001) (for an explanation as to why most of the people who were killed died inside churches and the role of Catholic and Protestant churches in the Genocide.).

[51] Security Council Resolution 713 (1991) available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/596/49/IMG/NR059649.pdf?OpenElement> accessed on 12/10/08. and Security Council Resolution 918 (1991), available at

This declaration was backed by the establishment of ad hoc commissions that were meant to examine and document evidence to set the ground for the establishment of the ad hoc tribunals.[52] The International Tribunal for the former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) were then established by the Security Council with the intention of prosecuting those allegedly responsible for the atrocities.[53] The jurisdiction of the ad hoc tribunals extended to 'serious' instances of war crimes, genocide and crimes against humanity committed since January 1, 1991 and between January 1, 1994 and December 21, 1994 in the Former Yugoslavia and Rwanda and its neighboring states respectively.[54] The structure of the tribunals, their rules of procedure and evidence, and the principles which they use are nearly identical.[55]

Even though the two tribunals were established after half a century of a vacuity for the presence of international criminal tribunals, the ICTY and the ICTR have been admonished by many commentators. Most commentators are in agreement that the establishment of the ICTY and the ICTR is proof of the ineffectiveness of the Security Council since the tribunals would not have been needed in the first place if the Security Council had acted to prevent the atrocities.[56]

<http://daccessdds.un.org/doc/UNDOC/GEN/N94/218/36/PDF/N9421836.pdf?OpenElement> accessed on 12/10/08; Security Council Resolution 935 (1994) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N94/273/51/PDF/N9427351.pdf?OpenElement> accessed on 12/10/08. For a discussion of the history and background see, Christopher Greenwood, The International Tribunal for Former Yugoslavia, International Affairs (Royal Institute of International Affairs 1944-), Vol. 69, No. 4 (Oct., 1993), pp. 641-645.

[52] Security Council Resolution 780 (1992) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N92/484/40/IMG/N9248440.pdf?OpenElement> accessed on 12/10/08. and id for SC Res on Rwanda. See also M. Cherif Bassiouni, The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), The American Journal of International Law, Vol. 88, No. 4, (Oct., 1994), pp. 784-805.

[53] Security Council Resolution 827 (1993) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement> accessed on 12/10/08; and Security Council Resolution 955 (1994). available at <http://daccessdds.un.org/doc/UNDOC/GEN/N94/273/51/PDF/N9627351.pdf?OpenElement> accessed on 12/10/08.

[54] Statute of ICTY Arts. 1, 8 and Statute of ICTR Arts. 1, 7.

[55] Compare Statute of ICTY Arts. 6, 7, 9, 10, 15 and 18 with Statute of ICTR Arts. 5, 6, 8, 9, 10, 11, 12, 15 and 16. See also their rules of procedure which are identical; International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), *entered into force* 14 March 1994, *amendments adopted* 8 January 1996; available at <http://www1.umn.edu/humanrts/icty/ct-rules7.html> accessed on 22/09/08; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), *entered into force* 29 June 1995, available at <http://www1.umn.edu/humanrts/africa/RWANDA1.htm> on 22/09/08.

[56] Cassese, *supra note* 49, at 336 (calls the establishment of the ICTY a 'belated face-saving measure'); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW BEYOND THE NUREMBERG LEGACY 165, 173 (1997) (characterize both tribunals as those born of 'international impotence'); See also: Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc. S/1999/1257 (Dec 16, 1999) available at

Furthermore the Security Council's authority to establish international tribunals, the prosecution of vanquished groups leading to a sentiment that the tribunals enforced the victor's justice and the long time it took to commence and to conclude the prosecutions have been points on which both tribunals have been criticized.[57]

The ICTY and the ICTR are also the last ad hoc international tribunals to be created by the Security Council. In the years that followed the Security Council did not create the likes of the ICTY and the ICTR although it did participate in what have been described as 'internationalized' or 'mixed' tribunals created in Sierra Leone, East Timor, Kosovo and Cambodia. These 'internationalized' or 'mixed' tribunals are filled with a mixture of judges who are the nationals of the concerned state and judges who are elected by the international community, apply a mixture of international and domestic law and are ad hoc by design.[58] Since the mixed courts were created because of a combination of most of the factors that led to the creation of the ICTY and the ICTR lacking only the will of the Security Council to act in the same way they are seen as a non-sustainable way of making up for the Security Council's inaction.[59] This also accounts for the reason these hybrids have been accorded so little academic and political attention.[60] The Security Council has also participated in the processes of the International Criminal Court by ordering the investigations of the situation in Darfur in addition to its attempts to stabilize the situations at different times.[61]

<http://daccessdds.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement> accessed on 28/11/08.

[57] Cassese, *supra note* 49, at 337; Fröhlich, *supra note* 49, at 296; The ICTY confirmed the Security Council's power to establish international tribunals by virtue of its enforcement powers under Chapter VII of the UN Charter, See George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 The American Journal of International Law 64-69 (Jan., 1996); For an argument supporting the Security Council's Chapter VII decision see; Greenwood, *supra note* 51, at 646-647.

[58] Cassese, *supra note* 49, at 343; Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 The American Journal of International Law 295-296 (Apr., 2003); See also Scott Luftglass, *Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 Virginia Law Review 893-964 (May, 2004).

[59] Ibid.

[60] Dickinson, *supra note* 58, at 295-296.

[61] Generally see: Wikipedia, War in Darfur, From Wikipedia the free encyclopedia, available at <http://en.wikipedia.org/wiki/war_in_darfur> accessed on 28/11/07.

3.2 The General Assembly and Secretary-General

If the Security Council is portrayed as the executive organ of the United Nations the General Assembly could be rightly described as the legislative organ.[62] The General Assembly consists of all the members of the United Nations and unlike the Security Council in which the permanent members wield a veto all the members of the General Assembly have equal voting powers.[63] The General Assembly is never the less subject to the Security Council veto in cases concerning international peace and security as article 12 of the Charter precludes the General Assembly's jurisdiction in such cases. Subject to this limitation however the General Assembly has the widest powers under article 10 as it can "discuss any questions or any matters within the scope of the [UN] Charter or relating to the powers and functions of any organs provided for in the … Charter, and … may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

In spite of the fact that the General Assembly can discuss and make recommendations concerning human rights pursuant to the broadly phrased article 10 of the Charter the Assembly is given specific powers regarding human rights under article 13 which empowers it to initiate studies and make recommendations for the purpose of promoting human rights and fundamental freedoms. Therefore there is no doubt as to the Assembly's competence to deal with human rights issues. The General Assembly also appoints human rights organs such as the Economic and Social Council. The General Assembly also has specific powers such as the promotion of international co-operation in the political field and encouraging the progressive development and codification of international law, the promotion of international co-operation in the economic, social, cultural, educational, and health fields,[64] the recommendation of measures for the peaceful adjustment of any conflict situation, [65] receiving and considering the reports of other Charter organs including the Security Council[66] and the approval of the budget of the UN and the balance due from each member.[67]

[62] Shaw offers a parade of descriptions such as "the parliamentary body", "a deliberating chamber", "forum for the exchange of ideas and discussion" M.N. SHAW, INTERNATIONAL LAW 828, 831 (Fourth Ed. 1997).
[63] Articles 9 and 18 of UN Charter.
[64] Article 13 (1) (a) and (b) of the UN Charter respectively
[65] Article 14 of the UN Charter.
[66] Article 15 of the UN Charter.
[67] Article 17 of the UN Charter.

The Secretary-General is described by the Charter itself as the "chief administrative officer" of the United Nations Organization in general and that of the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council in particular.[68] Being appointed to such position by the General Assembly upon the recommendation of the Security Council the Secretary-General's appointment is subject to both the approval of the majority of the General Assembly's members[69] and to the infamous veto.[70]

As the chief administrator of the United Nations the Secretary-General performs important functions such as: organizing the meetings and conferences of UN Organs, coordinating and integrating the activities of different UN Organs, depositing treaties, preparing the annual work report of the UN, appointing and administering the staff of the Secretariat, preparation of studies and the annual budget of the UN.[71] While the Secretary-General, like the Security Council, does not have any charter based powers connected with the protection of human rights many Secretary-Generals have in practice been active in this area. Needless to say, the human rights activity of the Secretary-General does not emanate from his role as the chief administrator of the organization.

The Secretary-General's role in the international community's effort in dealing with gross violations of human rights stems from his political powers. The political role of the Secretary-General in turn stems both form the interpretation and practice of some provisions of the Charter and from the Secretariat's practice.

Article 99 of the Charter provides that the Secretary-General has the authority to bring to the attention of the Security Council any matter which may threaten international peace and security.[72] This provision has been at the foundation of the assertion that the Secretary-General is a political in addition to or even rather than a mere administrative figure.[73] The fact that the

[68] Articles 97 and 98 of the UN Charter respectively.
[69] Article 18 of UN Charter.
[70] The appointment of the Secretary General according to my reading of Article 27 (2) and (3) cannot be considered as a procedural matter.
[71] Generally see articles 12 (2), 20, 73 (e), 97, 98, 101, 102 and 110 (2) of the UN Charter
[72] The only other entities with such power are state parties and the General Assembly, see Articles 11(3) and 35 of the UN Charter.
[73] D. W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 92 (5th Indian Reprint 2003); Shaw, *supra note* 62, at 834, Malanzuck, *supra note* 32, at 380, Stoessinger, *supra note* 10, at 38.

General Assembly has authorized the Secretary-General to place matters in its provisional agenda has warranted the same conclusion.[74]

The interpretation of the Charter with respect to the political powers of the Secretary-General and the actual power and role assumed by the Secretary-General has however not been an issue of textual interpretation. These have to a great extent depended on the personality of the Secretary-General and the international political circumstances of the time.[75] According to Article 98 of the Charter; for example, the Secretary-General is the chief administrator of the UN's principal organs and the rules of procedure of these organs authorize the Secretary-General to: place items in their provisional agenda, make statements in their meetings, submit proposals and draft resolutions and so on.[76] Whether the Secretary-General exploited these powers to strengthen his political influence depended to a great extent on the personality of the Secretary-General.[77] Moreover political situations have also determined the extent to which the Secretary-General was capable of being assertive. For instance while the Secretary-General's political role reached its peak during the cold war due to the General Assembly's increasing reliance on the Secretary-General in the "Uniting for Peace" phenomenon.[78] Another example is the decline of the importance of the Secretary-General after the conclusion of the cold war in the late 1980's.[79] The practice of the General Assembly and the Security Council to entrust the Secretary-General with political roles in accordance with the Charter's Article 98, which allows UN organs to assign the Secretary-General any "other functions" is therefore also dependant on international political conditions.

3.2.1 The General Assembly

Although the General Assembly is much more closely tied to human rights than the Security Council, its powers when it comes to dealing with gross violations of human rights are limited.

[74] Bowett, *supra note* 73, at 92.
[75] Id., at 87-88; Malanzuck, *supra note* 32, at 380; See also Charles Henry Alexandrowicz, *The Secretary-General of the United Nations*, 11 The International and Comparative Law Quarterly 1109 -1130 (Oct., 1962).
[76] Bowett, *supra note* 73, at 92-93.
[77] Ibid.
[78] Shaw, *supra note* 62, at 846-849; Stoessinger, *supra note* 10, at 18.
[79] Malanzuck, *supra note* 32, at 381.

Since the General Assembly can only make recommendations to member states whatever influence it may have over a gross violations situation is no more than moral coercion as opposed to the Security Council's power to make binding decisions pursuant to article VII of the Charter. Irrespective of the non-binding nature of its powers the General Assembly has nonetheless been able to exert compelling moral authority on most international issues in addition to usurping Security Council territory while the later was subsumed into the cold war status quo.

The General Assembly's assertiveness was boosted among other things by the "Uniting for Peace" resolution which allowed the General Assembly to step in the shoes of the Security Council if the later failed because of super-power rivalry.[80] The reaction of the General Assembly to gross violations situations were nonetheless not carried out under the "Uniting for Peace" resolution. They were rather exercised as normal recommendations with an atmosphere in which the General Assembly was empowered and emboldened by the "Uniting for Peace" atmosphere. For example in the case of Rhodesia and South Africa it was the General Assembly that set the pace for the Security Council by taking measures of its own.[81] Although the General Assembly has over the years made resolutions on most of the gross violations situations the South African situation deserves consideration as it involves an ice breaking case that had protracted from the days of the establishment of the United Nations to the end of the Cold War. The situation also involved a case in which the General Assembly made its utmost efforts to deal with a gross violations situation.

The Apartheid system of South Africa was condemned in the General Assembly by India (and later Pakistan) right from the time of establishment of the United Nations. The General Assembly which at that time was dominated by western industrialized states was rather indifferent and hesitated to take a firm stand against South Africa. Yet the General Assembly had declared as early as 1946 that the racist system of the country contradicted with the UN Charter.[82] As the membership (demography) of the General Assembly increased because of the entry of newly liberated Afro-Asian states and as the cold war intensified the General Assembly was becoming more and more confident to become active in responding to gross violations in

[80] General Assembly Resolution 377 (V) U.N. General Assembly, 5th Sess., Doc. A/1481; 45 American Journal of International Law Supp. 1-6 (1951). See H. Woolsey, *The "Uniting for Peace" Resolution of the United Nations*, 45 The American Journal of International Law 129 (Jan., 1951).
[81] Steiner and Alston, *supra note* 25, at 650.
[82] J. F. Green, *supra note* 25, at 780.

South Africa. In 1962 the General Assembly decided to cross over into the Security Council's turf when it imposed what could be characterized as an embargo but for its non binding character. The General Assembly called on member states to refuse to sell arms, cease diplomatic relations, refuse the entry of its ships and aircraft, and to boycott goods so as to force South Africa to give up its racist ways.[83]

In the decades that followed the General Assembly followed through its policy of isolating South Africa by using different albeit non-binding means. The General Assembly was successful in alienating (which usually resulted in the resignation or expulsion of) South-Africa from the UN Educational, Scientific and Cultural Organization (UNESCO), the UN Economic Commission for Africa (ECA), the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF), the World Health Organization (WHO) and the International Labor Organization (ILO).[84] It also made numerous attempts to expel it from the UN Conference on Trade and Development (UNCTAD) and even from the membership of the General Assembly itself. The Assembly also established the Special Committee against Apartheid (1962),[85] called for the boycott of the South African team from the Olympics,[86] adopted the Convention on the Suppression and Punishment of the Crime of Apartheid and labeled the constitutional order of South Africa a "crime against humanity".[87] It was under such intense action on the side of the General Assembly that the Security Council was prompted into taking the measures discussed in the previous subsection.

[83] UN General Assembly Resolution 1761, available at <http://daccess-ods.un.org/access.nsf/get?open&DS=A/RES/1761(XVII)&Lang=E&Area=RESOLUTION> accessed on 24/02/09.
[84] John Carey, *supra note* 34, at 27-33. See also J. F. Green, *supra note* 25, at 779-783.
[85] Peter Jackson and Mathieu Faupin, The Long Road to Durban: The United Nations Role in Fighting Racism and Racial Discrimination, UN Chronicle, available at <http://www.un.org/Pubs/chronicle/2007/issue3/0307p07.html> accessed on 8/6/08. For a detailed description of the Committee against Apartheid see Role of the Special Committee against Apartheid, available at <http://www.anc.org.za/un/reddy/struggle2.html> accessed on 8/6/08.
[86] Ibid Peter Jackson (etal)
[87] International Convention on the Suppression and Punishment of the Crime of Apartheid**,** Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) available at <http://www.unhchr.ch/html/menu3/b/11.htm> accessed on 22/o8/o8.

3.2.2 The Secretary-General

It was stated earlier in this chapter that the Secretary-General's role in the international community's effort in dealing with gross violations of human rights stems from his political powers. Two such 'political' involvements or powers have in practice been associated with the Secretary-General's activities in this area. The first of these is the Secretary-General's personal decision and subsequent endeavors to deal with a situation. The second type of involvement occurs where the Secretary-General is requested to intercede in a situation by organs of the United Nations. In both cases the Secretary-General may choose either to get involved personally or may choose to send an envoy in his/her stead.

A decision to get involved in a gross violations situation without being requested to do so by any Charter organ of the United Nations depends only on the personality of the individual occupying the office of the Secretary-General. This is evidenced not only by the role of the personality of the Secretary-General in exercising the 'political' powers discussed above but also by the activities and approaches of different Secretary-Generals. For example Secretary-General Dag Hammarskjöld preferred to act only upon the direction of a UN charter-organ while Secretary-Generals U Thant and Waldheim preferred to be active in this field.[88] The discretionary nature of the Secretary-General's intercession was confirmed by the Third Committee of the General Assembly where a motion to regulate this power was denied on the ground that it was up to the Secretary-General to decide how and when to act in gross violations situations.[89] A recent example of a pro-human rights Secretary-General is Kofi Annan who has been credited as the most active in this matter for his efforts to 'mainstream'[90] human rights into all the activities of

[88] Ramcharan B.G., *The Good Offices of The United Nations Secretary-General In The Field of Human Rights*, 76 American Journal of International Law 137-139 (January, 1982); See also Waldheim's assertion that it is the Secretary-General's moral duty to do so, UN Doc. A/8701/Add.1, section IX (1972). But also see R. B. Lillich, *The U.N. and Human Rights Complaints: U Thant as Strict Constructionist*, 64 The American Journal of International Law 610-614 (Jun., 1970).

[89] UN Doc. A/C.3/35/L.78 (1980). and UN Doc. A/C.3/35/SR.56-62 (1980).

[90] Steiner and Alston, *supra note* 25, at 599; A United Nations Priority, available at <http://un.org/rights/HRToday/> accessed on 28/10/08; Kofi Annan was successful enough in selling the idea of mainstreaming human rights into all UN activities that the General Assembly established the Office of the High Commissioner for Human Rights (OHCHR) by joining what used to be the High Commissioner's Office and the Center for Human Rights by Resolution 48/141. See the official website of the OHCHR "who we are" <http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx> and "What we do" <http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx> accessed on 28/10/08.

the United Nations and his 'action plan to prevent genocide'.[91] While it is accurate to assert that Secretary-Generals engaged in human rights protection of their own accord not much else could be added to that as so little is known of such activities. This is because the Secretary-Generals usually preferred to act in concert due to the sensitiveness of the situations in which they had to operate.[92]

The second type of Secretary-General involvement occurs where an organ of the UN asks the Secretary-General to offer his good offices.[93] While examples of the Secretary-General's involvement in human rights in general are abundant[94] the situation in which the involvement could be qualified as a gross violation might be more infrequent. Nevertheless examples such as the involvement of the Secretary-General in the situation in South Africa[95] and Chile[96] and Secretary-General Kofi Anan's preventive strategy on genocide[97] show that the Secretary-General is in fact engaged in gross violations situations.

3.3 The Human Rights Council

The United Nations Human Rights Council replaced the United Nations Commission on Human Rights when it was established by the General Assembly in 2006.[98] Since the Council has

[91] United Nations, 'Risk of Genocide Remains Frighteningly Real', Secretary-General Tells Human Rights Commission as He Launches Action Plan to Prevent Genocide, Press ReleaseSG/SM/9245 AFR/893 HR/CN/1077, available at <http://www.un.org/News/Press/docs/2004/sgsm9245.doc.htm> accessed on accessed on 6/11/07.
[92] Ramcharan, *supra note* 88, at 137.
[93] Generally Ibid.
[94] See for example: United Nations, Yearbook of the United Nations (1972) *Office of Public Information, United Nations, New York, available at* <*http*://domino.un.org/unispal.nsf/fd807e46661e3689852570d00069e918/de9be8e9630430da8525631c0067f2e4!OpenDocument> accessed on 6/11/07, United Nations, Yearbook of the United Nations (1974) *Office of Public Information, United Nations, New York, available at* <http://domino.un.org/UNISPAL.NSF/1ce874ab1832a53e852570bb006dfaf6/37688b2b2252853c85256332006e88ec!OpenDocument> accessed on 6/11/07, United Nations, Yearbook of the United Nations (1976) *Office of Public Information, United Nations, New York, available at* <http://domino.un.org/UNISPAL.NSF/1ce874ab1832a53e852570bb006dfaf6/295767025a94cb1f85256396004f101b!OpenDocument> accessed on 6/11/07.
[95] Ramcharan, *supra note* 88, at 137.
[96] UN Doc. A/10295 (1975).
[97] U.N. Doc. SG/SM/9245-AFR/893-HR/CN/1077 (Apr. 7, 2004), available at <http://www.un.org/News/Press/docs/2004/sgsm9245.doc.htm.> accessed on 16/07/08. Although it is too early to pass judgment on the work of the Special Advisor to the Secretary-General on the Prevention of Genocide the Advisor's role in the Darfur situation has been commendable; Schabas, *supra note* 6, at 15.
[98] A/Res/60/251 (3 April 2006) A/RES/60/251, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf> accessed on 01/12/08. The

replaced the Commission in its roles and procedures but has not yet significantly modified the procedures of the Commission the roles and procedures of the Commission are still relevant to the discussion of UN organs dealing with gross violations of human rights.[99] The new Human Rights Council is of course not ripe enough for criticism or admiration for a two year old institution in international law is still too young to have any impact at all. Thus in this section our focus will be on the procedures of the Commission on Human Rights and we deal with the Human Rights Council by looking at how it has improved the structure and mechanisms of the Commission.

The United Nations Commission on Human Rights (hereinafter the Commission) was established in 1946 by the Economic and Social Council in accordance with article 68 of the UN Charter which provides that the ECOSOC "shall set up commissions in economic and social fields and for the promotion of human rights." Members of the Commission were 53 representatives of member states (i.e. not independent experts) designated by the ECOSOC in accordance with regional representation.[100] Although the Commission is not comparable in importance and eminence to the UN organs discussed so far it is none the less the most important UN organ in the field of human rights.[101]

The importance of the Commission to gross violations situations began to be realized in 1967 when it reversed its most infamous decision which held that it does not have the power to consider complaints against states regarding their human rights practices.[102] The shift from the 'no power' doctrine was obviously induced by the same forces behind the anti apartheid and the

resolution was passed with Venezuela abstaining while the United States of America, Israel and two other states. For a discussion of the reasons for US hostility to the resolution see Wikipedia, United Nations Human Rights Council, From Wikipedia, the free encyclopedia, available at <http://en.wikipedia.org/wiki/United_Nations_Human_Rights_Council> accessed on 01/12/08.

[99] Ibid see specially articles 1, 3 and 5; Note also that the Commission is more relevant (than the Council) for this study as we are looking for experience that can be used for the purpose of evaluating the ICC rather than state of the art in international human rights.

[100] Ibid, See also Howard Tolley, Jr., *Decision-Making at the United Nations Commission on Human Rights, 1979-*82 Human Rights Quarterly 27, 29-34 (Feb., 1983).

[101] Steiner and Alston, *supra note* 25, at 600.

[102] In 1947 the Commission decided, in what is commonly referred to as the 'No Power decision', that it had "no power to take any action in regard to any complaints concerning human rights" (United Nations Commission on Human Rights, report of the First Session, U.N. Doc. E/259, Art. 22) the same year the ECOSOC confirmed the no power decision and further restricted the Commission from accessing individual complaints, (E.S.C Res. U.N. Doc. E/573 (1947)). In 1967 the Commission (Res. 8 (xxiii)) and later the ECOSOC (Res. 1235 (xlii) took the initiative to reverse the decision they took in 1947.

human rights activities of third world states (with the support of the Communist Bloc) that were increasingly dominating the aforementioned organs of the United Nations.[103] The 1235 and later the 1503[104] mechanisms were created by the ECOSOC to allow the Commission and its Sub-Commission to respond to gross violations of human rights anywhere in the world.[105]

A typical complaint received by the Secretary General goes first through the 1503 procedure and then to the 1235 procedure. Accordingly, a complaint is first considered confidentially by a working group made up of five members of the Sub-Commission on the Promotion and Protection of Human Rights. The working group considers the complaints from individuals and NGOs so as to decide if the complaints are procedurally appropriate and substantively worthy of the Sub-Commission's time. The Sub-Commission in its turn decides whether the complaints should be considered by the Commission.[106]

If the Sub-Commission decides that the Commission should consider the matter the later finally deliberates on the substance of complaints after which it could choose to refer the matter to an ad-hoc committee or to the 1235 procedure.[107] The Commission could end all deliberations by deciding that the case is procedurally inadmissible or that it does not show a "consistent pattern

[103] See Steiner, *supra note* 24, at 764; Donnelly, *supra note* 37 , at 58; Steiner and Alston, at 612; Howard Tolley, Jr., *The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications*, 6 Human Rights Quarterly 426-429 (Nov., 1984).

[104] Procedure for dealing with communications relating to violations of human rights and fundamental freedoms, Resolution 1503(XLVIII) of the Economic and Social Council; available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/9fb315fdda618e28802567d000550d12?Opendocumen> accessed on 12/07/08.

[105] The 1503 procedure was created as a result of objections by states who claimed that the non-confidential 1235 procedure cannot use confidential communications to the UN as an input. The 1503 procedure was passed to allow confidential communications to pass to the 1235 procedure. See Tolley (1984), *supra note* 103; at 450. The accidental effect was the creation of a two tiered process in which the 1503 superseded the 1235 process in its frequent use as it was preferred by states for its confidentiality, See Steiner and Alston, *supra note* 25, at 612.

[106] The Sub-Commission considers whether the communication: reveals a consistent pattern of gross and reliably attested violations (of which racial discrimination and apartheid are parts by default), is consistent with the provisions of the United Nations Charter, is based exclusively on information from the media, is insulting to a state, exhausts local remedies and is submitted within a reasonable time after the exhaustion of the local remedies or is prejudicial to the work of a UN Agency (Sub-Commission Resolution 1 (XXIV) (1971); Tolley (1984), *supra note* 103, at 432-433. While the process remains essentially the same under the United Nations Human Rights Council the role-players have changed in that the Human Rights Council Advisory Committee's five member Working Groups on 'communications' and on 'situations' have more or less taken up the role of the Sub-Commission. See: Office of the High Commissioner for Human Rights, Human Rights Council Complaint Procedure, available at <http://www2.ohchr.org/english/bodies/chr/complaints.htm> accessed on 01/12/08.

[107] The Sub-Commission may at times go as far as submitting draft proposals of resolutions suggesting their adoption by the Commission. Tolley (1983), *supra note*100, at 44. According to Donnelly since the Sub-Commission is seen as independent a mere referral to the Commission is seen as proof of serious violations of human rights; Donnelly (1993), *supra note* 37, at 59.

of gross and reliably attested violations of human rights and fundamental freedoms."[108] Alternatively the Commission could, after consultations with the relevant state, defer its decision for the following year's session by deciding to 'keep a situation under review'.[109] A common restraint upon the working group, the Sub-Commission, the Commission and its committees is that they conduct their work under the 1503 procedure in complete confidence.[110]

Once a situation reaches the 1235 phase the Commission uses two mechanisms. It can raise a situation in its annual public debate where states and NGOs are given the chance to enroll delinquent states to what has come to be known the '1235 list'.[111] The Commission can also, under its mandate to 'examine information' or 'make a thorough study of' gross violations situations,[112] take any of the measures that it has developed along the years. Although the more often used method is the appointment of a rapporteur or any selected individual or group to 'examine information' or 'make a thorough study' of a situation, the Commission has also resolved to provide advisory services, to call upon a government to provide information or to defend its position, to call upon the Secretary-General to appoint a special representative, to call upon the Security Council to consider the situation or to criticize the government committing the violations.[113]

In conjunction with the country specific mechanisms created in connection with the 1503 and 1235 procedures the Commission has also come up with 'global' or 'thematic' mechanisms that deal with specific issues rather than specific countries. As if to show that necessity is the mother of all invention the first such procedure, the Working Group on Enforced or Involuntary Disappearances was created following the failure of the Commission to establish a country specific procedure on Argentina during its 'dirty war' of the 70's.[114] More thematic mechanisms were created in subsequent decades of which those on: summary and arbitrary executions,

[108] See articles 1, 2 and 5 of the 1305 Resolution.
[109] Tolley (1984), *supra note*103, at 450.
[110] The Commission may however decide to divulge any information in exceptional circumstances; see Steiner and Alston, *supra note* 25, at 616.
[111] Steiner, *supra note* 24, at 765.
[112] Articles 2 and 3 of 1235.
[113] Steiner and Alston, *supra note* 25, at 621. Steiner, *supra note* 24, at 764.
[114] Steiner and Alston, *supra note* 25, at 641; The working group's first 'urgent-action procedure', which involved finding of 'disappeared' individuals within the first three months of their disappearance, was used to locate Iraq's representative to the Commission who was actually hinted to become the working group's first president, Donnelly, *supra note* 37, at 62.

torture, racism and arbitrary detention bare direct relevance to gross violations of human rights. The modus operandi of these mechanisms included inquiries directed to governments about specific cases, request for urgent action to undo some harm, in-loco visits, conducting studies and providing reports and advisory opinions to the Commission by persons or groups in charge of the mechanism.[115] The United Nations Human Rights Council carried on with the practice of using thematic and country specific mechanisms without changing the context of the Commission's practice. There currently are thirty thematic and eight country specific mechanisms under the Council.[116]

It is to be noted that although the Commission (and now the Council) plays the most important role in the administration of these mechanisms; the role of its subsidiary organ, the Sub-Commission on the Promotion and Protection of Human Rights,[117] is not to be belittled. The Sub-Commission is credited for strengthening the mechanisms and stimulating international confidence in the gross violations processes.[118] The Sub-Commission's strength lies in the independence of its members who are elected by the Commission as individual experts and not state representatives.[119] Although the Human Rights Council has now replaced the Sub-Commission with the Human Rights Council Advisory Committee (hereinafter the "Advisory Committee) the independence and professionalism of the later are also guaranteed.[120]

The Human Rights Council, as a predecessor of the Commission, has basically taken over the mantle and the mechanisms of the Commission while introducing some general but important structural changes. To begin with, the number of Commissioners was reduced from the Commission's fifty-three to forty-seven.[121] Unlike the Commission which was a subsidiary organ

[115] Steiner and Alston, *supra note* 25, at 642; Wikipedia, United Nations Commission on Human Rights, From Wikipedia the free encyclopedia, available at <http://en.wikipedia.org/wiki/United_Nations_Commission_on_Human_Rights#Criticism> accessed on 30/1108.
[116] Office of the High Commissioner for Human Rights, Special Procedures of the Human Rights Council, available at <http://www2.ohchr.org/english/bodies/chr/spexial/index.htm> accessed on 01/12/08.
[117] It used to be the Sub-Commission on Prevention of Discrimination and Protection of Minorities, See Sub-Commission on the Promotion and Protection of Human Rights, available at <http://www.unhchr.ch/html/menu2/2/sc.htm> accessed on 20/8/08.
[118] Buergenthal, *supra note* 2, at 83, Steiner and Alston, *supra note* 25, at 601.
[119] Ibid.
[120] Human Rights Council Resolution 5/1. Institution-building of the United Nations Human Rights Council; available at <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_5_1.doc> accessed on 20/8/08.
[121] Art. 7 General Assembly Res 60/251. Thirteen seats go to Africa, thirteen to Asia, six to Eastern Europe, eight to Latin America and the Caribbean and seven go to Eastern Europe and 'others'. As can be expected the proposal to reduce the number of members was a 'Western' sponsored proposal. See generally: Diverging Views on the Human

of the ECOSOC the Council is established as a subsidiary organ of the General Assembly and its members are elected by the vote of a majority of members of the General Assembly.[122] The Council is also able to meet at least three times a year and can hold special sessions with the consent of one third of its members.[123] In an ill fated attempt to heal the Commission's inability to exclude the worst violators of human rights from its membership the General Assembly resolution which established the Council provides that member elected to the Council "shall uphold the highest standards in the promotion and protection of human rights" and that they should fully cooperate with the Council in the Universal Periodic Review mechanism during their membership.[124] The Universal Periodic Review is a novel mechanism which in addition to reviewing the human rights records of all UN members every four years, reviews the human rights of Council members during their term of membership.[125] Furthermore the resolution also provides that the General Assembly can, by a two-thirds majority vote, suspend the voting rights in the Council of any member state that commits gross violation of human rights.[126]

3.4 Factors Influencing the Performance of the Charter Based Mechanisms

Looking back at the history of the UN and considering the powers given to its organs one can see that the organization is the result of the time's superpowers whose primary interest was ensuring international peace and security without compromising their respective national interests.[127] The superpowers had the least concern for the world-wide protection human rights as even the

Rights Council: The Developing Nations and the United States, available at <http://www.centerforunreform.org/node/49> accessed on 01/12/08. Remember that this is not the first time that number and composition were at stake (i.e. in the Commission). Third World countries (with the support of the Soviets) had with the intention of being in a better position to deal with the South-African situation and presumably also to vote down their own condemnation increased the Commission's membership from 44 to 53; Ramcharan, infra note 130, at 155-56.

[122] Art.1 and 7 of General Assembly Res 60/251.

[123] Art. 10 of General Assembly Res 60/251.

[124] Art. 9 of General Assembly Res 60/251.

[125] Art. 5(e) and 9 of General Assembly Res 60/251; See also Office of the High Commissioner for Human Rights, Special Procedures of the Human Rights Council, available at http://www.ohchr.org/EN/HRBodies/UPRmain.aspx> accessed on 01/12/08.

[126] Art. 8 of General Assembly Res 60/251.

[127] Generally see all citations in footnote 2, Buergenthal, at 23, Farer, at 553-555.

ECOSOC, the only charter organ[128] that can be labeled a human rights organ, was given only promotional powers.[129] Despite the uncontested importance of superpower hegemony in the formative years of the UN the voting power of developing states was to play a greater role in subsequent years and especially in the development of UN institutions.[130] But as we saw in the previous sections it was not only the legislative intent of the founding fathers of the UN or of specific procedures that really mattered in the human rights practice of the organization. The nature and role of actors in the institutions and mechanisms and the national and international political context in which these roles were played also affected the direction in which human rights protection evolved. In this section we will identify the strengths and flows of the international community's efforts in using the UN to confront gross violations.

Before going into the details however one important point needs to be put in order. The means at the disposal of the UN in its dealing with gross violations situations can be divided into two broad categories. The more serious of these is the Security Council's use of enforcement action under Chapter VII of the UN Charter whereas the milder measure is the use of public pressure or the 'mobilization of shame' by the General Assembly and the Human Rights Council. While the effectiveness of either is subject to controversy we shall for the sake of this paper assume that both are effective. The most important reason for our assumption is that a determination as to whether they are ultimately effective or not will not add much value to our study which is concerned with the effectiveness of an institution which uses prosecution or individual deterrence. In fact, since the paper will not deal with whether individual prosecution is an effective deterrent the utility of determining the effectiveness or otherwise of enforcement action or public shame is nil. Furthermore presuming the effectiveness of the two would at any rate have been unavoidable as an evaluation of the effectiveness of factors in this section could not be

[128] Note that we have used 'charter organ' to mean organs established by the UN Charter itself and 'charter based organ' to include both charter organs and those established by the charter organs.
[129] See arts 62 and 68 of UN Charter.
[130] For a general examination of the role of decolonization and the subsequent membership of third world states in the developments in the General Assembly and particularly the UN Commission on Human Rights; see Ron Wheeler, *The United Nations Commission on Human Rights, 1982-1997: A Study of "Targeted" Resolutions*, 32 Canadian Journal of Political Science / Revue Canadienne De Science Politique 75 (Mar., 1999); Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 International Organization 618 (Summer,1986); Thomas Buergenthal, *The Evolving International Human Rights System***,** 100 The American Journal of International Law 788 (Oct., 2006); Philip Alston, *The UN's Human Rights Record: From San Francisco to Vienna and Beyond***,** 16 Human Rights Quarterly 376 (May, 1994); B. G. Ramcharan, *Strategies for the International Protection of Human Rights in the 1990s*, 13 Human Rights Quarterly 155 (May, 1991); Tolley (1983), *supra note* 100, at 28, Tolley (1984), *supra note* 103, at 420.

made unless effectiveness is presumed at least for the sake of argument. And finally it should be emphasized that we should not be fearful of the possibility of the assumption leading us astray from the objective reality. While the Security Council wields two of the most powerful tools for the enforcement of international law; economic and/or diplomatic embargo and the use of armed force[131], the use of public shame is known to cause international diplomatic pressure and to have domestic political effects.[132]

Probably the strongest aspect of the Charter based mechanisms can be attributed to the fact that their existence, legitimacy and mandate emanates from the UN Charter. Thus not only are they equipped with all the grace and the political, military and public relations resources of the UN but they, unlike any of the other mechanisms discussed in this paper, exercise their authority on any state as they can claim their authority based on the human rights provisions of the Charter

[131] Note however that despite being capable of universally (multilaterally) applying two of the most powerful tools known to International Law (these tools are normally effectively applied in the bilateral relation of states) its effectiveness specially in connection with gross human rights violations situations has been questioned in recent years. Not only have economic sanctions been criticized for their adverse effects of the rights of the very same people who they are supposed to protect (See Committee on Economic, Social and Cultural Rights, General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights (Seventeenth session, 1997), U.N. Doc. E/C.12/1997/8 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 50 (2003). available at <http://www1.umn.edu/humanrts/gencomm/escgencom8.htm> accessed on 4/12/08. See also OHCHR, The Human Rights Impact of Economic Sanctions on Iraq, Background Paper prepared by the Office of the High Commissioner for Human Rights for the meeting of the Executive Committee on Humanitarian Affairs (5 September 2000) available at <http://www.casi.org.uk/info/undocs/sanct31.pdf> accessed on 4/12/08.) their effectiveness has also been questioned (Supplement to An Agenda for Peace: Position Paper of The Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, Report of the Secretary-General on the Work of the Organization, A/50/60 - S/1995/1 (3 January 1995) available at <http://www.un.org/Docs/SG/agsupp.html> accessed on 10/3/07.) Matthew Craven, Humanitarianism and the Quest for Smarter Sanctions, European Journal of International Law, Vol.13, No.1, 45-54.

[132] The consensus around academic circles is that states do not generally want to be embarrassed in front of the international community and that such embarrassment is also seen as an incentive for other states to take measures to induce the violating state to comply and a moral weapon for domestic pro-rights initiatives. Nonetheless the consensus is also one which is skeptical of the whole idea since it seems to be accepted because stronger measures do not seem to be feasible in light of the unwillingness of the international community to create strong monitoring institutions and therefore, to use Donnelly's choice of words, 'half a loaf is better than none': Jack Donnelly, *Human Rights at the United Nations 1955-85: The Question of Bias***,** 32 International Studies Quarterly 296, 301 (Sep., 1988); Tolley also thinks that the 1503 procedure is a hidden crack in the fortress of sovereignty, Tolley (1984), *supra note* 103, at 459. John Carey concludes, after considering the arguments of many supporters of the argument that 'publicity war' against Apartheid South Africa, that there still was no empirical evidence suggesting that the campaign was either successful or a failure. Yet, he still maintains that publicity would be justified even if its only tangible effect were to satisfy victims by letting them know that their suffering was recognized by the international community; John Carey, *supra note* 34, 154-158. Generally also see: Philip Alston (1994), *supra note* 130, at 376; David P. Forsythe, *The United Nations and Human Rights, 1945-1985***,** 100 Political Science Quarterly 294 (Summer, 1985).

and on the Universal Declaration of Human Rights.[133] Thus if used effectively they can have the entire international community condemn instances of gross violations of human rights in one voice. Their Charter-based and broadly defined mandate also gives them greater flexibility regarding their rules of procedure and adoptability to changing international political circumstances.[134]

But their nexus to the UN Charter and the consequent advantages are a mixed blessing to say the least. It is exactly because of their potential for effectiveness and because they can exercise their power on any UN member state with any degree of intrusiveness that states are meticulous abut ensuring that they exercise political control over these institutions. States have ensured not only that the legal authority of the charter organs remains limited[135] they also have in particular retained political control via the composition of these organs and their voting procedures. While the Security Council, the General Assembly and the Human Rights Council (and its predecessor Commission) are occupied by state representatives their modus operandi is defined by the veto or the vote. The Sub-Commission on the promotion and protection of human rights which is independent of political control was not given significant powers although, as we saw in the last section, it proved to be rather influential in practice. Furthermore the intentional ambiguity of their mandate makes these mechanisms dangerously unpredictable as politically remote controlled organs they run the danger of using human rights as a pretext to interfere with the political affairs of their rivals.

The reactive nature of Charter based institutions, the overlap between their mandate and that of other organs and the frequency with which they hold sessions have also been used to measure their effectiveness. Although studies have shown that gross violations of human rights can be predicted because they take place under certain political, social and economic circumstances and

[133] See Donnelly (1988), *supra note* 132, at 297; Donnelly (1986), *supra note* 130, at 613; Patrick James Flood, The Effectiveness of UN Human Rights Institutions (1998) Chapter Four; International Commission of Jurists, Establishing a Complaint Procedure in the Human Rights Council – Moving Beyond the 1503 Procedure (November 2006) <lost citation> at 2, Buergenthal (2006), *supra note* 130, at 791; Steiner and Alston, *supra note* 25, at 601.
[134] Steiner and Alston, *supra note* 25, at 601; see also how these organs adopted their role to the demands of political pressure caused by the rise and demise of the cold war and that of declaration described in the previous section.
[135] For example the ECOSOC and the Commission are given the power to "promote" human rights (arts 62 and 68 of UN Charter), the General Assembly "discusses", "initiate studies" or "makes recommendations" (arts 10 and 13 respectively) and the Security Council's role is limited to situations threatening international peace and security. Note how members of the Security Council have been careful in using their Chapter VII powers for the cause of human rights while making sure that their actions do not develop legally binding precedents; Mariano (2002), *supra note* 43, at 226.

usually over prolonged periods of time the role of Charter based mechanisms and that of the Commission and Council on Human Rights in particular is best caught in Ramcharan's description as a "fire brigade approach".[136] Even if we ware to disregard the repetition of effort created by the overlapping mandate between bodies within the Human Rights Council and between the Human Rights Council and regional organs or between the Security Council and International Criminal Court such indifference cannot be justified at least regarding the overlap between organs of the same Charter body and between Charter bodies and treaty based organs as all of them are funded by the UN.[137] With regard to the frequency with which the organs hold successions the security council could be seen as the most effective in reacting to any situation as it unfolds because it is in session throughout the year.[138] The General Assembly and the Human Rights Commission on the other hand meet annually and are unable to react to a situation quickly unless they hold a special session.[139] Since the possibility of a special session is contingent upon a politically controlled voting procedure their timely action is not guaranteed.[140] The problem associated with the frequency of sessions was worked out with regard to the newly established Human Rights Council by increasing its number of sessions to three times a year and by making it easier to hold special sessions.[141]

And the last point regarding the design of these mechanisms has to do with the confidentiality of the 1503 procedure. Although the justification given for the confidentiality of this procedure is

[136] B. G. Ramcharan, *The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts*, Conference-The American Red Cross-Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts April 12-13, 1983, 33 American University Law Review 110 (Fall, 1983); Hilde Hey, Gross Human Rights Violations: A Search for Causes, A Study of Guatemala and Costa Rica, 43 International Studies in Human Rights (1995) at 177, 180-83; Alston points out that "as a general rule it seems that blood needed to be spilled, and in large quantities," before the Commission acts on a situation: Philip Alston, "The Commission on Human Rights" in Philip Alston (ed.) The United Nations and Human Rights: A Critical Appraisal, (1992) at 163. Donnelly (1993), *supra note* 37, at 60, Donnelly gives as examples the case of Equatorial Guinea, Paraguay and Uruguay which spent six, nine and seven years respectively within the confines of 1503 confidentiality at 59-60.

[137] See, Louis B. Sohn, *The Improvement of the UN Machinery on Human Rights*, 23 International Studies Quarterly, Special Issue on Human Rights: International Perspectives 186, 196 (Jun., 1979).

[138] See art 28 of UN Charter.

[139] Art. 20 of UN Charter.

[140] The General Assembly, for instance, was not able to deliberate on or react to the genocide in Rwanda in a timely fashion as the genocidal episode commenced and ended while the General Assembly was out of session (during May, June and July) Schabas (2006), *supra note* 6, at 13.

[141] It is now possible to hold a special session if one third of its members agree to do so; Art. 10 of General Assembly Res 60/251. The Council has in fact been able to put the new procedure into operation as it has convened eight special sessions since its establishment just two years ago; 8th Special Session of the Human Rights Council: The Situation of human rights in the East of the Democratic Republic of Congo, (Friday 28 November 2008) available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/8/index.htm> accessed on 01/12/08.

that it may encourage the states being investigated to cooperate with the Council[142] there are inherent disadvantages associated with it. First of all; knowing that public shame is the ultimate weapon of the Council one is justified in concluding that confidentiality will diminish the utility of public shame.[143] But even if we were to accept this justification because of the possibility that states will cooperate with a confidential procedure in order to avoid public shame the delay caused by the procedure discounts the advantages. Since the Commission used to meet only once a year it takes from two to three years on average before the 1503 procedure passes a situation on to the 1235 procedure while the state being scrutinized can usually add a year to this figure by pretending to cooperate.[144]

We have seen that the Charter based system's advantage lies in that the UN can speak for the international community in condemning gross violations of human rights. The UN's ability to speak in the name of universal consciousness is very important because, besides Security Council enforcement action which is extremely rarely used, the UN's weapon against gross violations is the mobilization of shame against the violating stats. Unfortunately though, this natural or inherent potential has been compromised by the way in which states have been using or rather abusing the Charter based mechanisms. The practices that have eroded the UN's legitimacy as the representatives of human consciousness have been blamed, by learned observers and practitioners, on the over-politicization of the charter based mechanisms. Such over-politicization can be summarized under the role of political bias and the role of lobbing in the decision making process and the over-stretching the substantive reach of the mechanisms.

In a seminal study published in 1988 Jack Donnelly argued that political bias in the UN organs is among the most important impediments to the organizations effectiveness in its human rights work.[145] Based on a statistical survey of the General Assembly's and the Commission's

[142] Donnelly, *supra note* 130, at 612.
[143] The International Commission of Jurists labels the 1503 procedure a "black hole" which absorbs thousands of communications and gives out a few results in pointing out the disadvantage of confidentiality; International Commission of Jurists (2006), *supra note* 133, at 3.
[144] Donnelly (1993), *supra note* 37, at 59; The Human Rights Council nevertheless meets at least three times in regular sessions and is thus more rapid. That does not however mean that confidentiality does not delay the current procedure or that it would not have worked faster had confidentiality not been there.
[145] Donnelly (1988), *supra note* 132; He uses the time taken by Commission and General Assembly and the amount of attention given to civil and political rights relative to economic, social and cultural rights as one yardstick by which to measure bias. His second yardstick is the UN's discrimination in its choice between violators who belonged to the 'Western', 'Eastern' or 'Southern' bloc or geopolitical groups in condemning in condemning these

allocation of time to the matter he points out that from total disregard for economic, social and cultural rights and bias against the Soviet bloc the late 1960's the UN system readjusted its gears bestowing undivided attention to these rights and bias against the West after decolonization.[146] Surprisingly the focus was turned to the economic, social and cultural rights practices of the Western bloc and not to that of third World or Eastern bloc countries even though the economic social and cultural rights practice of the former outperforms that of the later.[147]

Such bias was also outrageously evident in the choice or discrimination, for the purpose of condemnation, between gross violators of human rights based on which geopolitical side the violators belonged to rather than the seriousness of the violations which they are known to have perpetrated. Even the pariah states: Chile, Israel and South Africa who were deservedly labeled the 'Unholy Trinity'[148] for their gross violations practices in the 1970's were selected for condemnation because of their political proximity to the West rather than their human rights practices. Although no sensible commentator would justify the actions of the 'unholy trinity' most agree that the exaggerated reaction of the UN organs is proof of bias against the West because of the UN's utter inaction regarding similar (or maybe even worse) contemporaneous situations such as those in: Ethiopia, Equatorial Guinea, East Timor, Kampuchea, Paraguay, Korea, Uganda, Zaire, Pakistan, Syria and other Arab countries and many countries in the Soviet bloc.[149]

One only needs to compare the yearly condemnation of Israel and the establishment of different sorts of 'committees' on Israel (including a "Division of Palestinian Rights" in the Secretariat) with similar situations such as those listed above to see how the political coalition between Arab states, post-colonial Afro-Asian states and the Soviet bloc was effective in shaming its political

violators. For a detailed (although not as important as this one in terms of their contribution) although early debate on the subject see: Jack Donnelly, *Recent Trends in UN Human Rights Activity: Description and Polemic*, 35 International Organization 633-655 (Autumn, 1981); Philip Alston, *The Alleged Demise of Political Human Rights at the UN: A Reply to Donnelly*, 37 International Organization 537-546 (Summer, 1983); Jack Donnelly, *The Human Rights Priorities of the UN: A Rejoinder to Alston*, 37 International Organization 547-550 (Summer, 1983).

[146] Donnelly (1988), *supra note* 132, at 274-285. Similar conclusions have also been reached by: Green, *supra note* 25, at 787; Tolley, *supra note* 100, at 29.

[147] Donnelly (1988), *supra note* 132, at 274-285.

[148] Alston, *supra note* 128, at 377.

[149] See: Donnelly, *supra note* 132, at 288, 290-91; Wheeler, *supra note* 130, at 76, 81; Sohn, *supra note* 137, at 202-205; Ramcharan (1991), *supra note* 130, at 158; Green, *supra note* 25, at 792, Tolley (1983), *supra note* 100, at 49-50; Tolley (1984), *supra note* 103, at 453; Farer, *supra note* 2, at 578-579; Schabas, *supra note* 6, at 17; Steiner and Alston, *supra note* 25, at 620.

foes while protecting one another.[150] The failure of the General Assembly to even seriously attempt to prevent the massacre of hundreds of thousands of civilians in what became Bangladesh and its subsequent resolution (which was supported by 83% of member states) for India's withdrawal despite clear understanding as to what the consequences of such a withdrawal would be epitomizes the political nature of the UN even where the 'unholy trinity' are not involved.[151]

Thus it is only when one sees how politically biased the Security Council, the General Assembly and the Commission are that one begins to appreciate why the Sub-Commission on the Promotion and Protection of Human Rights has been admired as a success story. Although many have cast doubt regarding the independence and expertise of the members of the Sub-Commission even its critics agree that even the 'relative' independence and professionalism of the members have in practice set apart the Sub-Commission as an impartial and objective institution.[152] The irony however is that the ECOSOC and the Commission have always stepped

[150] Despite the post-cold-war domination of the UN by the West and the West's success in establishing the Council instead of the Commission anti-Israeli bias is still prevalent in the Council. Similar to the General Assembly's actions (discussed in the paragraph) the Human Rights Council has also distinctively identifies Israel for attack. For example just two years since it opened shop it has condemned Israel in both years without giving attention to worse violations in other parts of the world. For instance this year alone it until the 14th of July passed four strongly worded resolutions against Israel and followed up on those it passed the year before whereas it only 'expressed its deep concern' regarding the situation in Darfur and did not pass any resolutions on the situations in Zimbabwe, Saudi Arabia or Burma. And even when considering the situations in which Israel is concerned it is always Israel that is scrutinized and never its Arab opponent such as Syria, the Hamas or Hezbollah. See Resolutions: 7/1. Human rights violations emanating from Israeli military attacks and incursions in the Occupied Palestinian Territory particularly the recent ones in the occupied Gaza Strip; 7/17. Right of the Palestinian people to self-determination; 7/18. Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan; 7/30 Human rights in the occupied Syrian Golan; 7/16. Situation of human rights in the Sudan; in UN Human Rights Council, 7th session of the Human Rights Council (Geneva, 3 - 28 March 2008) available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/index.htm> accessed on 01/12/08. One of the Council's emergency sessions was also dedicated to Israel, see: UN Human Rights Council, 2nd Special session of the Human Rights Council, Geneva, 11 August 2006, available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/2/index.htm> accessed on 01/12/08 and General Assembly, Report of The Human Rights Council on its Second Special Session (Geneva, 11 August 2006) available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.S-2.2_en.pdf> accessed on 01/12/08. See also UN News Center, Ban Ki-moon calls for equal scrutiny of all countries by UN human rights organ; available at <http://www.un.org/apps/news/story.asp?NewsID=25819&Cr=human&Cr1=rights> accessed on 01/12/08.

[151] Farer, *supra note* 2, at 581, John Salzberg, UN Prevention of Human Rights Violations: The Bangladesh Case, International Organization, Vol. 27, No. 1, (Winter, 1973), at 115,121-22.

[152] See: Forsythe, *supra note* 132, at 254-55, Salzberg, *supra note* 151, at 123, Donnelly (1993), *supra note* 37, at 59; Buergenthal, *supra note* 130 at 83, Steiner and Alston, *supra note* 25, at 601; See also the comments of UN High Commissioner for Human Rights Louise Arbour at the Commission's final session that the Sub-Commission is "a discredit to this Commission" in reference to the membership of Cuba, Saudi Arabia and Zimbabwe to the Commission and the subsequent failures but emphasizes the irony by stating: "To suggest it should be apolitical is

in to make sure that the political control of the member states is not eroded even by a "relatively independent" expert body.[153]

A final point concerning politicization of human rights is that in attempting to find any and all weaknesses of their foes states have gone beyond the spectrum of human rights and into areas that are probably better left to the domestic system of states. Thus not only has the UN been criticized for overstretching its mandate in the name of human rights but it has also been shown that its mechanisms have been more effective when it is dealing with violations of rights on which there is a greater degree of moral consensus.[154] The proposition therefore is that the UN should avoid bickering over highly politicized debates when it comes to enforcement and give more attention to violations whose outrageousness can unite states despite their minor differences over details.[155]

While political bias within the UN declined significantly with the conclusion of the cold war[156] the effects of lobbying within the UN began to be more visible thus drawing the attention of activists and politicians alike.[157] Although political lobbying has always been there it took the

somewhat akin to criticizing spring for coming after winter. But political considerations should not be allowed to bypass entirely the substance of the work entrusted to the Commission." UN News Center, Time for new UN rights body is now as status quo cannot continue, says top official, available at <http://www0.un.org/apps/news/story.asp?NewsID=14053&Cr=commission&Cr1=rights> accessed on 4/12/08.

[153] Forsythe, *supra note* 132, at 254, Steiner and Alston, *supra note* 25, at 601.

[154] Donnelly, *supra note* 132, at 297; Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 Georgia Journal of International and Comparative Law 1, 22-28 (Fall, 2006); Tolley, *supra note* 100, at 55; Donnelly, *supra note* 145, at 653.

[155] The work of the Council in this regard is also objectionable since not only is its Universal Periodic Review mechanism focused on the widest possible substantive reach (i.e. 'the fulfillment of each state of its human rights obligations') it has also breached the bounds of moral any consensus by passing highly controversial resolution concerning 'defamation of religions' and burdening the Specia; Rapporteur on Freedom of Expression with reporting on instances in which the freedom of expression is abused, an issue that (however important it may be) has nothing to do with the violation of human rights. Human Rights Council, Resolution 7/19. Combating Defamation of Religions, available at <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_19.pdf> accessed on 01/12/08; Wikipedia, *supra note* 98; See also Alston, infra note 157, at 22.

156 Donnelly (1988), *supra note* 132, at 276, Wheeler, *supra note* 132, at 86.

[157] Political bias of course never disappeared, it was now wielded by its former victims i.e. the West with the leadership of the sole remaining hegemon, the United States of America, Steiner, *supra note* 24, at 764. This has to be sure caused a lot of resentment among third world countries and many accuse the Commission and Council of bias towards the West. See for example: Philip Alston, Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council, Center for Human Rights and Global Justice Working Paper, Number 4, 2006, available at <http://www.chrgj.org/publications/docs/wp/WPS_NYU%20_CHRGJ_Alston_Final.pdf> accessed on 05/11/08. Also published on: 9 Melbourne Journal of International Law, available at <http://www.austlii.edu.au/au/journals/MelbJIL/2006/9.html> accessed on 16/11/08; UN Information Service, Countries Trade Barbs Over "Selectivity" in Human Rights, Debate Justifications of War in Iraq Independent Expert

center stage with the increasing realization that even after political bias declined states were being condemned not based on only whether gross violations have occurred but also on whether they have a strong lobbying capacity or have powerful friends and no significant foes.[158] The first effect of lobbying is seen by how successful states were in preventing their case from being viewed outside the 1503 confidential procedure.[159] The determination to avoid public shame was so strong that states even lobbied members of the Sub-Committee on the Promotion and Protection of Human Rights and the Working Group under it so much so that the Sub-Committee was forced to use a secret ballot system in proceedings that were confidential to start with.[160] Even when states were not able to block a public consideration of their case they still had the option of saving themselves from a strong condemnatory resolution against them.[161] The fact that the majority of members of the Commission were themselves gross violators and therefore potential victims of a condemnatory resolution makes it easier to have them on board in garnering support for softer resolutions.[162]

If, in light of the foregoing discussion, the UN Charter based organs can be described as politicized then the Security Council can only be described as the prophet or king of politicization. The bias of the Security Council is much more magnified than that of the other organs as the bias is towards the narrow interests of the five permanent members as opposed to

---

on Extreme Poverty Presents Report to Commission on Human Rights, HR/CN/1015 (2 April 2003) available at <http://www.unis.unvienna.org/unis/pressrels/2003/hrcn1015.html> accessed on 05/12/08.

[158] Tolley, whose work can be regarded as one of the most comprehensive early works on the Commission, points out that lobbying the members of the Commission begins early on by putting pressure on the Foreign Ministries in the capital cities and may involve threatening the state with economic sanctions, Tolley, *supra note* 100, at 49; See also where the US Congress threatened to withhold aid from states that did not vote for its membership in the Commission but did not act on its threat United Nations Foundation, *Flouting Bush, House Votes to Withhold UN Dues* (2001) available at <http://www.unwire.org/unwire/20010511/14704_story.asp?> accessed on 4/12/08.

[159] Wheeler, *supra note*130, at 78, 81; Note that Wheeler studied the Commission's work extensively but unlike Donnelly (see fn. 145) he used the number and strength of resolutions. Despite their difference in method and the time of study (1988 vs. 1999) Wheeler confirms most of Donnelly's conclusions on bias and adds upon the study of political lobbying.

[160] Ibid; at 81.

[161] Wheeler, *supra note* 130, at 77, 94-96; Tolley, *supra note* 100, at 49.

[162] Forsythe, *supra note* 132, at 255; Wheeler, *supra note* 130, at 94-96; See how China has successfully avoided public condemnation even at the done of the Tiananmen Square killings. China was at first accomplished at lobbying only third world states but has now began successfully lobbying the very western states that used to sponsor resolutions in an attempt to have it condemned. Steiner and Alston, at 634-640 (on Saudi Arabia at 615-618); Wheeler, *supra note* 130, at 90; Steiner, *supra note* 24, at 764; Barbara Crossette, *China Tries To Deflect Criticism on Rights* (New York Times, March 7, 2000) available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE3DE1338F934A35750C0A9669C8B63> accessed on 05/12/08; Hongyi Harry Lai, *Behind China's World Trade Organization Agreement with the USA*, 22 Third World Quarterly 237-255 (Apr., 2001).

that of each member of the UN. And since the interest of only five states is given absolute prominence and given the weight of the Security Council's decisions the likelihood that these states will be lobbied by other states who need favorable decisions is very great.[163] Lobbying in the Security Council is of course more concrete since a strong veto wielding ally in the Council can be worth a hundred states in the General Assembly or the Commission/Council. No wonder then how Israel, a distinguished and longest standing member of the "Unholy Trinity", is able to avoid Security Council adversity.[164] Even the cases of Security Council action that have been discussed in this chapter have all been subject to criticism. If we take the Yugoslav case the Security Council acted only after the unilateral action by NATO as Russia had prevented the possibility of any action.[165] And the case of Rwanda also saw the preventable massacre of millions because of the lack of interest in Rwanda by the permanent members of the Council.[166] Furthermore the Security Council's sanctions have also been highly criticized by human rights advocates as indiscriminate (some describing them as "weapons of mass destruction") and as a gross violation of the rights (including "genocide") of populations on whom they are applied. Thus the legitimacy of the Security Council is the worst achievable standard in the UN system as most members of the international community[167] and commentators would concur.[168]

[163] Aznar-Gomez Mariano, *supra note* 43, at 234, Steiner, *supra note* 24, at 763-764.
[164] Note also this chapter's discussion on how the Security Council was crippled by the cold war so much so that the General Assembly decided to act to deal with peace and security matters under the rubric of the Uniting for Peace resolution.
[165] See: Schabas, *supra note* 6, at 13.
[166] This was found particularly disturbing because the UN already had forces on the ground who rather than being authorized to prevent or mitigate the atrocities were actually about to be reduced in the midst of the genocide. See Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc. S/1999/1257 (Dec 16, 1999) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement> accessed on 14/12/07; Schabas, *supra note* 6, at 13; Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 The American Journal of International Law 501 (Jul., 1996); Steiner and Alston, *supra note* 25, at 652.
[167] see Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 European Journal of International Law 99 (2002); who argues that even though no member of the UN would question the legal validity of the Security Council most states bind themselves unwillingly and many have violated its binding resolutions intentionally and in plain sight just to show their conscientious protest against the resolutions.
[168] See: Ibid, Aznar-Gomez Mariano, *supra note* 43, at 234; O'Connell, *supra note* 167, at 63; Akhavan, *supra note* 166, at 501.

Chapter 4: TREATY BASED MECHANISMS

Introduction

The treaty based system of human rights is a result of specialized human rights agreements that developed under the auspices of the United Nations. The UDHR, ICCPR and ICESCR, together known as the 'international bill of rights', lie at the core of the treaty based system. Preceded only by the Genocide Convention, the Universal Declaration and the two covenants have led the way for the establishment of an ever expanding array of treaties that expound the substance of their focus-area and establish treaty bodies to monitor their enforcement. The Conventions on; the Elimination of All Forms of Racial Discrimination, the Elimination of all Forms of Discrimination Against Women, Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and on the Rights of the Child together with the international bill of rights are considered to constitute the treaty based system of human rights of the United Nations.

Regardless of an abundance of treaty bodies from which to choose the ones that are directly relevant to gross violations of human rights are the Human Rights Committee established by the International Covenant on Civil and Political Rights; the Committee Against Torture established by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Committee on the Elimination of Racial Discrimination established by the Convention on the Elimination of All Forms of Racial Discrimination and the mechanism established by the Apartheid Convention. It shall be the Human Rights Committee of the ICCPR that we shall afford more attention to in this chapter rather than the other institutions. This is mainly because this Committee is, as we shall discover later, the more prominent and more studied of the four institutions. As we proceed in this chapter we shall nevertheless keep an eye the Committee against Torture and the Committee on the Elimination of Racial Discrimination while keeping the Human Rights Committee at the center of our analysis. The Chapter ends with a summary of the lessons that can be learned about factors that influence the effectiveness of these and other similar institutions.

4.1 The ICCPR Human Rights Committee

The Human Rights Committee is established by article 28 of the International Covenant on Civil and Political Rights (Hereinafter the ICCPR).[1] Similar to the Sub-Commission on the Promotion and Protection of Human Rights, a Charter organ which was discussed in the previous chapter, the Human rights Committee is composed of independent part-time experts who are elected and serve in their personal capacity. In addition to operating in their personal capacity members of the Committee are expected to have an honorable character, be well-known for their human rights expertise and at least some of them are expected to be legal or paralegal professionals.[2] The 18 members are elected by state parties to the ICCPR from a pool of individuals nominated by the states for this purpose.[3] The Human Rights Committee has three major mechanisms that though not specifically meant to tackle gross violations situations, can be and are in fact relevant in this respect. These are the inter-state complaints mechanism, the state reporting or periodic reporting mechanism and the individual complaints or communications mechanism.

The first of the mechanisms, the inter-state complaints mechanism, is established and spelled out in article 41 of the ICCPR. Implicit in the mechanism is the assumption that violations of the ICCPR, like the violation of other international laws such as trade laws, will evoke the reaction of state parties who are the theoretical victims of the violation of a treaty provision. The mechanism allows states to consider the human rights violation as a trigger of the state responsibility of the offending state. Thus it allows any state that agrees to be subject to this mechanism to make a formal address concerning the violation to any other state that has agreed likewise without requiring that the complainant's national(s) to be injured for the acquisition of the right to make a complaint.

Once an inter-state complaint has been made the state against whom the allegation is made is given three months to answer to the allegations or to explain how it has fixed the problem which was complained about. If the two states do not settle their differences within six months of the initial communication they can refer the case to the Human Rights Committee which has twelve more months to conciliate the parties. After an initial three months for the state complained

[1] Available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> accessed on 02/06/09.
[2] See ICCPR Art. 28.
[3] Each state may nominate two of its nationals for this purpose, See art 29 of ICCPR.

against to respond, a six months negotiating period and a final full year has passed since the notice to the Committee, the process ends with the committee writing a report stating the facts and either the terms of the agreement or where the parties have not yet agreed the argument of both sides. Where the year long dispute has ended with the parties still having differences the Committee could still continue, in accordance with article 42, to reconcile the parties by establishing an 'ad-hoc Conciliation Commission'. Although this mechanism is set out in the ICCPR itself it has so far never been used by any state.[4]

The state reporting or periodic reporting mechanism which is spelled out in article 40 of the ICCPR is the only mandatory and most fully developed mechanism of the Human Rights Committee.[5] Simply put; the state reporting mechanism goes along the following path. Every 5 years state parties to the ICCPR are expected to submit reports on the measures they have adopted to implement the Covenant together with the issues and difficulties they have faced in the implementation endeavors.[6] The Committee then 'studies' the state reports and prepares a report to the state parties together with whatever 'comments' it considers appropriate. The Committee can also pass on its comments and the reports of any state to the ECOSOC.[7]

Although the state reporting mechanism seems simple and harmless as originally designed in the ICCPR it has grown to be more intricate and noteworthy in the years that followed. The general direction in which the Committee proceeded in interpreting its powers can be described as

[4] See THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS: IN A NUTSHELL, 46.

[5] Farrokh Jhabvala concludes from the fact that state or periodic reporting mechanism is the only mandatory procedure in the ICCPR shows us that civil and political rights are to be implemented progressively. Farrokh Jhabvala, *The Practice of the Covenant's Human Rights Committee, 1976-82: Review of State Party Reports*, 6 Human Rights Quarterly 104-105 (Feb., 1984); But see John P. Humphrey, *Response to Farrokh Jhabvala's Article, "The Practice of the Covenant's Human Rights Committee 1976-82: Review of State Party Reports,"* 6 Human Rights Quarterly 539-540 (1984); and Farrokh Jhabvala, *Response to John P. Humphrey's Letter in 6 Human Rights Quarterly 539 (1984)*, 7 Human Rights Quarterly 242-244 (May, 1985).

[6] Although the Committee decided that the reports of every state should be within five years of its previous report or its supply of additional information the Committee preferred to retain its prerogative to seek information at any time by virtue of article 40 (1) (b) of the ICCPR, Dana D. Fischer, *Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee*, 76 The American Journal of International Law 148 (Jan., 1982). For instance in 1992 the Committee made an urgent request to Bosnia-Herzegovina, Croatia and Yugoslavia to submit specific reports regarding the implementation of Articles 6, 7, 9, 10, 12 and 20 of the ICCPR. Vojin Dimitrijevic, "The Monitoring of Human Rights and the Prevention of Human Rights Violations through Reporting Procedures", in Arie Bloed et. al. (eds.) Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms 15-16 (1993).

[7] ICCPR Article 40 (4).

assertive and progressive. The Committee has developed a practice under which every government representative makes a public report after which the representative is questioned by Committee members in what is known as the 'initial examination'.[8] The Committee may then decide to call on the government to appear for a second round where questions related to the initial examination may be raised and a topic by topic discussion is made.[9] The Committee also began rigorously inquiring as to whether any and what actions were taken by states in response to its recommendations on the previous report.[10] This assertiveness has manifested itself in the committee's public criticism of states, its criticism and even rejection of state reports where they are incomplete and its use of diplomatic means to pressure non complying states.[11] The Committee's assertiveness and expansiveness is also reflected in how it was able to diversify its sources of information. The Committee has resorted to gathering information concerning a state's practices from specialized agencies of the UN and from NGOs although the ICCPR does not give it an explicit mandate to do so.[12] The Committee also began conducting *in loco* investigations to validate the accuracy and truthfulness of state reports where the concerned state is willing and cooperative.[13] And as a final point the Committee has also widened the class of institutions to which it reports by ensuring that its reports reach any of the relevant specialized agencies of the UN through the Secretary-General.[14]

And finally there is the individual complaints or communications mechanism which is established by the Optional Protocol to the International Covenant on Civil and Political Rights.[15] The Optional Protocol allows the Human Rights Committee to "receive and consider communications" from individuals who claim to be victims of states parties to the protocol. It is stated in black and white in the Optional Protocol that no complaint will be received if it is made

[8] Fischer, *supra note* 6, at 143.
[9] Ibid
[10] Id. At 148, See also Buergenthal, *supra note* 4, at 45.
[11] David P. Forsythe, *The United Nations and Human Rights, 1945-1985*, 100 Political Science Quarterly No. 2. The Academy of Political Science 253 (Summer, 1985).
[12] Fischer, *supra note* 6, at146-147.
[13] Buergenthal, *supra note* 4, at 45.
[14] Ibid
[15] Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, available at <http://www.unhchr.ch/html/menu3/b/a_opt.htm> accessed on 27/07/08.

against a state that has not signed the Protocol.[16] The mechanism, as its name indicates, is activated by a 'written communication' which will be considered by the Committee only if admissibility requirements are fulfilled. Once it is ascertained that the complaint conforms to some procedural requirements such as the exhaustion of local remedies it is sent, together with an order for provisional measures if necessary, to the alleged violator who has six months within which to answer to the allegation.[17] The Committee then 'examines' the communication in a closed meeting (i.e. without conducting hearings) and forwards its 'views' to both parties.[18] A summary of the cases considered is incorporated into the Committee's annual report to the UN General Assembly.[19] Although it is conceivable that the individual complaints procedure could spot out gross human rights violations as evidenced by the Committee's early cases most of its practice under this mechanism shows otherwise.[20] The committee, because of the procedure's design, is ill equipped to deal with gross violations under this procedure as individual complaints are detailed enough to be prohibitive of being considered on a mass scale.[21] Thus the committee would be overwhelmed if it were to attempt to give solutions to gross violations situations as it

[16] Id. Article 1.

[17] See United Nations, International Covenant On Civil And Political Rights, Selected Decisions of the Human Rights Committee under The Optional Protocol, Thirty-third to thirty-ninth sessions (July 1988 - July 1990) United Nations, New York and Geneva 8-12, 65, 102 (Volume 3-2002).

[18] Article 5(4) of the Optional Protocol.

[19] Id. Articles 1-6.

[20] Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 The Yale Law Journal 273, 344 n.315 (Nov., 1997); Mullerson argues that while gross violations are "either a result of deliberate state policy or a breakdown of law and order in a country," individual complaint procedures are typically designed to correct "specific shortcomings in the functioning of a legal system or as a result of certain failures of that system" on a case by case basis. Rein Mullerson, 'The Efficiency of Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR', in Arie Bloed et. al. (eds.), *supra note* 6, at 27. Keith, on the other hand, points out that an individual complaints process requires the individual concerned to gather such type of information which is typically difficult to collect in [or which will not be allowed by] a state which is committing gross violations of human rights: Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior*? 36 Journal of Peace Research 99 (Jan., 1999); It should also be noted that individual mechanisms are less relevant in this regard as states with bad human rights records seem to be reluctant to sign up to individual complaint procedures resulting in the concentration of states that are unlikely to commit gross violations of human rights under the mechanisms discussed in this chapter.

[21] Note that in the previous chapter's Charter based Human Rights Commission/Council 1503 mechanism an individual's complaint is used not to investigate its merits as such but to count it as evidence of a wider and systematic violation of rights. Generally see, Louis B. Sohn, *The Improvement of the UN Machinery on Human Rights*, 23 International Studies Quarterly, Special Issue on Human Rights: International Perspectives 207 (Jun., 1979); Ramcharan, *Strategies for the International Protection of Human Rights in the 1990s*, 13 Human Rights Quarterly 157 (May, 1991); Jack Donnelly, International Human Rights 66 (1993).

operates on a case by case basis.[22] Furthermore; while some of the signatories of the additional protocol have in fact been involved in gross violations these seem not to have reached this mechanism as most of the cases that have reached the Committee are individual petitions usually contesting specific laws from states with respectable human rights records.[23]

4.2 Committee Against Torture (CAT)

The Committee against Torture (Hereinafter CAT) is established by article 17 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Hereinafter UNCAT or Convention against Torture).[24] Composed of ten independent experts the Committee's composition is modeled on that of the ICCPR Committee. The UNCAT as a matter of fact goes a little further than modeling its Committee on that of the ICCPR when it urges member states to 'bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and are willing to serve on the Committee against Torture.'[25]

The CAT can be considered as a very unique treaty based institution owing to the variety of mechanisms available to it in its struggle against torture and other cruel, inhuman or degrading methods of treatment or punishment. In addition to the inter-state complaints, state reporting and individual complaints mechanisms which are common to most treaty systems the UNCAT utilizes an investigatory mechanism and most recently (since 2002) a preventive mechanism.

The inter-state, periodic or state reporting and individual complaints mechanisms of the CAT are nearly identical to that of the ICCPR Committee. The inter-state mechanism for instance is not

[22] Claudio Grossman scoffs at the thought of using the individual complaints mechanism to deal with gross violations by comparing it to a young lad who tries to stop a flood that is about to burst a dam by putting a finger in a hole on the structure; Claudio Grossman, *Strengthening the Inter-American Human Rights System: The Current Debate, The Future of the Inter-American System for the Promotion and Protection of Human Rights*, 92 American Society of International Law Proceedings 188 (April 1-4, 1998).

[23] See Elizabeth Evatt, *Reflecting on the Role of the International Communications in Implementing Human Rights*, 20 Australian Journal of Human Rights (1999) available at <http://www.austlii.edu.au/au/journals/AJHR/1999/20.html> accessed on 28/07/08.

[24] Available at <http://www.hrweb.org/legal/cat.html> accessed on 06/02/09.

[25] UNCAT Article 17 (2).

only identical to that of the ICCPR procedure but it is also, like its counterpart, so far unused.[26] Except for its inclusion in the UNCAT (as opposed to an optional protocol), the individual complaints or communications mechanism of the CAT is also identical to that of the ICCPR. The state reporting or periodic reporting mechanism is also no different from that of the ICCPR.[27] Thus rather than discussing the mechanisms that are identical or nearly identical to the mechanisms already discussed we will deal with the mechanisms that make the CAT stand out while avoiding unnecessary repetition.

The investigatory mechanism of the CAT, which is comparable to the United Nations Commission on Human Rights' 1503 and 1235 mechanisms, is set out in article 20 of the UNCAT and the Rules of Procedure established by the CAT.[28] The mechanism is initiated by the reception of information by the CAT alleging or indicating that torture is being systematically practiced.[29] The mere reception of such information does not of course guarantee the continuation of the process as the CAT ascertains the reliability of the information and of its source with the assistance of the Secretary General of the UN.[30] If the CAT is convinced that that the information received contains well-founded indications that torture is being systematically practiced in the territory of a state party it goes on to gather more information on the situation from the state party or from any other source that it deems appropriate.[31] The Committee may 'if warranted' designate one or more of its members to carry out an enquiry, an in loco visit or a hearing in the territory of the alleged violator(s). Where an enquiry of sorts is warranted, the committee may possibly seek from the concerned state all sorts of information and cooperation including the designation of an accredited state representative to help the individual(s) involved in the investigation.[32] The mechanism is brought to an end with the CAT submitting its

[26] See *supra note* 22.
[27] Compare articles 28, 29, 40-44 of the ICCPR with articles 17-23 of the UNCAT.
[28] Committee Against Torture, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, Rules of Procedure, CAT/C/3/Rev.4, 9 August 2002, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.3.Rev.4.En?OpenDocument> accessed on 30/08/08.
[29] Article 20 of the UNCAT and articles 69 and 70 of the Rules of Procedure.
[30] Article 75 of the Rules of Procedure.
[31] Although the options are left open for the Committee article 76 of the Rules of Procedure indicates that other governments, UN organs, individuals or Non-Governmental Organizations could be among the likely sources of such information.
[32] Articles 78-82 of the Rules of Procedure.

'comments and suggestions' to the state investigated and may, with the assent of the state, include the same in its annual report to the states parties and to the UN General Assembly.[33]

The investigatory mechanism has three interesting features that need mention. First of all, the procedure is not mandatory on states parties. Interestingly though, a state party does not have to 'recognize the competence' of the CAT in order to allow it to apply this particular mechanism on it. The application of the mechanism is presumed unless a state makes an explicit reservation in accordance with article 28 of the Convention. Compared to the usual procedure of 'explicit recognition verses mandatory application',[34] utilized by the UNCAT itself and all of the other mechanisms discussed in this chapter, this approach is unique to the CAT investigatory mechanism. Second of all, the long-term cooperation of the suspected state is required throughout the procedure. Unlike many of the other procedures discussed in this chapter that require the states only to communicate with the respective committees in writing; this one entails the visit of committee members (possibly with a large delegation of medical, linguistic and diplomatic experts and staff) to the sovereign territory of states. And once they are in the country the committee members may seek to knock on the doors of usually secluded places of detention, interview prisoners and criminal administration personnel and staff, hold hearings of witnesses and demand that the provision of accredited representatives and information from the authorities. Thus the cooperation of the state parties under investigation is needed to the very end of the procedure. And third there is the issue of confidentiality. All the documents and evidence from the investigation are to be kept confidential, the explicit consent of the concerned state being the only exception for disclosure. The meetings of the CAT regarding investigations are also to be held in camera.[35]

The latest and most robust of the CAT procedures is the preventive mechanism established by the Optional Protocol to the UNCAT. [36] The aim of the protocol being the establishment of a

[33] Article 20(5) of the UNCAT and articles 83 and 84 of the Rules of Procedure.

[34] See articles 19, 21 and 22 of the UNCAT, articles 40 and 41 of the ICCPR and articles 9,11 and 14 of International Convention on the Elimination of All Forms of Racial Discrimination.

[35] See articles 72-74 of the Rules of Procedure.

[36] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United

non-judicial preventive mechanism in preference to responding to violations, it establishes a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter the 'Subcommittee on Prevention') and obliges state parties to establish 'national preventive mechanisms' or 'visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment'.[37] The ten[38] members of the Subcommittee on Prevention, in addition to fulfilling the requirements of ICCPR Committee membership, should have professional experience in criminal justice administration and should be engaged in the Subcommittee's work as full time employees.[39] The emphasis of the Optional Protocol on the qualification of the members is quite visible as it, in addition to giving detailed consideration to the issue, requires nominating states parties to provide detailed information about the qualifications of the nominees and makes their qualification the first and most important issue (or precondition) to be considered for their election.[40]

Even though comparable to the powers of the CAT in its investigatory role, the powers and responsibilities given to the Subcommittee on Prevention are more extensive and are explicitly stated in the Optional Protocol. The Subcommittee on Prevention can, in accordance with a pre-set and pre-notified schedule, visit any state party in order to make recommendations on how the state can prevent the commission or practice of torture or other cruel, inhuman or degrading treatment or punishment. In order for the Subcommittee to do this properly the states parties undertake to receive the Subcommittee in its territory and to grant it unrestricted access to any place of detention and to provide it with any relevant information including information on the number of detention sites and details about their populations (including the history of individual detainees). The Subcommittee is also to get full access to these places and to the individuals

Nations by resolution A/RES/57/199; available at <http://www.unhchr.ch/html/menu2/6/cat/treaties/opcat.htm> accessed on 30/08/08.

[37] Id Articles 1 and 2.

[38] See Art. 5(1) although this article provides that the number of members would be increased to 25 after the 50th ratification that has not so far been achieved. See Election of the members of the Subcommittee on Prevention of Torture to replace those whose terms are due to expire on 31 December 2008, available at <http://www2.ohchr.org/english/bodies/cat/opcat/elections2008.htm> accessed on 24/02/09.

[39] See article 5 of the Optional Protocol.

[40] See articles 5(2), 6(1) and 7(1)(a) of the Optional Protocol.

inhabiting them. The Optional Protocol explicitly grants even a right to conduct private interviews with any person including detainees that it deems are of value to the Subcommittee's task.[41]

In addition to its visiting powers the Subcommittee is also given the responsibility to work with states parties and their national preventive mechanisms to strengthen their own role in the prevention of torture or other cruel, inhuman or degrading treatment or punishment. In this respect the Subcommittee is given the power and responsibility to assist states parties in the establishment and upkeep of national preventive mechanisms. It is in particular given the power and responsibility to maintain direct or even confidential contact with national preventive mechanisms, help build the capacity of such institutions, help them protect potential victims and it is also expected to lobby or pressure states parties to strengthen these institutions. The Subcommittee is also empowered to create contacts and cooperate with any international, regional of national institutions that have concurrent aspirations.[42]

Once the Subcommittee on Prevention has conducted its visit and gathered all the information it deems worthy it is expected to evaluate the situation and make its recommendations and observations known to the concerned state party and if need be to the national preventive mechanisms. But these reports or 'recommendations and observations' are not for public consumption and even the Subcommittee's annual public report to the CAT is presumably devoid of any details as they might shame the state concerned. The consent of the state can of course allow the report to be published at any time. It is only where the state refuses to cooperate with the Subcommittee in its visits or refuses to improve a situation in accordance with the recommendations of the Subcommittee that the CAT can make a public statement or even publish an entire report after giving the state concerned a chance to clarify its stance on the matter.[43]

[41] See articles 11-14 of the Optional Protocol.
[42] See article 11 of the Optional Protocol.
[43] See article 16 of the Optional Protocol.

Among the distinctive aspects of the Optional Protocol is that a state ratifying the Protocol has to agree to implement the protocol in its entirety as no reservations to the Optional Protocol are allowed. A party ratifying the Optional Protocol may; however, delay the implementation of its provisions concerning the powers of the Subcommittee and those concerning national preventive mechanisms for up to three years from the date of ratification.[44]

4.3 The Committee on the Elimination of Racial Discrimination and the Mechanisms of the Apartheid Convention

The Committee on the Elimination of Racial Discrimination (hereinafter the 'Racial Discrimination Committee') is established by the International Convention on the Elimination of All Forms of Racial Discrimination (1966).[45] The jurisdiction of the Committee overlaps with gross violations in that it has jurisdiction over apartheid which can be taken as a subset of racial discrimination.[46] The Racial Discrimination Committee which is very similar to the ICCPR Committee has eighteen members whose qualifications, independence and even procedure of election is nearly identical to that of the ICCPR Committee.

The inter-state complaints, periodic reporting and individual complaints mechanisms contained in the Convention on the Elimination of Racial Discrimination are similar to the ICCPR's mechanisms. The inter-state complaints mechanism of the Racial Discrimination Committee is

[44] See articles 24 and 30 of the Optional Protocol.

[45] Available at <http://www.hrweb.org/legal/cat.html> accessed on 22/o8/o8.

[46] Art 1 of International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' And apartheid is defined by Art. 7 (2) (h) of the Rome Statute as 'inhumane acts of a character … committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime' Also see the definition of the 'crime of apartheid' in Art. 2 of the Apartheid Convention which we shall not reproduce here because of the size of the definition. Apartheid is treated as a subset of racial discrimination also in the preambles and Arts. 3 and 5 respectively of the Convention on the Elimination of All Forms of Racial Discrimination and United Nations Declaration on the Elimination of All Forms of Racial Discrimination, Proclaimed by General Assembly resolution 1904 (XVIII) of 20 November 1963, available at <http://www.unhchr.ch/html/menu3/b/9.htm> accessed on 22/o8/o8.

the same as its ICCPR and UNCAT counterparts except for a small procedural variation. Instead of ending the process with a report based on the information gathered the Racial Discrimination Committee uses the information for the consumption of an '*ad hoc Conciliation Commission*' whose mandate is not constrained by a deadline.[47] But whatever the differences of the inter-state complaints mechanism of the Racial Discrimination Committee from the two committees, their comparison ends with a similar predicament of having never been used during the duration of their existence.[48]

The state reporting or periodic reporting mechanism of the Racial Discrimination Committee is also indistinguishable from that of the ICCPR Committee in its design.[49] Whatever difference there is between the reporting mechanisms of the two lies in that while the ICCPR Committee has developed a reputation for assertiveness and expansiveness the Racial Discrimination Committee has been criticized for exhibiting quite the opposite attributes.[50] Except for the fact that it is established by the convention itself, rather than by an additional protocol, the individual complaints or communications mechanism of the Racial Discrimination Committee is also similar with that of the ICCPR.

As part of the state reporting mechanism the Racial Discrimination Committee uses different working groups, rapportours and similar arrangements. Particularly notable in this respect is the Committee's inclusion of 'preventive measures including early warning and urgent procedures' in its agenda since 1993.[51] This procedure allows the Committee to give special attention to situations that seem to be building up the momentum for gross violations of the Convention on the Elimination of All Forms of Racial Discrimination and to conduct emergency sessions, make in loco visits and draw the attention of the Secretary-General and the Security Council to some

[47] Compare Arts. 11 and 12 of the Racial Discrimination Convention with Art. 41 (1) of the ICCPR.

[48] How To Complain About Human Rights Treaty Violations, The Four Principal UN Human Rights Treaties Containing Complaint Mechanisms – Overview, available at <http://www.bayefsky.com/complain/7_overview_cerd.php> accessed on 24/02/09.

[49] Compare Arts. 19 and 40 of the Racial Discrimination Convention and the ICCPR respectively.

[50] Donnelly (1993), *supra note 21*, at 69. But also see M.N. SHAW, INTERNATIONAL LAW 232-233 (Fourth Ed. 1997).

[51] See *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 18* (A/48/18), annex III. Available in: Office of the United Nations High Commissioner for Human Rights, About the early-warning measures and urgent procedures, available at <http://www2.ohchr.org/english/bodies/cerd/discussions.htm> accessed on 22/o8/o8.

situations.[52] Under this procedure it adopted its 'Declaration on the Prevention of Genocide' under which it decided to strengthen its early warning system by working out a set of indicators by which it can recognize if a state is moving to violence of genocide.[53] Afterwards the committee issued a 'follow up' decision in which it listed a set of indicators by which it can achieve the declaration.[54]

The International Convention on the Suppression and Punishment of the Crime of Apartheid[55] establishes a state reporting or periodic reporting mechanism that is quite different from the procedures considered so far. According to article 9 of the Apartheid Convention the Chairperson of the UN Commission on Human Rights appoints three persons from the members of the Commission who represent states who are parties to the Apartheid Convention. And if there are no or not enough state party representatives in the Commission for this purpose, the Secretary General of the UN is given the duty to designate the necessary number of members in consultation with states parties. Thus the constitution of the organ, the election of its members and the nomenclature of the organ responsible for enforcing this mechanism are different from those considered so far. The members of the 'group', unlike the 'committees' so far considered, are also state representatives rather than independent experts.

4.4 Factors Influencing the Effectiveness of the Treaty Based Mechanisms

Unlike the Charter based mechanisms discussed in the last chapter the treaty based mechanisms do not have a birth right conferred to them by the UN Charter. For that reason they are, at the

[52] Ibid.

[53] The Committee on the Elimination of Racial Discrimination, Declaration on the Prevention of Genocide, (CERD/C/66/1) 17 October 2005; available at <http://www2.ohchr.org/english/bodies/cerd/docs/declaration_genocide.doc> accessed on 24/o8/o8.

[54] Committee on the Elimination of Racial Discrimination, Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination, (CERD/C/67/1) 14 October 2005; available at <http://www2.ohchr.org/english/bodies/cerd/docs/indicators_for_genocide.doc> accessed on 24/o8/o8.

[55] Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) available at <http://www.unhchr.ch/html/menu3/b/11.htm> accessed on 22/o8/o8.

outset, deprived of the aura of an institution which makes its claims in the name of humanity and is able to make those claims based on the UN Charter or the Universal Declaration of Human Rights. This is because the treaty based mechanisms derive their authority from specific treaties that specifically delimit their mandates.[56] And since the treaties are not signed by all or even a good majority of existing states they can extend their reach only to those states who are party to the relevant covenants and do not have any power over non state actors such as insurgencies and belligerencies.[57] Even for states that are already party to these treaties the only type of mandatory mechanism they have to confront is the state reporting mechanism. The inter-state complaints and particularly the individual complaints mechanisms of the treaty based organs and the investigatory and preventive mechanisms of the CAT are non-compulsory and therefore apply only to those states that explicitly agree to be examined under these procedures.[58]

What is more; the powers given to the treaty organs under the mechanisms discussed in the previous section are very vaguely defined thus giving the bodies an uncertain authority. Even the only mandatory mechanism, the state or periodic reporting mechanism, gives these institutions very vague mandates. Under the periodic mechanism the ICCPR Committee is given the power to "study" and make "general comments", the CAT is given the power to make "comments or suggestions" and the Racial Discrimination Committee is given the power to make "suggestions and general recommendations" on state reports.[59] Neither is the fate of the optional mechanisms very different. For instance while the role of these organs in the inter-state complaints mechanism is defined by a general conciliatory role[60] even the individual complains mechanism

[56] See for example that the second articles of the ICCPR, the UNCAT and the Anti-Discrimination Convention explicitly confer duties only on states that have signed the respective treaty by using terminology such as "Each State Party undertakes" or "shall". The Apartheid Convention is a little different in that it declares (in art 1 sub article 1) "*The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security*". But such a declaration would normally not be binding on non states parties if the principles and crimes being declared are already a part of positive international law.

[57] Dimitrijevic, *supra note* 6, at 5.

[58] See the previous section for a detailed discussion of the mechanisms that are being referred to under this section.

[59] See Arts. 40 (4) of ICCPR, 19 (3) of UNCAT and 9 (2) of the Racial Discrimination Convention. And according to article 9 of the Apartheid Convention the Committee has the power to 'consider' states reports.

[60] *See that* the powers regarding inter-state complaints is only mediation and conciliation Art. 21 of the UNCAT.

of the ICCPR and the Racial Discrimination Convention gives the organs the power to "forward its views" and make "suggestions and recommendations" respectively.[61] And under the CAT's investigative and preventive mechanism the CAT can only make "recommendations and observations".[62] Because of the uncertainty of the authority conferred by these mechanisms the treaty bodies have generally been operating on a thin ice of legal authority when they formulated their practices. For example the lack of fact finding powers, lack of authority to question states or to ask them to provide additional information and the non-existence of follow-up procedures are but a few of the problems that the treaty organs had to face.[63]

Despite these structural weaknesses the treaty organs have in practice compensated for these weaknesses through the way in which they have utilized their powers. Two reasons can be attributed to the successfulness of the treaty organs and the ICCPR Committee in particular in overcoming the disadvantages associated with not being a charter organ and that of having weak and vaguely defined powers. The first of these reasons is that the treaty organs have been assertive and progressive in interpreting their mandates rather than being restrictive and textual. In the previous section we have seen how the ICCPR Committee turned a state duty to make reports every five years into one in which states are obliged to send representatives to make a public report in which committee members could ask questions or even shame the state representative by using information gathered from informal sources. The Committee may even ask a representative to appear whenever it deems fit or to require the representative to report on progress made or actions taken to implement the Committee's recommendations. Such an enhancement of the state reporting mechanism is not a monopoly of the ICCPR Committee as all the treaty organs have taken the assertive turn.[64] Since the issue of assertiveness and progressiveness was introduced in the previous section because it would have been impossible to

Art. 41 of the ICCPR and Arts. 11 and 12 of the Racial Discrimination Convention.

[61] Art. 5 (4) of the ICCPR Optional Protocol and Art. 14 (7) of the Racial Discrimination Convention.

[62] See article 16 (1) of Optional Protocol to the UNCAT and Arts. 83 and 84 of its Rules of Procedure.

[63] Ramcharan, *supra note 21*, at 25-28, Donnelly (1993), *supra note 21*, at 65-66, Keith, *supra note* 20, at 99 Steiner and Alston, International Human Rights in Context, Law Politics and Morals 739 (2000).

[64] The Racial Discrimination committee for example pre-dates the ICCPR committee in using the method of inviting state representatives to make the report. The practice of examining the situation of a country without the later having reported to the committee was practiced by committee established by the ICESCR before the other treaty organs. The practice of using 'informal' sources of information and in particular information from NGOs is widely used by all treaty organs; see Steiner and Alston, *supra note* 63, at 774.

depict the periodic or state reporting mechanism based only on the text of the relevant treaties we will resume that discussion under this section.

The first point regarding the ICCPR Committee's assertiveness concerns its attempts to make its decisions more authoritative than is allowed by the text of the ICCPR and its Optional Protocol. Even though the committee can give out internationally non-binding decisions and views the Committee did not sit back while states simply ignored its decisions. It articulated its decisions in ways that suggest that states do not have the choice of not enforcing its decisions.[65] The second point has to do with the lack of any follow-up procedure regarding the Committee's powers under the ICCPR and the Optional Protocol.[66] Faced with helplessness and uncertainty as to whether and how states complied with its previous recommendations it began to ask for follow-up repots.[67] It also appointed a special rapporttour on the compliance of states with its decisions under the individual complaints mechanism.[68] And third; even though it does not have the power to compel states to appear before it or to provide it with information under the individual complaints procedure[69] it has been both assertive and creative in resolving this shortcoming. Although it did not assert that states have a duty to appear before it, it came up with what has come to be called a "default judgment jurisprudence" under which it holds states culpable based on the applicant's reliable evidence even if the state party did not partake in the proceedings.[70] Furthermore, the Committee developed a list of obligations connected is the state's obligation to provide written information.[71]

The second and the more critical reason attributable to the treaty organs' success in overcoming their structural deficiencies is the actual and perceived neutrality and professionalism of these

[65] See Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 Georgia Journal of International and Comparative Law 1, 25-28 (Fall, 2006) ; Helfer & Slaughter, *supra note* 20, at 351.
[66] See Ron Wheeler, *The United Nations Commission on Human Rights, 1982-1997: A Study of "Targeted" Resolutions*, 32 Canadian Journal of Political Science / Revue Canadienne De Science Politique 99 (Mar., 1999); Steiner & Alston 739.
[67] Buergenthal, *supra note* 4, at 45.
[68] Steiner and Alston-741, Helfer & Slaughter, *supra note* 20, at 344-345,MORE***
[69] See Art.5(1) of Optional Protocol (under this article it is expected to make its decisions based on the "written" information made available to it by the complainant and state complained against); See also Donoho, *supra note* 66, at 25-28.
[70] Donnelly (1993), *supra note* 21, at 65-66; Helfer & Slaughter, *supra note* 20, at 350-351.
[71] Helfer & Slaughter, *supra note* 20, at 350-351.

organs.[72] Even though the ICCPR Committee is not unlike the UN Sub-Commission on the Promotion and Protection of Human Rights in having been criticized for being filled with members who are agents of dictatorial regimes or who have held governmental or diplomatic posts simultaneously with their committee membership[73] it has withstood the test of international politics and has established itself as a neutral institution filled by professionals. Partly explained by its consensus voting procedure[74] the ICCPR Committee has earned the respect of experts in the field for its genuine independence from trends in international politics including the factional battles that griped the UN during the cold war.[75] Even if it is true that all treaty organs have to grapple with the fact that their members are part-timers[76] their practice shows that the treaty requirements of committee members' service in their personal capacity, their high moral character and emphasis on their general and particularly legal competence seems to have been taken by member states seriously enough.[77]

Despite the relative success and the abovementioned strengths we can unfortunately also learn from the shortcoming of the treaty organs. In addition to the overlap in the mandates of the regional, the UN Charter based and treaty organs that was discussed in the previous chapter the problem of overlap with regard to the treaty organs is compounded by a competition of sorts between institutions whose mandate overlaps. To start with, the concurrence between the

[72] This is also the single most important factor that distinguishes the treaty based organs from the Commission and Council of the UN Charter organs. Note also that impartiality has been held as the most important explanation for the success of the ILO and the ICRC; see Donnelly (1993), *supra note 21*, at 68; John Carey, UN Protection of Civil and Political Rights, Volume 8, Procedural Aspects of International Law Series, 172 (1st ed. 1970).

[73] Steiner & Alston-707, Helfer & Slaughter, *supra note* 20, at 346, Donoho, *supra note* 65, at 609-611.

[74] Although voting was allowed de jure it was never used as the committee allowed members to write and annex an 'individual opinion' to what was officially declared as its 'consensus decision' so as to avoid conflict while maintaining unanimity. For opinions on the positive(and negative) effects of this procedure. See Helfer & Slaughter, *supra note* 20, at 355, 359.

[75] Jack Donnelly, *Human Rights at the United Nations 1955-85: The Question of Bias*, 32 International Studies Quarterly 297 (Sep., 1988); Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 International Organization 609-611 (Summer,1986); Steiner and Alston- 707-708; Helfer & Slaughter, *supra note* 20, at 353-354.

[76] In addition to the problem connected with the members' holding offices that introduce a conflict of interest with their committee work as independent experts there are instance in which they have declined more onerous committee work because such work would conflict with their part-time status and other full-time or regular workloads. See Jhabvala, *supra note* 5 at 92. Note also the fact that members of the CAT may hold that position as their second part-time job as the UNCAT urges the appointment of ICCPR Committee members to the CAT.

[77] Helfer and Slaughter report that despite the fact that the ICCPR does not require that members should be legal experts a good part of the committee's members were law-educated and are (or were) legal practitioners Helfer & Slaughter, *supra note* 20, at 346.

mandates of the treaty organs is an anomaly especially if one considers the fact that the UN is expected to cover the expenses of all these organs.[78] But not only do we have a redundant overlap between these organs the relative success of one institution or mechanism has usually not been an indifferent factor to the others. For instance, the relative strength and hence the relative success and prominence of the Inter-American and European systems that are discussed in the next chapter has spelt a disaster for the ICCPR Committee as the regional systems have taken from it both potential customers and the spotlight necessary for the success of international human rights institutions.[79] And the ICCPR committee on its part seems to have taken a lion's share of what is left over from the real lions of the Americas and Europe.[80]

As if the UN's establishment of overlapping mandates and mechanisms was not enough, it has also deprived these institutions with sufficient funds to run their business.[81] Not only has this affected the institutions' ability to publicize their work, a matter that we shall take up next, but it has also affected their ability to function properly[82] not to mention the speed with which they work.[83]

Two points can be raised regarding the treaty based Committees' effectiveness with respect to their capacity to raise the stakes for non-compliance with human rights norms. Devoid of powers the sorts of which are exercised by the UN Security Council the treaty based organs are left at the

[78] Assume, for instance, that case arises in state X wherein group A cracks down on political dissidents from group B for the latter's protest over language right or the latter's demand for greater autonomy. One could understand if the overlap were between international 'political organs' that may put political pressure on the violator and one 'legal organ' to independently determine if and what type of violations occurred. But what we are facing here is an overlap between legal organs that have the mandate to deal with not just one and the same case but with one and the same transaction and legal issue. Our example presents only one situation in which all the treaty organs discussed in this chapter and probably most other charter based and regional regimes' mandates overlap.

[79] Helfer & Slaughter, *supra note* 20, at 347.

[80] William A. Schabas, Preventing Genocide and Mass Killing: The Challenge for the United Nations, Minority Rights Group International 20 (2006) (argues that the ICCPR Committee has overshadowed the Racial Discrimination Committee so much so that the later has produced too little jurisprudence); also Steiner & Alston, at 740, 777, (produce empirical support for concluding that the ICCPR Committee has taken the lion's share and that it gets to bask under the spotlight at the expense of the other treaty organs); see also Helfer & Slaughter, *supra note* 20, at 348.

[81] Donnelly (1993), *supra note* 21, at 81; Helfer & Slaughter, *supra note* 20, at 346-347

[82] Helfer & Slaughter, *supra note* 20, at 348-349.

[83] Helfer & Slaughter, *supra note* 20, at 248 (report that an individual complaint case usually takes from two to three years); See also Ramcharan, *supra note* 21, at 157; Schabas, *supra note* 80, at 20.

mercy of their capacity to mobilize international public shame against violators.[84] Especially since treaty based organs are not endowed with the glow associated with being a UN charter organ it is unfortunate that these organs have not been that successful in generating public attention.[85] And the second point, which also applies to a lesser degree to the UN mechanisms, is the inability of the treaty based institutions to diversify the tools or means and methods with which to 'raise the stakes' or increase the pain for gross violators. A growing consensus among human rights experts holds that states that are likely to be apprehensive about public shame are those that already are or have the domestic will to respect human rights and states that commit gross violations and especially those whose political elite depend on repression to stay in power will not be deterred by public shame.[86] In this light one sees how important it is for the treaty based mechanisms (and the charter based ones) not only to be more outspoken and public but also to increase the effect of their sting by diversifying what they can threaten violators with.[87]

And finally a lesson might be sought from the disused inter-state complaints mechanisms of the treaty organs. In the previous sections we saw that the inter-state complaints mechanism of the treaty based systems suffer from a serious case of disuse. But before concluding that such disuse is caused by a lack of demand for such a mechanism or that it was a miscalculation to have incorporated such a mechanism in the human rights system, we will briefly examine the reasons and explanations that can be provided for such disuse. The first reason is connected with the theoretical assumption behind the use of inter-state mechanisms and the second with their political and economic costs.

---

[84] The same conclusion is also made by other publicists. See: Donnelly (1993), *supra note 21*, at 65-66; Keith, *supra note* 20, at 99, Helfer & Slaughter, *supra note* 20, at 279.

[85] Steiner & Alston-707, 710, Helfer & Slaughter, *supra note* 20, at 379, 348, 388.

[86] Steiner & Alston- 621; Donoho, *supra note* 65, at 11, 28,29, Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: the Universal Declaration and the Search for Accountability*, 26 Denver Journal of International Law and Policy, 591, 609 (Summer, 1998); Donnelly, *Recent Trends in UN Human Rights Activity: Description and Polemic*, 35 International Organization 654 (Autumn, 1981); Henry Steiner, 'International Protection of Human Rights' in Malcolm Evans (ed.) International Law 768 (2003); David P. Forsythe, *The United Nations and Human Rights, 1945-1985*, 100 Political Science Quarterly 510-11 (Summer, 1985) (points out that even though a government normally needs to respect human rights to ensure its legitimacy sheer effectiveness in utilizing governmental powers could achieve the same result, i.e. ensure its local and international legitimacy).

[87] Although the writer does not think that making recommendation for treaty based on charter based mechanism's effectiveness is the proper goal of this research it could be pointed out, as a passing remark, that using methods such as the suspension of membership rights, the imposition of diplomatic isolation, or allowing diplomatic or economic sanctions could be good examples of how to diversify the means of international pressure.

The idea that a state should make a formal complaint against another state and subsequently go into formal dispute settlement channels shows that the law is assuming that by violating the human rights of its citizens the state is violating a contractual obligation towards fellow states to whom the real international duty is owed.[88] In that case, the first impediment for the inter-state mechanism would be that the state whose right is violated must feel that the consequences of the violation are serious enough to have its state machinery move towards fixing the problem. But in our case the violation of the human rights of a state's own citizens is hardly a serious reason for an uninvolved state to claim that its international legal rights have been violated. And since rational states would not like to have their diplomatic relations with any other state in tatters for no tangible political or economic reasons they will invoke the inter-state mechanism only if they have other pursuable interests to which human rights can be appended.[89] But even where a human rights concern coincides with other pursuable interests the use of the inter-state mechanism is not guaranteed as the state has yet to go through more "friendly" diplomatic means before taking a measure as drastic as accusing another state in an international forum. Thus the pursuit of its interests through quiet diplomacy, enacting or threatening to enact legislation that restricts trade or aid benefits, the reduction or suspension of diplomatic relations and putting pressure through the political organs of regional and universal organizations are considered to be less corrosive and likely to be exhausted before the initiation of an inter-state complaints is even put on the table.[90] From this one can conclude that it is only in extreme and exceptional circumstances that states will resort to inter-state complaints mechanisms.

[88] Vojin Dimirijevic, 'The Monitoring of Human Rights and Prevention of Human Rights Violations through Reporting Procedures', in Arie Bloed et. al. (eds.) Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms 1-2 (1993)

[89] (Ibid, In Donnelly's irreplaceable words "Moral interests such as human rights may be no less "real" than material interests. They are, however, less tangible, and policy, for better or worse, tends to be made in response to relatively tangible national objectives. Moral interests, which are far less likely to be a major political concern of powerful national actors, also are much more easily lost in the shuffle of the policy-making process." Donnelly, *supra note* 75, at 616; see also Carey, *supra note* 72, at 37-42, who concludes that the mechanism will not work because of the importance of bilateral relations of states after studying the interstate mechanism of the ILO. Helfer & Slaughter, *supra note* 20, (have concluded that the interstate mechanism has not been used without a political motive after studying the inter-state mechanisms of both the ILO and the European Commission on Human Rights); see also Scott Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?* 10 Human Rights Quarterly 249, 252-253, 289 (May, 1988).

[90] Leckie, *supra note* 89, at 252-253, Sandy Vogelgesang, *Diplomacy of Human Rights*, 23 International Studies Quarterly, Special Issue on Human Rights: International Perspectives 216-245 (Jun.1979).

We have seen not only that states do not feel that any real rights or interests of theirs have been violated because of the infringement of human rights but also that an inter-state complaints mechanism is the most corrosive and extreme measure available under such circumstances. What is more, such a measure may also be politically and economical costly. To start with, as with any international legal complaint a state that wishes to make a formal complaint must brace itself for counter-complains of a similar nature. This should be a deterrent for states that have their own human rights ghosts to hide.[91] Even if a state has nothing to hide an inter-state complaint is sure to damage the economic interest of investors who have a stake in the soaring of the diplomatic relation of the two states. For this reason, it will be difficult to gather the support of parliaments for such action especially if the reduced foreign investment is going to have an impact on local interests.[92] Even if we assume such economic interests away we still have large costs associated with the logistical support for: the carrying out of an intensive legal and factual research, the coordination of different branches of government, involvement in the inter-state procedure and the monitoring the state's compliance to whatever arrangement that may have been reached as a result of the inter-state complaint.[93]

Looking at the fact that inter-state complaint mechanisms are the most underutilized international mechanism to have ever been designed and considering the reasons behind their disuse; one can safely conclude that as the reasons for their disuse have not changed there is no inductively reasonable ground to suspect that their ill-fate is going to change any time soon. Therefore, the only possible utility of such a mechanism could be to ring the bells of state sovereignty. In other words, the existence of the mechanism could be a sign of the fact that violation of international human rights norms is a matter between sovereign states and not between states and their citizens.

[91] Which, in my estimation, should comprise of a good majority of states!
[92] Leckie, *supra note* 89, at 253-255.
[93] Ibid.

Chapter 5: REGIONAL MECHANISMS

Introduction

The regional mechanisms are similar to the treaty based mechanisms in that they are established by multilateral treaties independent of the UN Charter. These mechanisms are however distinct in that they are parts of wider regional organs and their jurisdiction extends only to states parties in specific regions of the world. Since these mechanisms are parts of wider regional organizational frameworks this chapter places each mechanism in its respective political and legal context before looking into the details of that mechanism. Such an approach is essential since, as will be shown at the end of the chapter, the context in which the mechanisms operate is a very important part of how effectively the mechanisms will operate. The chapter considers the European, Inter-American and African systems in that order.

5.1 The European System

The European system of human rights is primarily based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which was drafted under the auspices of the Council of Europe and opened for signature as early as 1950.[1] Around the time of its entry into force (i.e. 1953), 'regionalism' in the fields of human rights and security was looked at with suspicion in the UN system.[2] Nevertheless; parties to the European Convention were determined 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.[3] According to the preamble of the ECHR this determination is inspired among other things; by the fact that 'governments of European countries … are like-

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, (Rome, 4.XI.1950) available at <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm#FN1> accessed on 07/09/08. See A. H. ROBERTSON & J. G. MERRILLS, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS, MANCHESTER UNIVERSITY PRESS 1-21 (3d rev. expand. Ed. 1993) (for a detailed history of the Convention).

[2] See STEINER AND ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT, LAW POLITICS AND MORALS 780 (2000); also D. W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 161-167 (5th Indian Reprint 2003).

[3] It is evident from the preamble of the European Convention that the rights that it proclaims are those established Universal Declaration of Human Rights and that the former derives inspiration from the later. Therefore far from trying to establish a breakaway human rights movement the ECHR is visibly attached to the Universalist world view.

minded and have a common heritage of political traditions, ideals, freedom and the rule of law' and by the belief that the realization of human rights is one of the methods by which the greater unity of Europe can be realized. These two themes, which we shall have occasion to revisit repeatedly in this chapter, are important threads in the fabric of the whole European system.

In addition to being the world's oldest human rights regime, from which the Inter-American and African systems have drawn inspiration and insight, the European system is credited for being the best in its class for the effectiveness of its mechanisms, its comprehensiveness and its development of a profound jurisprudence. But despite the significance and centrality of the ECHR to this study it has been preferred to consider the wider 'European' perspective as it would be parochial to consider the ECHR independent of the larger European institutional context. Thus we will begin the discussion with two of the most important political organs concerned with human rights and move on to a discussion of the European Court of Human Rights at some length.

5.1.1 The Role of Political Bodies: The Council of Europe and the EU

The Council of Europe and the European Union signify the political and economic backdrop of the whole European human rights system. Although the two institutions are not as such primarily concerned with gross violations of human rights we will consider how they might directly or indirectly be concerned with the subject.

The Council of Europe was established in 1949 by the Statute of the Council of Europe which was signed in London.[4] The overarching aim of the Council being European integration the council sets out to achieve this, among other things, by protecting and promoting human rights and fundamental freedoms among its members.[5] This link between European integration and human rights is, as we have seen earlier, an assumption shared by the ECHR. In addition to this assumption the Statute of the Council of Europe also emphasizes the 'spiritual and moral values'

[4] Statute of the Council of Europe, London, 5.V.1949. available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/001.htm> accessed on 9/9/08.
[5] See Art. 1 of the Stature of the Council of Europe. Also see Bowett, *supra note* 2, at 168-169.

which are common to European peoples and the like-mindedness of their countries in justifying the establishment of the Council.

Springing from the assumption that the promotion of human rights and fundamental freedoms would add to the realization of European integration, the Council of Europe has been active in the field of human rights. To begin with the ECHR itself is founded and maintained by the Council of Europe. In addition to sponsoring the ECHR the Council of Europe is also responsible for the instigation and upkeep of the Council of Europe Framework Convention for the Protection of National Minorities; The European Convention on Torture, Inhuman or Degrading Treatment or Punishment[6] and the European Social Charter. The Council of Europe has also established the European Commissioner for Human Rights.[7]

The role of the Council's executive organ, the 'Committee of Ministers', in following up the implementation of the decisions of the European Court of Human Rights and its success in this regard can also show the important role played by the Council of Europe in ensuring respect for human rights. Before the entry into force of Protocol 11 to the ECHR the Committee of Ministers used to have more extensive powers which included the power to elect the members of the European Commission on Human Rights and the power to decide the amount of payment of the Justices of the European Court of Human Rights. The Committee of Ministers even had the power to make final decisions in inter-state and individual communication mechanisms where a case is not referred to the Court by the Commission.[8] The semi-judicial role of the Committee of Ministers has now been abolished together with the European Commission on Human Rights when Protocol 11 came into effect in 1998.

But the most important role played by the Council of Europe in the field of human rights in general and in the field of gross violations in particular lies beyond these specific human rights achievements. According to article 3 of the Council's statute every member of the Council of Europe must accept the principles of the rule of law and human rights and fundamental freedoms and every member should collaborate 'sincerely and effectively' in, among other things; the

[6] Strasbourg, 1.II.1995, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm> accessed on 9/9/08.
[7] HREA, The European Human Rights System, available at <http://www.hrea.org/index.php?base_id=143> accessed on 9/9/08.
[8] See M.N. SHAW, INTERNATIONAL LAW 267-270 (Fourth Ed. 1997).

maintenance of human rights and fundamental freedoms. And according to article 4 it is only those states that are 'willing and able to' fulfill the provisions of article 3 that will be allowed to be members of the Council of Europe. Article 8 sets up the procedure through which 'serious' violators of human rights can be expelled from the organization. Although the Council's decision to admit Russia and Croatia despite their bad human rights records has raised eye brows,[9] the Commission has had a good record of taking gross violations seriously. The Council's denial of membership to Spain until the end of the brutal Franco Regime and the suspension of Greece (1969) and Turkey (1981) because of their human rights practices have been cited as proof of the seriousness with which the Council takes human rights violations.[10] This has in practice meant that states that desire the benefits of Council membership (and even membership to the European Union) have first become parties to the ECHR and cannot contemplate committing gross violations without forfeiting their chances for membership.[11] Furthermore; the Committee of Ministers has been actively following up the compliance of member states in order to exercise the powers given to it by article 8 of the Council's statute.[12]

The European Union (EU) was established in 1993 when the Treaty on European Union (Maastricht Treaty) was signed.[13] The primary aim of the EU is, similar to the Council of Europe, European integration. The EU is also based on the same values with the Council of Europe with regard to the protection of human rights and fundamental freedoms and its inspiration from the moral-cultural heritage of Europe. Article F of the Maastricht Treaty reflects both values:

---

[9] See Steiner and Alston, *supra note* 2, at 789.
[10] Jack Donnelly, International Human Rights 82 (1993).
[11] Steiner and Alston, *supra note* 2, at 790.
[12] Council of Europe, Committee of Ministers Declaration on Compliance With Commitments accepted by Member States of The Council of Europe (Adopted by the Committee of Ministers on 10 November 1994 at its 95th Session); Council of Europe, Committee of Ministers, Procedure For Implementing the Declaration Of 10 November 1994 On Compliance With Commitments Accepted By Member States Of The Council Of Europe (Adopted by the Committee of Ministers on 20 April 1995 at the 535th meeting of the Ministers' Deputies) available at <https://wcd.coe.int/ViewDoc.jsp?id=525835&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> accessed on 9/9/08.
[13] Treaty on European Union (92/C 191/01) available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html> accessed on 9/9/08. The EU, or its predecessors to be more exact, initially addressed only specific economic issues. After the European Coal and Steel Community (ECSC) established in 1952 and later the European Economic Community (EEC) achieved European economic integration the EU was established in 1993 added a political dimension to the integration process while maintaining and building on the work done by its predecessors. HREA, *supra note* 7. Also see Bowett, *supra note* 2, at 199-214; and Historiasinglo20.org, The Treaty of Maastricht, *Official Journal C 191, 29 July 1992* (1992) available at <http://www.historiasiglo20.org/europe/ maastricht.htm> accessed on 9/9/08.

> *1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.*
>
> *2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*

The Maastricht Treaty also deals with human rights protection in other ways. For example; the EU's cooperation in the fields of justice and home affairs is to be guided by European conventions on the protection of human rights and fundamental freedoms and the convention relating to the status of refugees.[14] Article 8 of the Treaty of Amsterdam,[15] which amended the Maastricht Treaty, states in unequivocal terms that the European Union 'is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. Furthermore; the Amsterdam Treaty has introduced procedures which allow the Council of the European Union to suspend the membership rights (including voting rights) of an EU member where the member is found to have been committing 'a serious and persistent breach' of human rights (Article 9).[16] The European Union Agency for Fundamental Rights was established in 2007 to assist the political institutions of the Union to implement its laws on human rights.[17] Thus despite the fact that the EU is not a human rights mechanism, not least a mechanism for dealing with gross violations, its political organs have specific ways that relate to human rights protection and even respond to gross violations of rights by member states.

[14] Article k of Maastricht Treaty. It should be added that in addition to being guided by such a policy all the members of the EU are also parties to the ECHR. See HERA, *supra note* 7.

[15] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Official Journal C 340, 10 November 1997, at <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html> accessed on 9/9/08.

[16] Even if the EU did not resolve to act under article 9 member states agreed to impose diplomatic sanctions on Austria when the far right Freedom Party (led by Joerg Haider) won the 1999 elections. This case has been sited to show how seriously the EU takes human rights issues in general and specially those related to racism. See; Austria: The 1999 Parliamentary Elections and The European Union Members' Sanctions, available at <http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_1/04_TXT.htm> accessed on 6/9/08; Latest news on the EU anti-racism legislation (article 13), accessed on <http://www.icare.to/antidiscrimination19.05.2000.html> accessed on 6/9/08.

[17] European Union, EU Annual Report on Human Rights 2007, Office for Official Publications of the European Communities, Luxembourg, Belgium 9 (2007).

Even more interesting is the fact that the EU goes beyond regulating the activities of its members when it comes to the promotion of the cause of human rights. The EU uses a range of diplomatic devises to promote human rights in its external relations. One way it does this is through its active participation and patronage in the UN and other international human rights fora. This usually takes the form of sponsoring, supporting and lobbying for resolutions in the UN mechanisms discussed in chapter 3 of this study.[18] The role played by the EU for the success of the international community in establishing the International Criminal Court is but another example of the reach of the EU's activities.[19]

Another way in which the EU promotes human rights in its external relations is through a wide range of assistance schemes that it establishes with governments and civil society organizations. In addition to mainstreaming human rights issues into all the aspects of its external relations the EU, as a rule, includes a 'human rights clause' into all its agreements with governments.[20] The EU also has extensive project funding schemes in which it works together with governments and especially civil society organizations to achieve common human rights goals. For example the European Initiative for Democracy and Human Rights (EIDHR) scheme through which the EU funds civil society organizations in third countries has coast the EU more than 577 million Euros for the 2002-2006 period.[21]

[18] Id, European Union, EU Annual Report on Human Rights 2006, Office for Official Publications of the European Communities, Luxembourg, Belgium (2006).

[19] Id. See also Sibylle Scheipers and Daniela Sicurelli, *Normative Power Europe: A Credible Utopia*? JCMS 2007 Volume 45. Number 2. at. 435–457

[20] European Commission, Furthering Human Rights and Democracy across the Globe, Office for Official Publications of the European Communities, Luxembourg, Belgium (2007) at 9-15. The EU can either take 'targeted restrictive measures' (which may include refusing entry for government officials to freezing bank accounts) or it can resort to the 'essential elements clause' of the agreement which allows it to suspend the agreement in its totality. See Der-Chin Horng, *The Human Rights Clause on the European Union's External Trade and Development Agreements*, 9 European Law Journal 677-701 (December 2003). On the subject of how much trade policy can be used in the furtherance of human rights see: H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 Journal of International Economic Law 133 – 189 (2002); C. M. Vászquez, Trade *Sanctions and Human Rights - Past, Present, and Future*, 6 Journal of International Economic Law 797 - 839 (2003); distinguishes between general trade sanctions and tailored sanctions; Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of "Selective Purchasing" Laws Under the WTO Government Procurement Agreement*, 2 Journal of International Economic Law, (1999); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 The American Journal of International Law *passim* (Oct., 2001).

[21] EU support for civil society- Regulation (EC) No 1889/2006 of 20 December 2006; available at <http://ec.europa.eu/europeaid/where/worldwide/eidhr/documents/reg_1889_2006_jo_l386_en.pdf.> accessed on 9/9/08.

5.1.2 The European Court of Human Rights

The European Court of Human Rights is a judicial organ in its fullest sense of the term and it is entrusted with the task and power of interpreting and applying the ECHR. The court employs an individual communications mechanism and an inter-state complaints mechanism which we shall take up under this title.[22] We will deal with the two mechanisms side by side as many of the issues and procedures pertaining to the mechanisms overlap. We will begin with the bigger picture by describing the basic nature and procedures of the court after which we shall describe the particularities of each procedure.

The European Court of Human Rights is permanently established by article 19 of the ECHR and consists of 47 judges[23] who are elected for a renewable term of six years by the Parliamentary Assembly of the Council of Europe.[24] The judges are elected in their individual capacity and are expected not only to be of high moral character and with outstanding qualifications fitting for the job but they are also expected to take great strain to avoid conflicts of interest with their office including those that might affect their full-timer status.[25] Judges whose tenure expires by virtue of not being re-elected or because of reaching the age of 70 are expected to see cases which they have begun working on to their conclusion.[26] And the dismissal of judges is difficult as it can be accomplished only with a two-thirds vote of the Plenary Court.[27] The judges also enjoy

[22] The Court also has an advisory jurisdiction that we shall not take up in this study. According to Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Conferring Upon the European Court Of Human Rights Competence to Give Advisory Opinions, (Strasbourg, 6.V.1963; available at <http://www.pfc.org.uk/node/328> accessed on 9/9/08) the European Court of Human Rights can give advisory opinions at the request of the Committee of Ministers on issues not related to Section 1 of the ECHR or issues that the Court or the Committee of Ministers might have to consider in consequence of proceedings that could be instituted in accordance with the ECHR. The Court has been asked to render its opinion in two instances until March 2008 and it declined one of them for lack of competence under article 47 of the ECHR; Council of Europe, Human Rights Information Bulletin: No. 73, 1 November 2007 – 29 February 2008, Directorate General of Human Rights and Legal Affairs, Council of Europe, Strasbourg (April 2008) at 5.

[23] Which corresponds to the number of states parties to the ECHR; Article 20. See article 26 of the Stature on the Council of Europe for the number of states parties. Note that the judges are not necessarily nationals of the states that nominate them. A Swiss national has for instance was nominated by Liechtenstein; See Wikipedia, European Court of Human Rights From Wikipedia, the free encyclopedia, available at <http://en.wikipedia.org/wiki/European_Court_of_Human_Rights> accessed on 9/9/08.

[24] See Arts. 19-25 of ECHR.

[25] Art 21 of ECHR. Potential judges who are nominated by states parties are interviewed by a special parliamentary committee before they are put forward for election to the Parliamentary Assembly; see Steiner and Alston, *supra note* 2, at 800.

[26] Art 23 of ECHR.

[27] Art 24 of ECHR.

diplomatic immunity equivalent to those enjoyed by the members of the Secretariat and Consultative assembly of the Council.[28]

The procedure followed by the court slightly varies depending on whether the mechanism that is utilized is an individual petition or an inter-state complaints mechanism. The question of admissibility is given precedence in both mechanisms. An individual petition is first considered by a committee of three judges who can, by majority vote, decide that a case is inadmissible or strike the application from the list of cases.[29] If the committee does not achieve unanimity on this matter the decision is subsequently made by a Chamber of seven judges. One of the Court's Chambers of judges is also responsible for deciding on the admissibility of inter-state complaints.[30] All cases in which local remedies have not been exhausted and cases in which an application is not made within six months from the date of a final decision are inadmissible. The same is true for individual applications that are anonymous, have already been examined or are substantially the same with one already examined, are incompatible with the Convention and its protocols, are manifestly ill-founded, or are an abuse of the right of application.[31]

If or after the Chamber has decided that the case is admissible it makes a decision on the merits of the case.[32] The decisions of the Chamber will be final if it does not relinquish jurisdiction to the Grand Chamber or one of the parties does not request that the case be referred to the Grand Chamber not later than three months after the Chamber's decision.[33] Since the Grand Chamber (of 17 Judges)[34] considers only serious issues that affect the 'interpretation or application of the Convention or the protocols thereto' or 'a serious issue of general importance,' a panel of five judges of the Grand Chamber decides if this threshold is present in a case before the Grand

[28] Art. 51 of ECHR cum Art. 40 of Statute of the Council of Europe.
[29] Art. 28 of ECHR. Even if the committee is given this power that does not necessarily mean that a case that has not been struck out will last till the end of the process. This is because the Court can, by virtue of article 37, strike an application out at any stage of the process if its convinced that the applicant does not intend to pursue the application, if the matter has been resolved or if there is any other reason that it thinks is reason enough to discontinue considering the case.
[30] Art 29 of ECHR.
[31] Art 35 of ECHR. The requirements that a request for an advisory opinion must fulfill are detailed in article 47.
[32] Note that the Chamber could decide, in exceptional cases, to consider both admissibility and merit at the same time in a joint procedure. Art. 29 (3).
[33] Art 30, 43 and 44 of ECHR. Art. 30 gives the parties the right to prevent the Chambers from relinquishing their jurisdiction!
[34] Note that the president of the Chamber and the member of the Chamber who sat in respect of the State Party concerned will be members of the Grand Chamber together with the President, Vise-President and thirteen other judges; see article 27.

Chamber considers the matter. Decisions of the Grand Chamber are final and should be published.[35]

As a matter of principle the court is urged to find a friendly settlement and end the whole process in confidential proceedings and give a final decision which should contain a brief statement of the facts and the solution reached. And if a settlement is not reached the court can pass a binding judgment after a full scale public hearing. The judgments of the Court, which are final and binding, are passed on to the Committee of Ministers and the later supervises the execution of the judgment.[36] The fact that the Committee of Ministers follows up and supervises the Court's judgments is very crucial since the Committee of Ministers will not only put diplomatic pressure on the judgment debtor but may also put the economic and political benefits of being a Council of Europe member at risk where gross violations are involved.

Article 33 of the ECHR sets up the inter-state mechanism that allows any state party to the ECHR, which in effect means any member of the Council of Europe and that of the EU, to allege that another member has violated the ECHR's substantive provisions and establish its assertions in front of the Court. Despite the fact that this procedure is as old as the Court itself it has been invoked only fifteen times in nine different situations.[37] Out of a total of 13 cases 12 involved a dispute over validity or manner of execution of a state of emergency or over an allegation of torture or usually both.[38] Dealing with as little as thirteen applications in half a century's time is obviously telling about the worth of the procedure. Nevertheless compared to its treaty based counterparts this one has at least been made use of.

An individual complaint, according to article 34 of the ECHR, can be made by any person, non-governmental organization or group of individuals claiming to be (or on behalf of) victims of violations by a state party of the rights set forth in the ECHR or the protocols added to it. The individual complaints mechanism is certainly not an institution designed to deal with gross violations of human rights. But as an institution that deals with individual applicants there is no

[35] Art 30, 43 and 44 of ECHR.
[36] Art 46 of ECHR. According to this article the parties 'undertake to abide by the final judgment of the Court in any case to which they are parties.' See also; Council of Europe, Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, available at <http://www.coe.int/t/e/human_rights/execution/02_documents/CMrules2006.asp> accessed on 18/09/08.
[37] Steiner and Alston, *supra note* 2, at 804.
[38] Steiner and Alston, *supra note* 2, at 800.

doubt that it will be used with greater frequency in times of gross violations. Furthermore; the Court has dealt with cases concerning torture every year and especially since the inception of America's global war on terror.[39] Be that as it may, the court's contribution to human rights lies in its dealing with a great number of individual complaints and the impact it has had on the European human rights system.

The European Court of Human Rights is receiving an average of over 2,500 cases per month in the year 2008 which, when compared to the Commission's about 2000 and the Court's less than 10 applications per year in the first years of the ECHR, is quite significant.[40] Not only has the Court's friendly settlement procedure been 'highly successful'[41] the court's decisions have been received well by all European states and particularly those states that the court found to have violated the ECHR. The Court's individual complaint cases usually involve issues typical to a domestic court such as requests for preliminary/interim measures, findings that violations have occurred, deciding on reparations or that specific payment (including interest in case of late payment) be made, granting of a residence permit and the reopening of criminal proceedings and/or the striking out of convictions from criminal records.[42] The European Court has been so successful in exercising these powers that it has been credited for being as effective as any other domestic court on the Continent.[43] Even more; the Court's judgments have prompted legal reform in many European countries including the most liberal and democratic of states. Countries such as Belgium, Germany, Sweden, Switzerland, France, the United Kingdom, the Netherlands, Austria, Denmark, Ireland, Greece and Italy have reformed their domestic legislations because of the judgments passed by the Court.[44] For these reasons and because of the

[39] Generally See, Human Rights Watch, World Report 2008 Events of 2007, (2008) Human Rights Watch, New York; at 63-73, 367, 420, 441, 451; Amnesty International, European Court of Human Rights: Ban on Torture Is Absolute and Universal, Amnesty International, Press Release, News Service No: 132 (11 July 2007) available at <http://www.amnesty.org/en/library/asset/IOR30/016/2007/en/dom-IOR300162007en.html> accessed on 18/09/08.

[40] Council of Europe, *supra note* 22, at 5; Compare with: Human rights information bulletin No. 42, an update on human rights activities within the Council of Europe, November 1997-February 1998, Directorate of Human Rights (April 1998) at 29.

[41] Steiner & Alston, at 801.

[42] See; Council of Europe, The European Convention on Human Rights and national case-law, 2006, Supplement to Human Rights Information Bulletin,No.71, Directorate General of Human Rights and Legal Affairs, Council of Europe (August 2007) at 37.

[43] See Laurence Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Litigation*, 107 Yale Law Journal 296 (1997).

[44] Donnelly, *supra note* 10, at 83, Steiner and Alston, *supra note* 2, at 801-803, For a snap shot of the European system's and Court's effects on both monist and dualists European states see: Evert A. Alkema, 'The Effects of the European Convention on Human Rights Instruments on the Netherlands Legal Order' and Hans Danelius, 'The

fact that European domestic courts are now routinely following its jurisprudence the European Court has earned the status of a Continental Constitutional Court.[45]

In contrast to being the oldest human rights (both continental and international) mechanism the European Court has continued to introduce novelties in response to changing circumstances within Europe. The ratification of Protocol 11 to the ECHR, which gave the Court the structure that was discussed in this section, is a good example of the adaptability of the European system to changing circumstances. Protocol 11 abolished the European Commission on Human Rights and made other reforms in order to ease the pressure of case overload caused by the dramatic increase in the number of cases. The explosion in the number of cases was in turn caused by the expansion of the membership of the Council of Europe and ironically also the Court's popularity within Europe.[46]

The ease created by the reforms introduced by Protocol 11 was apparently not enough so that just after six years have passed since the reforms came into effect Protocol 14 was issued to introduce even further reform. If and when Protocol 14 comes into force it will make some significant modifications that will reduce the Court's burden. Among the reform areas the most significant include: the introduction of 'single judge formations' for deciding on admissibility, it introduces a possibility in which the number of judges who will sit in the Chamber to be reduced to five, it allows the committee of three judges to decide on the merits of cases where they concern issues already dealt with by a well established precedent (for example if the violation is due to a law that has already been declared contrary to the ECHR), and it also adds an admissibility criterion according to which applications that do not show some 'significant disadvantage' to the victim will not be considered.[47]

European Convention of Human Rights in the Case-Law of the Supreme Court of Sweden', in Rick Lawson and Matthijs de Blois (eds.) The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers 1-14, 113-122. (1994).

[45] See Steiner and Alston, *supra note* 2, at 809; Thomas Buergenthal, *The Evolving International Human Rights System***,** 100 The American Journal of International Law 793 (Oct., 2006).

[46] Steiner and Alston, *supra note* 2, at 798-800, Buergenthal, *supra note* 45, at 793.

[47] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention,[47](Strasbourg, 13.V.2004) available at <http://conventions.coe.int/Treaty/en/Treaties/Html/194.htm> 17/09/08. The Protocol's attempt to add an admissibility criterion has quite expectedly raised disquiet in some circles; for example see: Amnesty International, European Court on Human Rights: Imminent reforms must not obstruct individuals' redress for human rights

5.1.3 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter ECPT) is established by article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[48] The ECPT has a structure and also utilizes a preventive mechanism that is very similar to that of the UNCAT's Subcommittee on Prevention of Torture.

The ECPT, like its UNCAT counterpart, is a non-judicial organ and is set up with an specific aim of preventing violations of article 3 of the ECHR.[49] What should be noted here is that apart from dealing with the same subject area (i.e. torture) the jurisdiction of the ECPT does not overlap with that of the European Court of Human rights. Being a non-judicial organ the ECPT does not deal with whether the ECHR has been violated. Its mandate is limited to making visits with the intention of making recommendations that will help prevent torture. The ECPT may, in certain circumstances, publicly express its disapproval of a situation in a state party where that state refuses to cooperate with it or refuses to improve a situation in accordance with its recommendations.[50] The ECPT reports annually to the Committee of Ministers of the Council of Europe and the same report is transmitted to the Consultative Assembly.[51]

violations, Amnesty International, Press Release, News Service No: 120 (11 May 2004) available at <http://www.amnesty.org/en/library/asset/IOR30/013/2004/en/dom-IOR300132004en.html> accessed on 18/09/08.

[48] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Strasbourg, 26.XI.1987) available at <http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm> accessed on 18/09/08.

[49] Id, preamble. And unlike its UNCAT counterpart the ECPT has an enhancement added to its preventive mechanism that allows it to conduct announced ad hoc visits in addition to the periodic ones (Art. 7(2)). Except for this distinction and some more or less trivial distinctions (for example in the number of times a committee member can be elected and the fact that states parties can nominate non-nationals to the ECPT etc.) the two are very similar.

[50] Id, Art. 10.

[51] Id, Art. 12.

5.2 The Inter-American System

The Inter-American human rights system, similar to the European system, has a core human rights treaty and an intergovernmental organization that provides a political backdrop. In order to better understand the human rights system we will begin with a brief and general description of the Organization of American States (OAS) and then move on to discuss the human rights mechanisms in greater detail.

5.2.1 Organization Of American States

The OAS was created by the Charter of the Organization of American States[52] which was approved by the ninth Inter-American Conference held in Bogota in 1948. Unlike the Council of Europe or the EU the organization's aim is neither oriented towards regional integration (in the European sense at least) nor is it significantly concerned with human rights.[53] According to the first article of the Charter of the OAS the organization is established by the states parties to 'achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.[54]

But the fact that the promotion and protection of human rights do not standout among the aims for which the OAS was established has not deterred the organization from playing a pivotal role in this regard. As a matter of fact it was the ninth Inter-American Conference (of 1948), the same conference that established the OAS, that approved the American Declaration of the Rights and Duties of Man.[55] In addition to authoring this Declaration (which predates the UN's UDHR) the

[52] Charter of The Organization of American States, General Secretariat Organization of American States Washington, D.C., (1997) available at <http://www.oas.org/juridico/English/charter.html> accessed on 18/09/08.

[53] Recall that the Treaties establishing the Council of Europe and the EU assume that the protection of human rights are indispensible for European integration and note their emphasis on Europe's common moral and cultural legacy of human rights.

[54] The OAS Charter's explicit emphasis on human rights is conveniently tucked in the second chapter under article 3 where it is stated that 'the American States reaffirm' the principle that 'the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.' Citing articles 15 and 17 of the 1948 OAS Charter, Cabranes argues that the primary concern of American states during the drafting process was to protect their sovereignty from US hegemonic encroachment; José A. Cabranes, Human Rights and Non-Intervention in the Inter-American System, Michigan Law Review, Vol. 65, No. 6 (Apr., 1967), at 1156 and ff

[55] Available at <http://www.hrcr.org/docs/OAS_Declaration/oasrights.html> accessed on 20/06/09; Although this document was (as a declaration) not binding at first it has now assumed a legally binding nature owing to: (1) the OAS' approval of the Statute of the Inter-American Commission on Human Rights which makes the declaration binding on states that have not ratified the American Convention on Human Rights; and (2) the American Human

OAS is responsible for establishing the two mechanisms that are the main subjects of this section. The OAS has instigated numerous treaties that constitute the basis of the regional human rights system. At the centre of this system lies the American Convention on Human Rights[56] which was adopted in 1969 and amended through the adoption of numerous additional protocols. Other treaties and documents that came into being under the auspices of the OAS include: the Statute of the Inter-American Commission on Human Rights and the Regulations of the Commission, the Statute of the Inter-American Court of Human Rights and the Rules of Procedure of the Court, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the Inter-American Convention on Forced Disappearance of Persons and the Inter-American Convention to Prevent and Punish Torture.[57]

5.2.2 The Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights was first established by the Council of Ministers of Foreign Affairs of the OAS in 1959 and its first Statute was approved the following year.[58] At the time it was formed the Commission was given the power to merely 'make

Rights Court's and Commission's decisions holding member states accountable for violating the Declaration despite their not signing the relevant Convention. See Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10, at 9-12 (July 14, 1989) Inter-Am. C.H.R., Res. No. 3/87, OEA/ser.L/V./II.71, doc. 9 rev. 1 PP 46-49 (1987) Garza v. United States, Case 12.243, Inter-Am. C.H.R., Report No. 52/01, OEA/ser.L/V/II.111 doc. 20 rev. P 60 (2001**)** University of Minnesota Human Rights Library, Inter-American Court of Human Rights, Series A: Judgments And Opinions, available at <http://www1.umn.edu/humanrts/iachr/series_A.html> accessed on 19/02/09 and University of Minnesota Human Rights Library, Inter-American Court of Human Rights, Advisory Opinions Of The Inter-American Court Of Human Rights, available at < http://www1.umn.edu/humanrts/iachr/seriesa.html> accessed on 19/02/09.

[56] American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992); available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> accessed on 18/09/08.

[57] These are available at <http://www1.umn.edu/humanrts.htm> and <http://www.oas.org/juridico/English.html> both accessed on 18/09/08.

[58] Revision of the Statute of the Inter-American Commission on Human Rights, (Resolution VIII of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, Santiago, Chile (Aug. 12-18, 1959), Pan American Union, Doc. 89 (English) Rev. 2 October 12 1959 at 10) The American Journal of International Law, Vol. 56, No. 2 (Apr., 1962), pp. 613-614; See also Brian D. Tittemore, *Ending Impunity in the Americas: The Role of the*

recommendations … for the adoption of progressive measures in favor of human rights' and to 'prepare such studies or reports as it considers advisable in the performance of its duties.'[59] In 1965 the Commission's power was extended by a revision of its Statute to include an individual communications mechanism and an inter-state complaints mechanism.[60] In 1967 the Charter of the OAS was amended (the amendment came into force in 1978) to make the Commission a principal organ of the OAS with the duty 'to promote the observance and protection of human rights' and 'to serve as a consultative organ' of the OAS on human rights matters.[61]

Although established by the OAS Charter, the Inter-American Commission on Human Rights' structure, competence, and procedure are determined by the American Convention on Human Rights which benchmarked the ECHR's Commission on Human Rights.[62] According to articles 34 and 36 of the later the seven members of the Commission who should be of high moral integrity and acclaimed in the human rights field are to work in their individual capacity. The members are elected for a four year term by the General Assembly of the OAS from a list of persons who are nominated by the states parties. And the states parties are at liberty to nominate any qualified person who is a national of an OAS member state with the proviso that each nominating state should put forward at least one person who is not its national.[63] A member can be reelected only once and may be expelled before her term expires if at least five of the Commission's members decide that her activities outside the Commission are incompatible with the independence, impartiality, dignity or prestige of membership of the Commission.[64]

Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law, 12 Southwestern Journal of Law and Trade in the Americas 435 (2006); Shaw, *supra note* 8, at 287.

[59] Art. 9 (b), (c). Article 11(c) of the same gives the commission the right to "move to the territory of any American state when it so decides by an absolute majority of cotes and with the consent of the government concerned." Tittemore, *supra note* 58, at 435 and fn 19.

[60] Tittemore, *supra note* 58, at 435 and fn 20; See also, Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 The American Journal of International Law 829-830 (Oct., 1975).

[61] Art. 106 of the OAS Charter.

[62] That is before Protocol 11 to the ECHR was passed; Buergenthal, *supra note* 45, at 798.

[63] Art. 63 of American Convention on Human Rights, Art. 3 (2) of Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/11.50 doc.13 rev. 1 at 10 (1980), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 93 (1992); available at <http://www1.umn.edu/humanrts/oasinstr/zoas4cms.htm> accessed on 18/09/08.

[64] Art. 8 (3), of the Commission's Statute; Art. 4 of the Regulations of the Inter-American Commission on Human Rights, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 103 (1992); available at <http://www1.umn.edu/humanrts/oasinstr/zoas5cmr.htm> accessed on 18/09/08.

The Commission utilizes an individual communications mechanism and an inter-state complaints mechanism similar to those of the European system on which they were modeled. However, according to article 45 of the Convention the individual communications mechanism is mandatory on states while the inter-state complaints mechanism applies to states that have recognized the Commission's competence and can only be invoked by such states. Since the individual and inter-state mechanisms are similar to those discussed in this chapter we will focus our attention on the Commission's other mechanisms. We will have the opportunity to take a bird's eye view of the individual and inter-state mechanisms while discussing the Court because the two layered arrangement of the Inter-American system.

What sets the Commission apart in terms of its mechanisms is the fact that it is given wider powers than the European Court or the European Commission on Human Rights that was abolished by Protocol 11 to the ECHR. According to article 41 of the American Convention on Human Rights the Commission has the power to develop an awareness of human rights, to make recommendations on its own initiative to member states regarding their legal system's attunement to the Convention, to request governments of member states to supply it with information on the measures adopted in matters of human rights and to give advisory opinions to member states.

The Commission has used these powers quite skillfully in the protection of human rights by interpreting them liberally. For example it has interpreted its power to make recommendations on the progressive realization of rights to allow it to address the recommendations to the individual state concerned and to the OAS membership in general.[65] This, together with its other powers, allowed the Commission to deal with the then prevalent gross human rights violations in the Americas by resorting to general and state specific reports that it put together by using information from individual petitions and in loco or on sight investigations.[66] The Commission's Annual Report to the General Assembly of the OAS has also been used to bring attention to gross violations situations.[67]

[65] Buergenthal (1975), *supra note* 60, at 832.
[66] Id; at 833.
[67] Claudio Grossman, *Strengthening the Inter-American Human Rights System: The Current Debate, The Future of the Inter-American System for the Promotion and Protection of Human Rights*, 92 American Society of International Law Proceedings 186 (April 1-4, 1998).

In addition to the width of its powers the Commission's strength lies in the fact that it is both a charter organ of the OAS and an organ of the Human Rights Convention. This is particularly important because not all OAS members have ratified the American Convention on Human Rights. Thus the Commission is able to apply the American Declaration on the Rights of Man and the OAS Charter to non states parties to the Convention while applying the Convention in addition to the two to states parties. Furthermore the Commission is able to deal with gross violations situations as a Charter organ while its undertakings regarding individual communications and inter-state complaints is based on the human rights Convention.[68]

5.2.3 The Inter-American Court of Human Rights

The Inter-American Court of Human Rights was created by the American Convention of Human Rights when it came into force in 1979.[69] The Court consists of seven part time judges[70] who in addition to being of the highest moral character and competence in the field of human rights possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them as candidates.[71] The judges are elected on their individual capacity for a term of three years that can be renewed only once.[72] Unlike elections to the Commission in which all OAS members have the right to nominate and vote for a judge, only signatories to the American Convention on Human Rights

[68] Buergenthal, *supra note* 45, at 795.
[69] Thomas Buergenthal, *Remembering the Early Years of the Inter-American Court of Human Rights*, Center for Human Rights and Global Justice Working Paper, NYU School of Law, New York (Number 1, 2005).
[70] Not only is their number small when compared to that of the European Court (which currently stands at 47 and will continue to increase so long as membership to the Council of Europe grows) but all seven judges consider each case sitting as one bench thus making an increase in case volume predictably difficult; see Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judge*s, 14 Human Rights Quarterly 173 (May, 1992); The Court's quorum is five judges; Article 13 of: Rules of Procedure of the Inter-American Court of Human Rights, Annual Report of the Inter-American Court of Human Rights, 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7 at 18 (1992), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 145 (1992) available at <http://www1.umn.edu/humanrts/oasinstr/zoas7ctr.htm> accessed on 24/09/08.
[71] Art. 52 of American Cnvention on Human Rights and Art. 4 of the Statute of the Inter-American Court on Human Rights, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98, Annual Report of the Inter-American Court on Human Rights, OEA/Ser.L/V.III.3 doc. 13 corr. 1 at 16 (1980), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 133 (1992) available at <http://www-old.itcilo.org/actrav/actrav-english/telearn/global/ilo/law/oassta.htm> accessed on 24/09/08.
[72] Art. 54 Convention and Art. 5 of Statute.

can vote for or nominate a judge to the Court.[73] The nationality of the judges is however not so limited and any member of the OAS could be nominated and elected as a justice of the Court through a procedure that is similar to that of the Commission's.[74]

The Court's jurisdiction can be classified into a 'contentious' and an 'advisory' jurisdiction both of which are enforceable only in one American state.[75] The contentious jurisdiction is set out in articles 61 through 63 of the American Convention and it includes all individual and inter-state cases concerning the interpretation and application of the Convention. Contentious cases may however be submitted by the Commission or by and against states that have recognized the competence of the Court. Contentious cases (i.e. individual and inter-state cases) reach the Court either where any of the states referred to above applies to the Court or the Commission refers a case to it.[76] In most cases the Commission will have already made a determination on the admissibility of the cases when they reach the Court.[77] Decisions in contentious cases are binding on the states parties although not enforceable.

The advisory jurisdiction of the Court concerns its power to interpret any human rights provision within the Inter-American system or any other international treaty applicable to the requesting OAS member.[78] The advisory services are rendered to any OAS member and are not limited to parties to the Convention on Human Rights. The jurisdiction also includes the Court's power to make recommendations or to forward its opinion regarding the compatibility of any of the state's domestic laws with the relevant international instruments.[79] The Court's advisory jurisdiction,

[73] Art. 53 of Convention.
[74] Art. 52 of Convention and Art. 7 of Statute.
[75] Only Costa Rica agreed to enforce the judgments by virtue of the headquarters agreement between it and the Court; See Buergenthal (2005), *supra note* 69, at 7.
[76] The Commission (as with states) does not however have any obligation to refer cases to the Court; see Inter-Am. Ct H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Series A. No. 5, 86 (1985), at para. 25, available at <http://www.corteidh.or.cr/seriea_ing/index.html> accessed on 24/09/08.
[77] If the Commission or the state party does not refer the case to the Court within three months after the case is communicated to the alleged violator the Commission will forward (by absolute majority) its 'opinion and conclusions' and/or its recommendations after first attempting a friendly settlement; Art. 48-51 of Convention.
[78] The Court, in an advisory opinion requested by Peru regarding the interpretation of article 64 of the Convention, held that its jurisdiction extended to interpreting any international treaty to which the pertinent state is a party; see Monroe Leigh, Inter-American Court of Human Rights, The American Journal of International Law, Vol. 77, No. 3 (Jul., 1983), at 637-640.
[79] Art. 64 (2) of Convention.

unlike its European counterpart, has been used extensively and has also been extensively used even when compared to its own contentious jurisdiction.[80]

5.3 The African System

The African system is also based on a core human rights treaty: the African (Banjul) Charter on Human and People's Rights (hereinafter the Banjul Charter)81 and a regional intergovernmental organization which provides the legal and political context. Since the African system has recently carried out a major reform of the whole regional system we will try to take both the previous and current systems into account.

5.3.1 The African Union

The African Union, which succeeded the Organization of African Unity in 2002,[82] is comparable to its European counterparts (the Council of Europe and the EU) in that its main aim is to promote regional integration and the cooperation of member states in their international relations.[83] Although its Constitutive Act's emphasis on human rights is not comparable to that of the European system's, the AU has as its primary objectives the 'promotion and protection of human rights'. In addition the Constitutive Act makes numerous explicit references to human rights including its declaration that the AU has the right to interfere in the internal affairs of

[80] Frost, *supra note* 70, at 175; also see generally Buergenthal, *supra note* 69.
[81] African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5.
[82] The overarching aim of the OAU Charter was the liberation and continued protection of African states from colonialism and neo-colonialism in addition to regional integration while only one reference is made to human rights where it is declared that one of the purposes of the OAU is to 'promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'. The Charter's concern with self-determination and apartheid stem from political concerns of the time rather than from a concern for human rights. Compare the Preamble and the second and third articles of the constituting documents of the OAU and the AU. For a discussion of the Pan-African context of the OAU Charter and the reasons for the unwillingness to emphasize human rights see; Armstrong Matiu Adejo (Dr.), *From OAU to AU: New Wine in Old Bottle?* Paper Prepared for CODESRIA's 10TH General Assembly on "Africa in the New Millennium", Kampala, Uganda, (8-12 December 2002) available at <http://www.codesria.org/Archives/ga10/Abstracts%20Ga%206-11/Regionalism_Adejo.htm> accessed on 30/9/08; Rachel Murray, 0521839173 - Human Rights in Africa: From the OAU to the African Union, Cambridge University Press, available at <www.cambridge.org> accessed on 30/9/08; See also Evarist Baimu, *The African Union: Hope for better protection of human rights in Africa?* 1 African Human Rights Law Journal 299, passim (2001).
[83] See the Preamble and Art. 2 of the Constitutive Act of the AU.

states where gross violations such as war crimes, genocide and crimes against humanity occur.[84] Furthermore among the novelties of the Constitutive Act (when compared to the OAU Charter) is that it creates the possibility whereby the AU's Assembly could impose sanctions 'such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature' where a member state fails to comply with the decisions and policies of the AU on human rights.[85] Although it is clear from this that the political organs of the African system have been granted more extensive enforcement powers than the Inter-American system, it seems to be the least effective of the regional systems considered in this paper and the Continent is most rife with the worst kinds of human rights violations.[86]

5.3.2 The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (hereinafter the 'African Commission') was created by Article 30 of the Banjul Charter and consists of 11 members who are nominated and elected by the Assembly of Heads of States for a term of six years.[87] The commissioners, who are expected to be reputable for their integrity and knowledge in human rights matters (and in law), work in their individual capacity.[88] The Commission is not a Charter organ of the AU.

The Commission' mandate is to 'promote human and peoples' rights and ensure their protection in Africa' and consists of a state (periodic) reporting, an inter-state complaints, individual communications[89] and other mechanisms that can be lumped into its 'promotional' jurisdiction.[90]

---

[84] See: the Preamble; Sub-articles (e), (h) and (g) of Art. 3; Sub-article (c), (h), (l), (m), (o) and (p) of Art. 4; Art. 23(2) and Art. 30 of the Constitutive Act of the AU emphasize the importance of human rights which when compared to the OAS Charter is considerable.

[85] Id; Art. 23 (2).

[86] See generally Christof Heyns, *The African Regional Human Rights System: In Need of Reform?* 1 African Human Rights Law Journal 155, 156-57 (2001); Shadrack Gutto, The Reform and Renewal of the Regional Human and Peoples' Rights System, 1 African Human Rights Law Journal 175, 176-84 (2001).

[87] For a brief historic description of the circumstances of the Commission's formation see; African Commission on Human and Peoples' Rights, History, available at <http://www.achpr.org/english/_info/history_en.html> accessed on 4/10/08; see also Wikipedia, African Commission on Human and Peoples' Rights, available at <http://en.wikipedia.org/wiki/African_Commission_on_Human_and_Peoples'_Rights> accessed on 4/10/08.

[88] Art. 31 of Banjul Charter.

[89] The inter-state and individual mechanisms are lumped in to its contentious or 'protective' mandate. See Arts. 30 and 45(2) of Banjul Charter.

[90] The state reporting mechanism is also a part of the Commission's promotional mandate because state reporting cannot, strictly speaking, be considered as 'enforcement.

Although the Banjul Charter does not specify the organ to which state-reports are to be made the Commission has been receiving state reports after it was authorized to do so by the Assembly.[91] Despite the Commission's efforts to establish sound reporting procedures and guidelines the periodic mechanism has been seen as a failure as many states have even to date not submitted their reports[92] and those that have submitted reports did not include adequate and relevant information in them so as not to allow the Commission to make sense of the situation in the country.[93] The fact that states have not followed the Commission's guidelines, have refrained from participating in the presentation of reports,[94] and have not given publicity to the reporting process or its results in addition to the Commission's adoption of unreasonably complex guidelines and its not making recommendations and not following up on states that have made reports has also contributed to the state of affairs of this mechanism.[95] The state reporting mechanism, as contained in the rules of procedure of the African Commission, is almost identical to that of the treaty based mechanisms dealt with in the previous chapter.[96]

The inter-state complaints and the individual communications mechanisms, although defined very vaguely by the Banjul Charter, are very similar to the inter-state and individual mechanisms discussed in this chapter and in the preceding chapters.[97] While the individual communications

[91] See Art. 62 of Banjul Charter (note also that state reports are to be submitted every two years); also Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 Penn State Law Review 696 (Winter 2004).

[92] As of March 2008 (note that the Banjul Charter came into force in 1986) fifteen states have not yet submitted a report while sixteen, fifteen and six states have only made their first, second and third reports respectively. Rwanda holds the record for submitting a grand total of four reports; African Commission on Human and Peoples' Rights, Status on Submissions of State Initial/Periodic Reports To The African Commission (Updated: March 2008) available at <http://www.achpr.org/english/_info/statereport_considered_en.html> accessed on 04/10/08.

[93] Christof Heyns, ibid, at 696. Claude E. Welch Jr., *The Organisation of African Unity and the Promotion of Human Rights***,** 29 The Journal of Modern African Studies 555 (Dec., 1991).

[94] Although the Commission was for a long time prevented from considering state reports because states did not appear before the Commission for the consideration of their own situation it has since 2006 (its 39th ordinary session) been considering state reports in the absence of the state concerned, Lee Stone, *The 38th Ordinary Session of the African Commission on Human and Peoples' Rights, November 2005, Banjul The Gambia*, 6 African Human Rights Law Journal 225, 227 (2006).

[95] Frans Viljoen, *State Reporting under the African Charter on Human and Peoples' Rights: A Boost from the South*, 44 Journal of African Law 111 (2000).

[96] See rules 81-87 of the Commission's Rules of Procedure, The African Commission on Human and Peoples' Rights, Rules of Procedure of the African Commission on Human and Peoples' Rights, *adopted on* October 6, 1995, available at <http://www1.umn.edu/humanrts/instree/africancomrules.html> accessed on 5/10/08.

[97] The inter-state mechanism of the African Commission has been used only once, See Hakima Abbas, Africa's long road to rights (2007-11-13) available at <http://www.pambazuka.org/en/category/features/44412> accessed on 26/29/08; Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Ethiopia, African Commission on Human and Peoples' Rights, Comm. No. 233/99 (2003) available at <http://www1.umn.edu/humanrts/africa/comcases/233-99.html> accessed on 26/29/08.

mechanism, which can be commenced either by alleged victims or Non-Governmental Organizations, has been used often the inter-state mechanism has been used only once.[98] If the Commission, in the process of considering individual communications, finds "special cases which reveal the existence of ***a series of serious or massive*** violations of human and peoples' rights [emphasis added]" it must refer the case to the Assembly of Heads of States or in cases of emergency to the Chairman of the same.[99] The Assembly can order the Commission to study the facts and circumstances of the case and make its findings and recommendations. No reports of the Commission could be published without the acquiescence of the Assembly.[100]

Despite the Banjul Charter's vagueness in its description of the two mechanisms and the provision of strict confidentiality of its proceedings and reports the African Commission has in practice found ways around these problems. The Commission's publication of its 'Annual Activity Reports' since 1994, its decision to begin making decisions on the merits of cases in 1993,[101] and its interpretation of article 46 to allow it to appoint special rapporteurs and to conduct in loco visits can be seen as hope for optimism of the Commission's potential for the protection of human rights on the Continent.

The African Commission's promotional mandate is very wide and it also represents most of the Commission's work volume.[102] Its promotional function can be divided into two broad categories.[103] The first includes the carrying out of different information gathering activities and their analysis (studies and researches), the presentation of such in different fora with the aim of educating the African public in human rights or to advance the cause of human rights to

[98] Christof Heyns, ibid, at 694-695; An official document issued the Commission as a guide on the communication procedure seems to suggest that individual communications are meant only to show the existence of gross violations and not to give standing to individuals. Never the less it is explained that the commission has in practice been accepting communications that show an individual's predicament rather than showing the existence of gross violations because the Commission felt that 'a single violation still violates the dignity of the victim and is an affront to international human rights norms.' The African Commission Human and Peoples' Rights, Information Sheet No.2, Guidelines of the Submission of Communications, Organisation of African Unity, at 6.

[99] Art. 58 of Banjul Charter.

[100] Art. 59 of Banjul Charter; Rule 77 of Commission's Rules of Procedure. In contrast see rule 78 of the later which makes periodic state reports open to the public.

[101] The Commission is not mandated to make decisions since it is only given the power to prepare 'a report stating the facts and its findings' at the end of an inter-state case and is not given even this much power in individual communications cases. Never the less it has since the Malawi case in 1993 been finding …. etc

[102] Welch, *supra note* 93, at 541, 548.; Steiner and Alston, *supra note* 2, at 922.

[103] Based on Art. 45 of the Banjul Charter. As noted earlier it is impractical to say that state reporting is an enforcement procedure. Nevertheless Article 45 of the Banjul Charter does not classify it as a promotional mandate.

governments, and the airing of its views or recommendations to Governments whenever the opportunity arises.[104] The second category includes the Commission's formulation and laying down of principles and rules aimed at solving legal problems relating to human rights upon which African governments may base their legislations. The Commission is also given the power to 'co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights'.[105]

5.3.3 The African Court on Human and Peoples' Rights

The African Court on Human Rights was established by the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.[106] The Court's eleven judges will be elected in their individual capacity for a six year one time renewable mandate and their independence and the procedures through which they are elected are in many respects similar to those of the other regional courts.[107] The judges of the Court other than the president are part-timers however.[108]

The Court has a contentious jurisdiction that is complementary to the African Commission's protective mandate and an advisory jurisdiction that it exercised independently of the Commission.[109] In both is contentious and advisory cases the Court has the jurisdiction to interpret and apply the Banjul Charter (and its protocols) and any other relevant human rights instrument. The Court's advisory opinion which is exercised upon the request of AU member

[104] Lee Stone, *supra note* 94, at 232-233.
[105] Id, Art. 45(1)(c).
[106] Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III). available at <http://www1.umn.edu/humanrts/africa/courtprotocol2004.html> accessed on 04/10/08. (Hereinafter 'protocol establishing the Court')
[107] See Arts.11-21 the Protocol establishing the Court.
[108] See Arts.15(4) and 21 of the Protocol establishing the Court.
[109] See generally Andreas O'Shea, *A Critical Reflection on the Proposed African Court of Human and Peoples Rights*, 1 African Human Rights Law Journal 285, 291-98 (2001); Robert Wundeh Ena, *The Jurisdiction of the African Court of Human and Peoples' Rights*, 2 African Human Rights Law Journal 223, passim (2002); Ibrahim Ali Badawi Elsheikh, *The Future Relationship between the African Court and the African Commission*, 2 African Human Rights Law Journal 252, 260 (2002).

states and subsidiary organs or any other organization recognized by the AU, is subject only to the Commission not dealing with the same matter at the time of request. [110]

The contentious/complementary cases of the Court typically come through the Commission either by the Commission itself or by a state party that has brought a complaint or one against whom a complaint has been made.[111] States that allege that the rights of their citizens have been violated may also submit their cases to the Court. Individuals and NGOs with an observer status before the Commission may also submit cases provided that the Court chooses to exercise its discretion in every case, the state against which the complaint is made has recognized the Court's competence to do so and the issue is not being discussed by the Commission.[112] If the Court finds that human rights have been violated it can 'make appropriate measures' which might include an order for compensations or reparations and these decisions are final and binding.[113] Judgments are sent to the Council of Ministers so that that later can 'monitor its execution on behalf of the Assembly.'[114]

5.4 Factors Influencing the Performance of Regional Mechanisms

The preceding two chapters discussed the factors that have affected effectiveness of the charter based and treaty based systems in responding to gross violations of human rights. In this section we will begin by discussing how the same factors are relevant to the effectiveness of the regional mechanisms. As the regional mechanisms consist of both the most and the least effective mechanisms in the world this chapter gives us an opportunity to study additional factors that are relevant for an analysis of the International Criminal Court. These additional factors are considered later in the section.

[110] Arts.3 and 4 of the Protocol establishing the Court. Mei argues that the court should utilize its advisory jurisdiction to its at most potential because the contentious jurisdiction is restricted in its ratione personae. AP van der Mei, *The Advisory Jurisdiction of the African Court on Human and Peoples' Rights,* 5 African Human Rights Law Journal 27, 32-27, 44-45 (2005).
[111] Art. 5 of the Protocol establishing the Court.
[112] Art. 5, 6 and 34(6) of the Protocol establishing the Court.
[113] Art. 27 and 30 of the Protocol establishing the Court.
[114] Art. 29 of the Protocol establishing the Court.

One thing that the regional mechanisms share with the treaty based ones is their structural weakness of not inheriting a legacy of being a part of an institution that clams to stand for the whole international community. Although it has been claimed that the regional institutions make up for this weakness by forging legitimacy based on regional geographic, historical and cultural bonds[115] it is shown, later in this paper, that the utility of such bonds to human rights protection is rather relative and may even be counter-productive. Both the charter based and treaty based systems have shown us that the structural advantages associated with being a charter organ is only a potential and that what really mattered as a determinant of effectiveness was how the organs utilized their mechanisms. The highly politicized, partial and confidential political and human rights bodies of the UN were contrasted with the UN Sub-Commission on the Promotion and Protection of Human Rights and the treaty organs whose effectiveness lay in their neutrality professionalism and assertiveness.

We saw in previous sections of this chapter that the composition of the regional human rights institutions in charge of the relevant mechanisms are rather professional as they are filled with legal experts who have some expertise in the human rights filed and are elected in their individual capacity.[116] While the African and American Court and Commission set high enough standards for the nomination and election of judges and commissioners the professional criteria for judgeship in the European Court of Human Rights goes by far the farthest in ensuring the professionalism and independence of judges. In addition to fulfilling the qualifications for the other regional organs the judges of the European Court are (among other things) to be employed on a full-time basis,[117] must quality for appointment to high judicial office or be jurisconsults of recognized competence and are interviewed before they are put forward for election.[118] They are specifically demanded by the ECHR not to engage in any other full-time employment and to avoid any activity that might affect their impartiality or independence.[119] Furthermore, rather than or in addition to the political organs of the Council of Europe it is the plenary court that is

[115] Ex., Donoho, *supra note* 121, at 45; Steiner and Alston, *supra note* 2, at 783.
[116] Compared to the ICCPR which requires only that consideration should be given to the "usefulness of the participation of some persons having legal experience, " (Art. 28(2) of ICCPR) all of the regional institutions are a step ahead.
[117] The second best in this field is the African Court which requires that only the president of the Court to be a full-timer. See Art.15 (4) and 21(2) of the Optional Protocol establishing the Court.
[118] See section 2 of this chapter.
[119] See Art. 21(3) of ECHR.

given the power to ensure the professionalism and independence of judges after they have been elected to office.[120]

We could conclude that the impartiality and independence of the regional systems and the European system in particular would go to great lengths in achieving the legitimacy that the character organs can only yearn for.[121] But when we see the practice of the European Court of Human Rights beyond the text of ECHR it becomes evident that such a conclusion would be an understatement. While the correspondence between the number of judges to the number of parties to the ECHR has been appreciated because it was meant to further the Court's legitimacy by increasing its link to every state and to states' domestic legal systems,[122] the systematic method with which this tool was used is remarkable. In an effort to advance the legitimacy of the court, not only has the Council of Europe always elected senior and highly qualified jurists from member states but it also followed a policy of appointing domestically prominent judges and ministers of justice for the first few years of the court's existence.[123] And in later years, after the court was well known to lawyers and politicians of member states, the Council began appointing experts of international law for their expertise rather than domestic prominence in order to allow the Court to cope with the rising number of cases that were becoming more and more sophisticated.[124]

The neutrality and professionalism of the regional systems described above is backed by an incremental assertiveness which is characterized either by the actions of the political organs or the human rights organs of the systems. The political organs' role usually involves the rearrangement of the system or the redefinition of its own role or that of the commission or court so that the demands of changing circumstance are met. In previous sections of this chapter we saw how the European system evolved from a two tiered system to one without a commission and how even the European court's procedures have been modified in so short a period after the

[120] Id; Art 24
[121] Such conclusion has of course been reached by many authors and seems to be presented as a fact that is not contested. Ex., Donnelly, *supra note* ?, at 620, 621, 625; Tom J. Farer, *The United Nations and Human Rights: More than a Whimper Less than a Roar*, 9 Human Rights Quarterly 571 (Nov., 1987); Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 Georgia Journal of International and Comparative Law 1, 45 (Fall, 2006); Donnelly, *supra note* 10, at 90; Welch, *supra note* 93, at 543-46; See also generally Buergenthal, *supra note* 69, at 14 & ff; Helfer & Slaughter, *supra note* 43, at 31.
[122] See Buergenthal, *supra note* 69, at 16; Helfer & Slaughter, *supra note* 43, at 300.
[123] Helfer & Slaughter, *supra note* 43, at 300; Donoho, *supra note* 121, at 45.
[124] Helfer & Slaughter, *supra note* 43, at 300.

abolition of the commission. We also saw how the mandate of the Inter-American Commission was extended to incorporate the individual and inter-state mechanisms and how the Charter of the OAS was amended to make the commission a principal organ of the OAS. Although not necessarily motivated by human rights we saw the replacement of human rights indifferent OAU Charter with the human rights friendly AU Constitutive Act and the establishment of the Africa Court on Human and Peoples' Rights. These are just some of the major examples of how active the political organs of the regional systems were in making crucial changes to the system in a bid to adjust to changing circumstances.[125] But similar to the treaty based committees the regional institutions' human rights organs played the most important role in taking on an assertive role in overcoming structural weaknesses or in modifying their role to adjust to changing circumstances. The Inter-American Commission for instance has not made much use of its individual complaints mechanism until after the wave of democratization in the late 1980s' as the whole continent was immersed in dictatorships that routinely committed gross violations.[126] Rather the commission preferred to widely construe its power to make recommendations to states on their progressive realization of Human rights to come up with a novel reporting mechanism best suited to shaming violators rather than deciding individual cases or setting profound jurisprudential matters.[127] The commission was also quick to realize that it had to use the individual mechanism more often when democratic governments took root in most of Latin–America.[128] Although not as impressive as the Inter-American Commission the African Commission's attempts to overcome its structural deficiencies include: its publication of an annual report, making "decisions" in place of "recommendations," the appointment of special rapportours and the initiation of *in loco* visits.[129] The European court is the least innovative in this regard as it had the strongest and most developed mandate and mechanism thus avoiding structural weaknesses that fuel the creativity of these institutions. This is evidenced by the legally and practically

[125] Modifying the Human rights mechanisms by the political organ is also not new to the charter based or treaty based systems as exemplified by the establishment of the Human Rights Council or the ratification of additional protocols to the treaties. However these are comparatively less active and very slow to react to change.
[126] Steiner and Alston, at 871-77; Welch, *supra note* 93, at 546.
[127] See generally Buergenthal, *supra note* 45, at 795; Burgenthal, *supra note* 60, at 832; Grossman, *supra note* 67, at 186; Welch, *supra note* 93, at 546; Farer, *supra note* 121, at 565; Donnelly (1993), *supra note 10*, at 86.
[128] Buergenthal, *supra note* 69, at 14; Steiner & Alston, at 871-877; Tittemore, *supra note* 58, at 453-469.
[129] See previous section. See also Julia Harrington, *Special Rapporteurs of the African Commission on Human and Peoples' Rights*, 1 African Human Rights Law Journal 247, passim (2001).

binding and enforceable nature of the decisions of the European mechanisms as contrasted to the American and African system's outcomes which are either not binding or not enforceable.[130]

The regional systems also offer new insights that surface when one compares the regional systems among themselves and with the charter based system.[131] The first of these insights concerns the role of political organs of the regional organizations to which the human rights mechanisms are a part. Let us begin with the place given to human rights by the founders of the institutions. We have seen that one of the purposes of the UN is the achievement of international cooperation in promoting respect for human rights although its achievement is not backed up with the necessary institutional mechanisms. The purposes of the European institutions, the Council of Europe and the EU, is intertwined with the promotion of human rights as the constitutive documents of these institutions emphasize the prominence of human rights in European heritage and assume that European integration would be impossible without respect for this common heritage. The OAU Charter also declares that the promotion of human rights is among its purposes as does the AU Constitutive Act. Neither African document however incorporates human rights in its policy of integration. The OAS Charter, as we have seen earlier, is the least concerned with the protection of human rights when compared with both the charter based and treaty based systems.

Although the importance given to human rights by the constitutive documents does indicate the seriousness with which human rights were taken by the founding fathers it does not necessarily correspond to the sufficiency of the powers given to the political organs or the practice of these organs in this respect. We have seen that the Charter based and African systems are good examples of this.[132] The Assembly of Heads of state and Government of the OAU is in fact given

[130] See Ramcharan, *Strategies for the International Protection of Human Rights in the 1990s*, 13 Human Rights Quarterly 21 (May, 1991); Buergenthal (2005), *supra note* 69, at 15, Welch, *supra note* 93, at 554, Elise Nalbandian, *The Challenges Facing African Court of Human and Peoples' Rights*, Mizan Law Review, Vol. 1 No. 1, 75,81 (June 2007); Frans Viljoen and Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004*, 101 The American Journal of International Law 1, 3, 32 (Jan., 2007). But see Tittemore, *supra note* 58, passim. (argues that the decisions of the Inter-American system are increasingly being respected and applied by domestic legal systems. Note however that even his claim is modest as he can show only a few examples that cannot be used to inductively prove a widespread practice).

[131] Note that the treaty based mechanisms are not blessed with political organs of their own and that it is the political organs of the UN (i.e. the General Assembly in Particular) that play such a role for them.

[132] Note that the charter organs of the UN are not endowed with specific mechanisms or a mandate to respond to gross violations and as was shown in the third chapter they slowly developed such practice in response to political

the power to consider Commission referrals concerning cases which reveal a series of serious or massive violations and to consider the annual activity reports of the Commission.[133] But the Assembly of Heads of State and Government was notorious for not giving any attention to the massive violations on the continent even where the commission sought to direct its attention to some of these violations and for owing more respect to the sovereignty of the most serious violators.[134] Although the AU Constitutive Act makes significant improvements to the powers of the Assembly by giving it the mandate to interfere in the internal affairs of member states and gives it powers that include the imposition of political and economic sanctions[135] how the African union will exercise these powers is yet to be seen. We have discussed the powers and active roles of the Council of Europe and the EU wherein respect for human rights made a requirement for membership and gross violators are liable to losing membership rights or even their membership. One would in this light not be surprised if much credit is given to the role of these political organs for the success of the European system.[136] The Inter-American Charter's lack of attention to human rights is paralleled by the political organs' neglect of the notorious violations in the region.[137]

Another angle from which we can look at the role of the political organs is whether they can diversify the tools with which they can apply pressure on gross violators in addition to public shaming. The European political organs offer the most diverse methods that comprise of both carrots and sticks for ensuring compliance. First of all; the European political organs create an incentive for compliance with human rights since human rights are made an important component of a continental policy of integration and are considered as a *sina qua non* for such

contingencies. The UN Commission on Human Rights, although a human rights organ, also developed a gross violations mechanism after a long period of self-denial.

[133] See Art, 58 of Bengal Charter

[134] See Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 International Organization 627 (Summer,1986); Viljoen and Louw, *supra note* 130, at 25, 33; Welch, *supra note* 93, at 554; Frans Viljoen, *Recent Developments in the African Regional Human Rights System*, 4 African Human Rights Law Journal 344, 345 (2004).

[135] Arts. 4(h) and 23(2) Of AU Constitutive Act and Art 29 of the Protocol Establishing the Court which establishes a follow-up mechanism to be overseen by the Council of Ministers.

[136] Welch, *supra note* 93, at 545; Steiner and Alton-784.

[137] Farer, *supra note* 121, at 86, (describes haw despite the Commission's gains in shaming Chile for its gross violations, the General Assembly of the OAS annual meeting failed to condemn Chile by following the Commission's lead and even accepted the invitation of the Chilean government to host the following year's annual meeting. See also Grossman, *supra note* 67, at 190-191; Welch, *supra note* 93, at 545.

smooth integration.[138] The economic and other incentives of joining the Council of Europe and the EU are strong and since membership is contingent upon a respectable human rights record members of the inter-governmental organizations normally comply with the decisions of the European Court voluntarily and most of these states are less likely to commit gross violations. And in addition to a very effective publicization capability[139] the cost of non-compliance is raised with the possibility of losing diplomatic and economic advantages associated with membership.[140] Except for the possibility of sanctions under the UN Charter and the AU Constitutive Act the Charters of the other institutions covered in this study offer only the mobilization of shame as an enforcement tool.

What is even more interesting is that the OAU and OAS have not been able to utilize public shaming to its fullest capacity because of the lack of publicization of their work.[141] Partly caused by a chronic shortage of resources which plagues the human rights mechanisms of these institutions[142] the achievements and decisions of these mechanisms are not backed by strong public relations efforts to the public at large or to the legal community.[143] The European system stands in sharp contrast to the two in that it injects adequate financial resources into the human rights mechanisms and sustains an all rounded public relations policy.[144] The European Court of Human Rights has been so successful and widely known that it is finding it increasingly difficult to cope with the increasing inflow of cases in recent years consequently deserving the description that it is a victim of its own success.[145]

---

[138] See the discussion at the beginning of this chapter on the nexus established between human rights and European integration by the statue of the Council of Europe and the Treaty of the European Union. See also; Steiner and Alston- 784.

[139] See Donnelly (1993), *supra note* 10, at 86, (shows how easily European gross violators can achieve a pariah status).

[140] Donnelly, *supra note* 134, at 623.

[141] Burgenthal, *supra note* 60, at 16; Viljoen and Louw, *supra note* 130, at 29, 30, Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 Penn State Law Review 679, 700-702 (Winter 2004).

[142] See generally Grossman, *supra note* 67, at 190-191, Jo M. Pasqualucci, The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law, 26 University of Miami Inter-American Law Review 297, 309 (Winter 1994-1995); Welch, *supra note* 93, at 555; Heyns, *supra note* 141, at 700-702; Steiner and Alston, *supra note* 2, at 872, 874, 893.

[143] See Buergenthal (2005), *supra note* 69, at 16; Viljoen and Louw, *supra note* 130, at 30, Heyns, *supra note* 141, at 700-702.

[144] Donoho, *supra note* 121, at 45; Helfer & Slaughter, *supra note* 43, at 300 -303.

[145] Ron Wheeler, *The United Nations Commission on Human Rights, 1982-1997: A Study of "Targeted" Resolutions*, 32 Canadian Journal of Political Science / Revue Canadienne De Science Politique 793 -794 (Mar., 1999); Steiner and Alston, *supra note* 2, at 798-800.

The last three factors that we are to discuss hereunder are similar in that they can be determined neither by the political organs of the respective international organizations nor by their human rights or judicial mechanisms. For instance the first of these factors, the nature of the violations that confront the system, cannot be determined or controlled by the institutions or states parties as violations occur mainly due to domestic and international determinants rather than the decisions of international institutions or their mechanisms. The argument regarding the nature of violations is that a mechanism that is more often confronted with gross violations of human rights is less likely to be effective as its decisions will not be enforced by the respective governments as such decisions will require major concessions from states or may even threaten power relations within the states.[146] One can see the difference between the European system which has for the most part dealt with unthreatening decisions that frequently involve jurisprudential matters that arise due to domestic legislation or court decisions (which are almost always not intentional or malicious violations) and the other systems that have been overwhelmed by gross violations cases for decades since their formation. Many observers have concluded that the success of the European system relative to both the international and regional systems can be explained by the relative subtleness of the cases with which it had to deal with.[147]

And the political culture and the human rights practices of the majority of the member states of these institutions have also been identified as a factor affecting the effectiveness of human rights mechanisms. Weakness in the domestic respect for human rights, the underdevelopment of democratic institutions and civil society, the lack of judicial independence and the rule of law and the prevalence of war and military or civilian dictatorships in Africa and Latin America have been pointed to for the unwillingness of a good number of states to cooperate with human rights mechanisms and the consequent ineffectiveness of these mechanisms.[148] An empirical study

[146] Donnelly (1993), *supra note* 10, at 86; Helfer & Slaughter, *supra note supra note* 43, at 329 (where the decision requires the cessation of gross violations and where such cessation is likely to increase the probability of regime change in a state, it is unlikely that the regime will make such a concession specially where the only alternative to regime change is public shame); See: Henry Steiner, 'International Protection of Human Rights' in Malcolm Evans (ed.) International Law 768 (2003); Steiner and Alston – 621; Donoho, *supra note* 121, at 11, 28, 29; Donnelly, *Recent Trends in UN Human Rights Activity: Description and Polemic*, 35 International Organization 654 (Autumn, 1981).

[147] Helfer & Slaughter, *supra note* 43**,** at 329; Donnelly (1993), *supra note* 10, at 86; Welch, *supra note* 93, at 546; Steiner and Alston, *supra note* 2, at 621, 871, 874.

[148] Donnelly, *supra note* 134, at 627; Thomas Buergenthal, *The Evolving International Human Rights System***,** 100 The American Journal of International Law 800-801 (Oct., 2006); Donnelly (1993), *supra note* 10, at 86; Buergenthal, *supra note* 69, at 4; Viljoen and Louw, *supra note* 130, at 25-27, 32-33; Welch, *supra note* 93, at 546;

conducted by Viljoen and Louw on the implementation of the decisions of the African Commission for instance shows that even within the same system compliance with the Commission's decisions varies depending on the level of "freedom"[149] and the prevalence of corruption in the state against whom decisions were made.[150] The same conclusion is also warranted by opposite trends in the European system whose decision have been willingly and eagerly applied by mostly liberal democratic states with excellent human rights records.[151] We have seen how the ECHR, the Statute of the Council of Europe and Maastricht Treaty pride themselves over Europe's political, social and cultural heritage of human rights. This heritage, that was in particular set by the two world wars which were fought on Europe's turf, has given Europe enough homogeneity and cohesiveness in producing the best and most effective human rights mechanisms to date.[152]

And finally one can also discern the hegemonic role of strong powers as a factor that can contribute to the effectiveness or ineffectiveness of human rights mechanisms dealing with gross violations. Jack Donnelly, in an article that can be seen as a very significant contribution to international regime theory in relation to human rights, argues that the establishment and relative effectiveness of the Inter-American human rights system can be explained only by the dominant power of the United States in the region coupled with its willingness to support the Inter-American system.[153] Given that the Inter-American system is similar to or less robust than the African system with respect to most of the factors discussed in this paper one can agree with

---

Heyns, *supra note* 141, at 700-702; Nsongurua J. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 American University International Law Review 1177, passim (2002); Nalbandian, *supra note* 130, at 78, n.16; Steiner and Alston, *supra note* 2, at 871 -881 (follow the work of the Inter-American Commission from its early days and depict how compliance within the system improved with the passing of the cold war and the democratization of most of the member states).

[149] Which they define as constituting the existence of democratic institutions, a functional multiparty system, independent of the judiciary, the rule of law, constitutionally guaranteed rights, active civil society and a freely functioning NGO community. Viljoen and Louw, *supra note* 130, at 25.

[150] Ibid

[151] Helfer & Slaughter, *supra note* 43, at 331; Donnelly, *supra note* 134, at 623; Donnelly (1993), *supra note* 10, at 86; Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights*, 43 Journal of African Law 201, 213 (1999); Welch, *supra note* 93, at 546.

[152] Donoho, *supra note* 121, at 45; Helfer & Slaughter, *supra note supra note* 43, at 331.

[153] Donoho, *supra note* 121, at 625-626, 637-638; The realist view on international organizations in fact holds that international organizations or regimes are formed by hegemonies so as to facilitate their own interests and that smaller powers take or accept these regimes if they are provided with some sort of inducement from the hegemon. See Kenneth W. Abbott and Duncan Snidal, *Why States Act through Formal International Organizations*, 42 The Journal of Conflict Resolution 8 (Feb., 1998).

Donnelly that the hegemonic influence of the US is the most important factor missing in Africa; therefore, explaining the better performance of the Inter-American system. Donnelly also points out as evidence of his thesis the fact that the US has maintained a member in both the Inter-American Commission and Court despite itself not being a member to the Convention and that the US has occasionally overtly applied pressure on states in order to solicit their cooperation.[154]

Although Donnelly's view on the role of hegemony has been subject to criticism[155] both the positive and negative roles of hegemony are certainly observable in the international practice of human rights. For instance we have seen the role of the post war super-powers in the making of the UN itself and in the place given to human rights in the UN Charter.[156] The effects of the cold war on the practice of all the Charter based institutions and the fact that the super-powers were able to affect not only the outcome of UN processes but to affect the substance of the international bill of rights can show that hegemony is very important in the making and breaking of international institutions.[157] The role of Great Britain in almost single handedly initiating and enforcing the anti-slavery movement can also been mentioned as an early example of how effectively a hegemon can contribute to the international enforcement of human rights or any norm for that matter.[158]

[154] Donoho, *supra note* 121, at 625.
[155] See: Conway Henderson, Human Rights and Regimes: A Bibliographical Essay, Human Rights Quarterly, Vol. 10, No. 4 (Nov., 1988) at 531-532.
[156] See generally Buergenthal, *supra note* 148, at 786
[157] See generally Philip Alston, *The UN's Human Rights Record: From San Francisco to Vienna and Beyond***,** 16 Human Rights Quarterly 376-377 (May, 1994); Wheeler, *supra note* 145, at 83, 85; Buergenthal, *supra note* 148, at 786.
[158] Henderson, *supra note* 155, at 532.

Chapter 6: THE INTERNATIONAL CRIMINAL COURT

Introduction

Sixty-three years ago the Nuremberg and Tokyo Tribunals were a novelty which brought to an end a history of international indifference towards the wellbeing and dignity of millions who were barely visible under the veil of state sovereignty. However imperfect the tribunals might have been their noble message has set the moral and normative tone of our time. Even though millions continued to suffer after the Nuremberg and Tokyo Trials, the legacy of the tribunals thought us that humanity should not and will not stand by and watch while part of it is being annihilated. From then on, if nothing else humanity will speak against mass violence. And when it can, humanity will bring down the perpetrators of mass violence and bring them to justice. History will not at any rate condone the actions of gross violators of the dignity of fellow human beings. This was the message that the post-war tribunals engraved in history and left us with a legacy that espoused accountability over impunity. Although the process has taken generations and has been grueling for most of the time the mere fact that a permanent international criminal court has been established goes a great length in fulfilling that promise. But does the establishment of the ICC go far enough? And what are the things that can or should be done to ensure that it will deliver on its promise of bringing about a culture of accountability? These are the themes on which this chapter develops.

The mere fact that the ICC has been established might be seen as an accomplishment on its own. But this fact by itself will not guarantee that the ICC will be successful in accomplishing its objective of dealing a blow to the culture of impunity. This chapter is set to examine what factors will contribute towards or inhibit the Court's success. To that end, it draws from the analysis of the international community's previous contraptions designed to react to similar atrocities to which the ICC intends to put an end to. While doing so, the chapter will not question the grand narratives of the Nuremberg/Tokyo legacy. That is; while evaluating the ICC the study does not probe into whether the prosecution of perpetrators in Nuremberg, Tokyo or The Hague has or will ever deter a war lord or a general who might be tempted to perpetrate gross violations.

A little explanation as to why the grand narratives associated with the place of deterrence in international or domestic criminal law will not be taken up might be in order. The intention of this study is not to question, to construct or deconstruct grand narratives that loom large in international and criminal law. Even the empirical studies of the reality or myth of deterrence are generally inconclusive[1] and this study does not intend to prove or disprove or empirically test the deterrence narrative. Although the study does not take sides in the deterrence debate it, for pragmatic reasons, takes for granted the grand narratives of international law and assumes that deterrence works.[2] Since this assumption is in operation throughout the paper it is important to clearly state it before going into the details of this chapter. There are two levels at which the paper could have dealt with the issue of effectiveness. One could study the ultimate effectiveness of prosecution, public shame, enforcement action, judicial determinations etc… thus questioning the meta-narratives of the subject. This kind of inquiry could no doubt have been a suitable research topic. But an approach of questioning and deconstructing or asserting and constructing the grand narratives behind the Nuremberg/Tokyo legacy requires an empirical or theoretical study that is not included within the ambit of this paper. One could also study effectiveness by identifying factors that are seen to influence effectiveness within the dominant discourse of

[1] Gordon P. Waldo & Theodore G. Chiricos, *Perceived Penal Sanction and Self-Reported Criminality: A Neglected Approach to Deterrence Research*, 19 Social Problems 522, 522-28, 536-39 (Spring, 1972); Stephen J. Knorr, *Deterrence and the Death Penalty: A Temporal Cross-Sectional Approach*, 70 The Journal of Criminal Law and Criminology (1973-) 235, 253-54 (Summer, 1979); Robert F. Meier & Weldon T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 American Sociological Review, 292, passim (Apr., 1977); Alex R. Piquero et.al, *Developmental Trajectories of Legal Socialization among Serious Adolescent Offenders*, 96 The Journal of Criminal Law and Criminology (1973-) 267, 273-74 (Autumn, 2005).

[2] Most commentators on the ICC have either argued in favor of the effectiveness of deterrence or otherwise but without basing their conclusions on empirical evidence. Ex., Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 Georgia Journal of International and Comparative Law 1, 46-47 (Fall, 2006); David Matas, *From Nuremberg to the International Criminal Court*, AIUSA Lawyers' Conference, University of Washington School of Law 8-9 (February 18, 2006); Lisa Hajjar, *Alternatives to an International Criminal Court*, Middle East Report, No. 207, Who Paid the Price? 50 Years of Israel 5-6 (Summer, 1998); Charles Villa-Vicencio, *Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 Emory Law Journal 205, 210 (Winter 2000); John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 Notre Dame Law Review 55, 58 (December, 2003); Spyros Economides, *The International Criminal Court: Reforming the Politics of International Justice*, Spyros Economides, Government and Opposition Ltd 29, 43 (2003); There are however those who see the issue as inconclusive. See Philippe Kirsch, *The International Criminal Court: Current Issues and Perspectives*, 64 Law and Contemporary Problems, The United States and the International Criminal Court 3, 4, (Winter, 2001); Henry Steiner, 'International Protection of Human Rights' in Malcolm Evans (ed.) International Law 770 (Oxford University Press, 2003) (indicates that international criminal court's deterrent effect is assumed to work the same way as domestic courts even though it is clear that the fact that the former work in the international arena should decrease the overall effectiveness of deterrence).

international law. This chapter and the study as a whole opt for the second option and take the grand narratives for granted by assuming the effectiveness of the tools available in international law and criminal law.

The chapter begins with a general overview of the ICC where its basic structures and procedures are briefly introduced. The second section contains a qualitative analysis of the ICC and can be regarded as the central part of the chapter. The third section briefly recaptures the study's conclusions and makes recommendations based on those conclusions.

6.1 General Overview of the ICC

The birth of the ICC could be attributed to the 1998 diplomatic conference of plenipotentiaries held in Rome. The Statute of the ICC (hereinafter the 'the Rome Statute' or 'ICC Statute') emerged from this conference where out of 148 states that participated 120 voted in favor of adopting the Statute while 7 voted against and 21 abstained.[3] The Rome Statute entered into force on July 1, 2002 and the ICC was officially opened on March 11, 2003.[4] Having The Hague, in The Netherlands, as its permanent seat the ICC is established as a permanent international court with its own legal personality.[5] Unlike the Charter or treaty based organs the ICC is not a part of and has no structural links with the United Nations.[6]

The political organ of the ICC, the Assembly of States Parties, is composed of representatives states parties to the Rome Stature and plays a role not unlike the regional political organs in

[3] Danesh Sarooshi, *The Statute of the International Criminal Court,* 48 The International and Comparative Law Quarterly 387 (Apr., 1999); Anne E. Mahle, The International Criminal Court, Justice and the Generals: Around the World, available at <http://www.pbs.org/wnet/justice/world_issues_int.html> accessed on 08/02/09.

[4] Art 126(1) of the Rome Statute provides that the statute would come into force "the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations." Rome Statute of the International Criminal Court, Preamble, paras. 4 and 6; available at <www.un.org/law/icc/statute/romefra.htm.> accessed on19/06/08.

[5] Arts 2 and 3 of Rome Statute.

[6] 9th paragraph of preamble and Art 2 of Rome Statute. The later states that "The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf." The kind of relationship between the two institutions is governed by a separate agreement; See *infra sec.* 6.2.1.2.

relation to the Court although the breadth of its political role is much more constrained.[7] In addition to its powers regarding the election of judges and prosecutors the Assembly exercises political oversight over the Court by budgeting and overseeing the management of the Court and participating in the removal of judges and prosecutors who are unable to fill their office or have abused their office.[8] The Assembly plays a role in the Court's contribution in the development of the international criminal law by issuing the definition of the crime of aggression, the Court's "Elements of Crime" and its "Rules of Procedure and Evidence" or by reviewing or amending the Rome Statute.[9] The Assembly is also endowed with the power to "consider" court referrals regarding noncooperation with the findings of the court.[10] In addition to holding annual and special sessions the Assembly is represented by a twenty one member Bureau which can hold as many sessions per annum as is necessary and at least one annual session.[11]

The ICC is composed of four organs: the Presidency, the Registry, the Office of the Prosecutor and the Chambers. The Presidency is composed of the court's President and First and Second Vice-Presidents who are elected by the plenary court and is responsible for the administration of the Registry and the Chambers.[12] The Registry is headed by a Registrar who is elected by an absolute majority of the judges for a once renewable five year full-time office.[13]

Headed by a Prosecutor who is elected by the absolute majority of the Assembly of States, the Office of the Prosecutor is a separate and independent organ of the court.[14] The Prosecutor and his/her deputies[15] serve as full-timers for a non-renewable term of nine years.[16]

[7] Signatories that have not ratified the ICC Stature are also granted an automatic observer status' See Art 112(1) of Rome Statute.
[8] Arts. 36(6)(a), 42(4), 112(2)(b), (d), (e) and 46 (1) (2) of the Rome Statute.
[9] Arts. 5(2), 9(1), 51(1), 52(3), 121-123 of the Rome Statute.
[10] Arts. 87(5)(7) and 112(2)(f) of Rome Statute.
[11] Arts. 112(2)(c), (3), (6) of Rome Statute.
[12] Arts. 36(2), 38, 41 and 61(11) of Rome Statute.
[13] Art. 43(4) of Rome Statute.
[14] Arts. 42 of Rome Statute. The Office's independence is also expressed, among other things, by the prohibition of the prosecutor and Vise-Prosecutors from partaking in any external professional occupation and an explicit prohibition of its officers against taking orders from outside organs or individuals.
[15] The deputies are elected by an absolute majority of the Assembly of States Parties upon the Prosecutor's nomination and cannot hold the same nationality with the Prosecutor; Ibid.
[16] Ibid.

The court's eighteen full-time judges are elected by the Assembly of States Parties to fill the three divisions of the Court.[17] In addition to the requirement that judges be of high moral character (which is a common requirement for the institutions discussed in previous chapters) the Rome Statute requires that judges be competent and experienced in one of the court's tongues and be nominated by a state party[18] by the procedure for the nomination to the highest judicial organ of the state or to the International Court of Justice.[19] The Appeals Division is occupied by the president and four other judges with an international law background and the Trial and Pre-Trial Divisions are occupied by six or more judges with a criminal law and procedure background.[20] While there is only one chamber in the Appeals Division the Trial and Pre-Trial Divisions have two chambers with a further possibility for the Pre-Trial Division to be composed of "Single Judge Chambers".[21]

The ICC has the jurisdiction to try what its statue recognizes to be the most serious crimes against humanity, war crimes and the crime of aggression.[22] That the court has jurisdiction over these crimes does not however mean that domestic mechanisms are no longer competent to handle cases concerning these crimes. The Rome statue makes it clear that the primary role for prosecution lies with states' respective domestic systems and that the ICC's role is complementary.[23] Thus one of the preconditions of the ICC's exercise of jurisdiction is the domestic system's unwillingness or inability to investigate or prosecute.[24] Another precondition

[17] Arts. 35 and 36 of Rome Statute; See also International Criminal Court, The Chambers, available at <http://www.icc-cpi.int/organs/chambers.html> accessed on 19/09/08 (contains the most up to date information on the organization and composition of the ICC's Chambers.

[18] Note that states are not required to nominate only their nationals.

[19] Ibid; Arts. 40-41 also provide for the general and operational principles guaranteeing the independence of the judges.

[20] Arts. 39(1) of Rome Statute.

[21] Arts. 39(2) and of Rome Statute.

[22] The Preamble and Arts 1 and 8 of Rome Statute. At the Rome Conference it was agreed that the Preparatory Committee would make a detailed study of the elements of crimes that the Statute gives a hint about in article 21(1)(a); See: KUNT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, SOURCES AND COMMENTARY 2 (2002).

[23] In the Rome Stature's preamble's formulation the domestic system's role is to 'take measures' while that of the international or ICC system is to 'enhance cooperation'. See also arts.1, 5 and 17 of Rome Statute; See Informal Expert Paper: The Principle of Complementarity in Practice, ICC-OTP (2003), pp. 3-4, available at <http://www.icc-cpi.int/library/organs/otp/complementarity.pdf> accessed on 20/02/09.

[24] According to Art. 17(2) of the Rome Statute a state is unwilling to investigate or prosecute if: "(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility … (b) There has been an unjustified delay in the proceedings … (c) The proceedings were not or are not being conducted independently or impartially". And it is unable if: "due to a total or

is that the crimes that are claimed to have been committed must have occurred after the first of July, 2002: the date of entry into force of the Rome statue.[25] Furthermore the ICC's jurisdiction is limited to crimes committed in the territory or by the nationals of a state party or to a state that accepts the court's jurisdiction for a particular case.[26] And the last precondition for the court to exercise its jurisdiction is that its processes must be triggered in accordance with its procedural rules.

The processes of the ICC can be triggered or set off in three different ways.[27] The first trigger is a state referral to the prosecutor. A state referral is different from the 'interstate complaints' mechanism discussed under previous chapters in that the end game in the Rome Statute is not a settlement by the parties but the prosecution individuals who are responsible for the violations. A state making the referral should as far as possible specify the circumstances of the crime and provide any evidence that it may possess. The second trigger is the prosecutor's decision (*proprio motu*) to conduct an investigation on his own initiative.[28] The third trigger is UN Security Council's power to refer a case acting under Chapter VII of the UN Charter. In all three cases the Court can exercise its jurisdiction against both state and non-state actors.

Once a case has been initiated the prosecutor will investigate and if warranted prosecute cases in accordance with the rules of procedure of the Court.[29] The pre-trial chamber oversees the prosecutor's investigations, has the power to issue warrants of arrest and conducts the first hearing to determine whether to confirm the prosecutor's charges before the trial.[30] The trial-chamber decides on all legal, procedural and evidentiary questions and has the power to pass

substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

[25] Art. 11,according to art 11 if a state becomes a party after this date the court will exercise jurisdiction only from the date of entry for that state. The state can of course waive this provision by entering a declaration according to art 12(3).

[26] Art. 12(2) of Rome Statute.

[27] See Arts. 13-16 of Rome Statute.

[28] According to Art. 13 of the Rome Statute the Prosecutor's proprio motu investigation is overseen by the pre-trial chamber.

[29] The procedure is supplemented by International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

[30] Arts. 53-61 of Rome Statute; according to Art 57(2) a single judge sits and has the power to exercise the jurisdiction of the pre-trial chamber except for decisions concerning the authorization of investigation on a state's territory, authorization of non- disclosure of evidence on state-security grounds and the confirmation of charges before the trial, in which case a three judge chamber is mandatory.

judgments that include prison sentences, fines and forfeitures. It may also decide that the proceeds of a fine or forfeiture be deposited in the victim's trust fund of the ICC.[31] Both the Prosecutor and the convicted individual may lodge may make an appeal to the Appeals Chamber.[32]

6.2 Towards a Checklist for Effectiveness: Analysis of the ICC

In this section we shall attempt to apply the findings of the entire study to the ICC. In order to do so in an orderly manner the lessons learned from the practice of the institutions studied in previous chapters are organized in a checklist. And the checklist at the same time applies the lessons to the ICC and makes conclusions about how the ICC's performance is going to be affected by factors summarized in the checklist. Whereas the discussion of this section is based mostly on the analysis and evidence produced in previous chapters footnotes are used where additional or supporting evidence is produced. The section subsequent to this one recaps the conclusions of the study and where appropriate makes recommendations that are based on the factors identified in this chapter.

6.2.1 Constitutional Factors

We have seen that the one inherent strength of the Charter based mechanisms when compared to the other mechanisms is that they can speak for the international community and in the name of human consciousness because they can claim that their authority emanates from the UN Charter and the Universal Declaration of Human Rights. An added advantage of such an endowment, as we saw, was that no state is immune from their scrutiny as the UN enjoys near universal membership. The ICC is more like the treaty based and the regional institutions in this respect. Therefore; the ICC does not enjoy that aura of an institution that speaks in the name of all nations (and in the name of humanity) and it lacks a link to the UN Charter and the Universal Declaration. Its jurisdiction is limited to states that have ratified the Rome Statute and the ICC's relevance can therefore be limited at will by states or regimes that are likely to commit gross violations of human rights as they can choose not to ratify the Rome Stature.

[31] Arts. 62-80 of Rome Statute.
[32] Arts. 18(4) and 81 of Rome Statute.

This of course is a paradox of sorts as states with a respectable human rights record are likely to become parties to the Rome Statute whereas states that are likely to commit gross violations will shy away from ratifying. The irony lies in that the ICC will operate in places where it is least needed and will be absent from places where it is needed the most.[33] Therefore; the ICC's relevance, similar to its treaty based and regional counterparts, will to a great extent depend on the number and type of states that ratify the Rome Statute. Universal ratification will, in this context, be the highest aspiration for the ICC to reach for.

Without prejudice to the conclusion just made, it is noteworthy that the ICC has a slight advantage over the treaty based and regional mechanisms when it comes to the states to which it can apply its jurisdiction. Whereas the treaty based and regional conventions impose obligations on states parties and their mechanisms can target only states, as opposed to non-state actors, the Rome Stature applies on and gives the ICC a jurisdiction based on the principles of territoriality and nationality.[34] The ICC also casts a wider net because its Statute allows non-party states to the Rome Statute to accept its jurisdiction on a case by case basis upon a mere declaration to that effect.[35] And finally the ICC's widest net can be cast by the Security Council of the UN as the later is given the power to entrust the ICC with jurisdiction over non-parties by virtue of a Chapter VII action.[36] Although this gives the ICC a chance to reach all corners of the globe weather such association with the Security Council is a plus to the ICC's effectiveness is a different matter that we shall take-up later.

6.2.1.1 Reactive Nature of Mechanisms

Another constitutional matter that we saw concerned the reactive or the "fire brigade approach" orientation of mechanisms. While the preventive orientation of the early warning systems established by the UN Secretary General and the Racial Discrimination Committee and the preventive procedures of the Subcommittee on Prevention of the UNCAT and ECPT have been praised, all the other mechanisms discussed in the paper operate only after disasters have come to

[33] Crawford describes this situation as one in which the ICC becomes "a court for the virtuous". James Crawford, 'The Drafting of the Rome Statute', in PHILIPPE SANDS (ED.) FROM NUREMBERG TO THE HAGUE THE FUTURE OF INTERNATIONAL JUSTICE 136-137 (2003).
[34] Art. 12(2) of Rome Statute.
[35] Art. 12(3) of Rome Statute.
[36] Art. 13(c) of Rome Statute.

pass.[37] The ICC can be presented as a preventive mechanism since the major point of prosecuting violators or putting an end to a culture of impunity according to the Rome Statute is to "contribute to the prevention" of the crimes defined by the Statute.[38] Presenting the ICC as a preventive mechanism makes more sense if we compare the history of the manifestly reactive *ad hoc* tribunals (i.e. the ICTY and ICTR) to the ICC which was neither established as a reaction to a particular conflict nor is limited to prosecuting perpetrators in any specific side in a specific conflict confined to a geographic and a time frame. In addition to its preventive aspect the ICC is also reactive in the sense that it provides for the removal of gross violators from society in order to mate out a punishment for their actions and where applicable to compensate the victims of such crimes.[39] This aspect is also revealed by the fact that the ICC also to some extent attempts to repair the broken lives of victims through victim reparations and through its use of the victims' trust fund.[40]

The preventive aspect of the ICC is also supported by its establishment as a permanent court contrary to the ICTY and ICTR which were established on an *ad hoc* basis.[41] Three specific advantages of its permanent status can be identified. First of all, and in light of our discussion on the adverse effects of delays on an institution's legitimacy, the permanency will save a lot of time and money that would have been spent for negotiations on the Court's composition, recruitment and hire of staff, finding and leasing of premises, procurement of equipment, drafting of its procedures etc . . . While these processes have to be overcome every time an *ad hoc* tribunal is established[42], the ICC has to go through these inconveniences only once. Second,

[37] Except for the Security Council's assumption that gross violations would be "halted" because of the establishment of the ICTY and the possibility (a farfetched one though) of arguing that the ITCY and ICTR were established by the Security Council to deter future crimes, the two *ad hoc* tribunals are evidently reactive institutions. See generally ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 3-4 (2003). Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 The American Journal of International Law 504 (Jul., 1996).

[38] Fifth paragraph of the preamble to the Rome Statute.

[39] See the preamble and part 6 of the Rome Statute. Booth argues that the preamble's (4th paragraph's) reference to "serious crimes" and "punishment" are meant to indicate that one of the major objectives of prosecution by the ICC is to satisfy the retributive urge of victims; Cherie Booth, prospects and Issues for the International Criminal Court: lessons from Yugoslavia and Rwanda, in Philippe sands, *supra note* 33, at 181.

[40] See *infra* sec. 6.2.3.

[41] See Art. 1 of Rome Statute.

[42] Melissa K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 Duke Law Journal 825, 829 (Dec., 1999); Anita Fröhlich, *Reconciling Peace with Justice: A Cooperative Division of Labor*, 30 Suffolk Transnational Law Review 271, 298 (Summer 2007); Christina M. Caroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal of Rwanda and the Rwandan Criminal Justice system in dealing with Mass Atrocities of 1994*, 18 Boston University International Law Journal

it usually takes exceptionally gross situations such as those in the former Yugoslavia or in Rwanda to create an international momentum for the establishment of *ad hoc* tribunals.[43] Since the ICC is permanently established and its paycheck already signed, it has made it easier to bring relatively smaller incidents to justice.[44] And third, the ICC's permanency will give it an opportunity to develop its case law and jurisprudence therefore bringing continuity for the development of international criminal law.[45]

6.2.1.2 Overlap and Competition

Earlier chapters have shown that the jurisdictional overlap of mechanisms may cause the inefficiency of the respective mechanisms as in the case of the General Assembly's allocation of resources to different and uncoordinated mechanisms[46] that aim to achieve the same end.[47] The worst effects of overlap were shown by how the success of the Inter-American and specially the European mechanisms have overshadowed the efforts of the ICCPR Committee and how the relative success of the later overshadowed the efforts of the CAT and Racial Discrimination Committee.[48]

The ICC's jurisdiction seems to overlap with the jurisdiction of all the mechanisms concerned with gross violations. This by itself may not, however; warrant the conclusion that the ICC will have to compete with and outperform and outshine the other institutions to remain relevant and effective. It is true that the ICC will make fact finding investigations on the same situations that will be studied simultaneously by more than one charter based organ, more than one treaty based

163, 181-185 (2000); Richard Vokes, *The Arusha Tribunal: Whose Justice?*, 18 Anthropology Today 1, *passim* (Oct, 2002).

[43] Marler, *supra note* 42, at 829.

[44] Ibid

[45] Fröhlich, *supra note* 42, at 298.

[46] For a criticism of the lack of coordination and information sharing among these institutions see Louis B. Sohn, *The Improvement of the UN Machinery on Human Rights*, 23 International Studies Quarterly, Special Issue on Human Rights: International Perspectives 186, 197 (Jun., 1979).

[47] Overlap may in fact be considered a good thing when the mechanisms are primarily focused on putting public pressure and not the determination of laws and facts. see for instance Howard Tolley, Jr., Decision-*Making at the United Nations Commission on Human Rights, 1979-82*, 5 Human Rights Quarterly 27, 43 (Feb., 1983).

[48] Note that the ICCPR Committee has even reversed the decisions of the European Court of Human Rights and has consequently been criticized for creating a possibility for "forum shopping", See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 The Yale Law Journal 273, 374-386 (Nov., 1997); See also Antionio Cassese, *A New Approach to Human Rights: The European Convention for the Prevention of Torture*, 83 American Journal of International Law 128, 129-31 (1989).

organ and most probably by one regional organ. Even though this should no doubt be cause for concern over the possibility of the international community's inefficient use of recourses, the risk of competition between the ICC and these mechanisms is minimal. This is primarily because the other institutions are not concerned with the prosecution of perpetrators of gross violations while this is the only objective of the ICC. Therefore, the failure or success of the ICC will not hinge upon the relative success or failure of these mechanisms. That is of course expecting the possibility for competition between the ICC and the Security Council of the United Nations.

It is a settled fact that the Security Council can establish courts similar to the ICC or those whose jurisdiction is the same with that of the ICC.[49] A problem of both overlap and competition could therefore arise if the Security Council were to establish an *ad hoc* or even a permanent international criminal court with a jurisdiction that overlaps with that of the ICC. The ICC would in fact be at a disadvantage if the Security Council were to wish to protect any of its own permanent members' soldiers or that of their allies. The Security Council could do this by circumscribing the jurisdiction of its *ad hoc* tribunal to target only one side of the conflict, while at the same time hampering the ICC's work by differing its investigations or prosecutions in accordance with Article 16 of the Rome Statute. One cannot dismiss such a possibility as farfetched or as improbable since not only are a majority of the permanent members of the Security Council i.e., the USA, China and Russia; not parties to the Rome Statute but the United States has successfully had its peacekeeping forces throughout the world exempted from prosecution by the ICC for two consecutive periods of 12 months.[50] The establishment of a

[49] Note, from our discussion in chapter 3, that although the powers of the Security Council to establish international criminal tribunals can be legally uncertain or even flowed the experience from Numbering to Rwanda shows that such tribunals are unlikely to accept the argument that their mandate is legally flawed. Furthermore a cumulative reading of articles 24 and 25 of the UN Charter shows us that states cannot dispute the decisions of the Security Council on matters that fall under its mandate under Chapter VII of the UN Charter. Generally see Shaw 841; Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?* 86 The American Journal of International Law,. 519-523 () W. Michael Reisman, *The Constitutional Crisis in the United Nations,* 87 The American Journal of International Law 83-100 (Jan., 1993); Jose E. Alvarez, *Judging the Security Council,* 90 The American Journal of International Law 1, 1-39 (Jan., 1996) Vera Gowland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case,* 88 The American Journal of International Law 643-677 (Oct., 1994).

[50] SC/RES/1422 (2002), Adopted by the Security Council at its 4572nd meeting, on 12 July 2002, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement> accessed on 05/01/09 and SC/RES/1487 (2003), Adopted by the Security Council at its 4772nd meeting, on 12 June 2003, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement> accessed on 05/01/09; Though the US has not however had this renewed after resolution 1487 (2003) its troops remain protected by the Status of Forces Agreements.

competing regional court to prosecute gross violations in Darfur has already been unsuccessfully attempted with the United States' patronage.[51]

Although we have to wait to see whether the Security Council will choose to compete with the ICC in the long run, the ICC has been taking some positive steps to reduce the cost ineffectiveness associated with its overlapping jurisdiction with the Charter based and treaty based UN organs excepting the Security Council. The Rome Statute contemplates[52] that the ICC will be brought into relationship with the UN by an agreement concluded by the Court's president after it has been approved by the Assembly of states parties. This agreement has come to pass on the 4th of October, 2004; when Secretary-General Kofi Annan and President Philippe Kirsch singed the "Relationship Agreement between the United Nations and the ICC."[53] The agreement tries to solve the overlap (ergo inefficiency) problem by having the UN undertake to cooperate with the ICC especially in the provision of information. The UN particularly undertook to waive the confidentiality obligation of its staff if and when they are required to testify before the ICC, to provide the ICC with its facilities and services on reimbursable basis, not to establish facilities and services that overlap with those of the ICC and also to establish common facilities where both institutions had to gain in terms of cost-reduction.[54] Since the ICC and the UN mechanisms would almost always be investigating the same fact situations this agreement should, if implemented properly, reduce the ill effects of their overlapping jurisdictions.[55] The ICC has also entered into a similar agreement with the European Union.[56]

---

[51] *U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC***,** 99 The American Journal of International Law 501, 501-502 (Apr., 2005).

[52] Under Art. 2.

[53] See generally Coalition for the International Criminal Court, Cooperation with the United Nations (Hereinafter 'Cooperation Agreement'), available at <http://www.iccnow.org/?mod=agreementsun> accessed on 06/01/09.

[54] See Arts. 4, 7, 9, 10, 15, 16 of the Cooperation Agreement.

[55] See generally; Marc Weller, *Undoing the Global Constitution: UN Security Council action on the International Criminal Court*, 78, 4 International Affairs 693, 682 (2002).

[56] Agreement between the International Criminal Court and the European Union, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:115:0050:0056:EN:PDF> accessed on 06/01/09; See also Paper on the Agreement between the ICC and the European Union, available at <http://www.amicc.org/docs/EU-ICC-Agreement.pdf> accessed on 06/01/09; also see the Common Position and Action Plan of the EU on the ICC on External Relations of the EU, The International Criminal Court & the fight against impunity, available at <http://ec.europa.eu/external_relations/human_rights/icc/index.htm> 06/01/09; also Amnesty International, European Union Amnesty International's Recommendations on Improving the Effectiveness of International Justice, available at <http://www.amnesty.org.ru/library/Index/ENGIOR530102007?open&of=ENG-385> accessed on 06/01/09.

6.2.1.3 Confidentiality and Frequency of Sessions

We have seen how the confidential nature of a mechanism's sessions and the frequency with which sessions are held can affect the effectiveness of an institution and its mechanisms. The 1503 confidential procedure is drained of its effectiveness because its confidentiality has caused significant delays and muted a mechanism whose only weapon is the mobilization of public shame. One of the strengths of the treaty mechanisms, on the other hand, is that they were able to forge a public reporting mechanism even though their treaties did not originally endow them with such a mechanism. While the regional systems had mechanisms that were fairly public, the importance of publicity was underscored by how the African Commission succeeded in having its otherwise confidential annual report published since 1994. The position of the ICC in this respect is encouraging as its procedures are open to the public in as far as it is a criminal court. Article 64(7) of the Rome Statute provides that ICC trials will be held in public except for camera sessions held for victim-protection or public security purposes.[57] In addition to recognizing the publicity of hearings as a due process right of the accused,[58] the Rome Statute recognizes the importance of publicity for an institution relying on deterrence of potential violators.[59]

The position of the ICC with respect to the frequency and duration of sessions is also encouraging. As the ICC is operational throughout the year, it will not be forced to cram or fit its annual pile of cases into a few weeks long session. This is certainly unlike the situation with the General Assembly, the Commission on Human Rights, the treaty based committees and the Regional Commissions. This also means that the ICC will not be confronted with the trouble of initiating special sessions in cases of quickly unfolding tragedies or with facing situations in which it misses out on these events as had occurred with the General Assembly during the Rwandan crisis. Even the Assembly of States Parties, a political organ which normally meets annually, can call up a special session with the assent of one-third of its members and is at any rate represented by the Bureau which can meet much more frequently and with much ease.[60]

[57] Also see Arts. 68 and 72 of Rome Statute.
[58] Art. 67(1) of Rome Statute.
[59] See Art. 76 of the Rome Statute which requires that sentences should be pronounced in public.
[60] See Art. 112 (3) and (6) of Rome Statute.

6.2.2 Composition and Professionalism of the Court

We have seen that the composition of organs that carry the responsibility of making use of the different mechanisms is one of the important factors that affect the effectiveness of the mechanisms. The perceived and actual effectiveness of what used to be the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and subsequently the Sub-Commission on the Promotion and Protection of Human Rights when compared to the ineffectiveness of the all powerful Charter institutions showed that the composition of the institution was at least as important as, if not more important than, the powers wielded by the institutions. More than the importance of its own accord, the composition of the institution will affect the assertiveness and ingenuity of the institutions and eventually their legitimacy or that of their respective mechanisms. We have seen that the assertiveness and legitimacy of the treaty based and regional mechanisms is directly proportional to the composition of the institutions.

Looking at the composition of the ICC one can only conclude that the Rome Statute has set a rather high benchmark even in comparison to the European Court of Human Rights. The standards of competence set even for the Registrar, the Deputy Registrar and the staff and particularly the investigator of the Court are quite high as these officers are required not only to be of high moral character but are also required to be highly competent.[61] The prosecutor and his/her deputies who are full-timers are required to be "highly competent in and have extensive practical experience in the prosecution or trial of criminal cases," in addition to being of high moral character and possessing an excellent knowledge and fluency in the Court's working languages.[62] Given similar moral standards and language skills, the judges of the chambers are expected to be qualified for the highest judicial office in the states parties and are also to be nominated through domestic procedures for the appointment of high judicial officers.[63] Furthermore, they are expected to have an established competence in the subjects of criminal law

[61] Since the Registrar (and the Deputy Registrar) and the staff are not discussed in what follows it should be noted that the Registrar and the Deputy registrar are also required to have an "excellent knowledge of and be fluent in at least one of the working languages of the court." Regarding the employment of staff, it is provided that particular attention ought to be given to the "highest standards of efficiency, competency and integrity." It is also provided that the staff should represent major legal systems and geographic regions and should give attention to the employment of female staff and staff with expertise on violence against women and children. See Arts. 43(3) and 44 of Rome Statute.
[62] See Art. 42(2) and (3) of Rome Statute.
[63] Art. 36(3) of Rome Statute.

and procedure and should have practiced the same as judges, prosecutors or advocates.[64] Alternatively, the judges could be from a human rights or humanitarian law background but with extensive experience in a professional legal capacity relevant to the judicial work of the ICC.[65] We can thus see that not only is the professional competence of the members of the different organs of the ICC guaranteed, but the professionalism expected of the judges is certainly also higher than that which is provided by the ECHR.

The ICC seems to be doing well in consolidating on what is provided for by the Rome Statute as members of the Prosecutor's Office and that of the Judiciary seem to be highly qualified for the job.[66] A profile of the prosecutors' and judges' qualifications seems to indicate that most of them are doctors or professors with extensive academic experience as instructors and publicists. Most of them also at the same time have extensive practical experience with some members serving as ministers of justice or heads of leading institutions in the area of human rights and humanitarian law. A good number of them also have extensive experience with international criminal tribunals, the International Court of Justice or the UN system.

Having established the high professional competence of the Court's composition let us move on to the independence of the Office of the Prosecutor and the Chambers and that of the professionals filling them. Article 38 of the Rome Statute guarantees the administrative independence of the presidency or the chambers and also the administrative independence of the prospector even from the Presidency. The assurance of the prosecutor's managerial and administrative independence over every piece of activity is ensured to the extent that even each individual member employed in the office is expected to be personally independent.[67] It is specifically stipulated that both prosecutors and judges of the ICC should avoid personal and

[64] Ibid
[65] Ibid
[66] ICC, Prosecutor's Office, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor.htm> accessed on 23/1/09; ICC, Pre-Trial Division, available at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/pre%20trial%20division/pre%20trial%20division?lan=en-GB> accessed on 23/1/09; ICC, Trial Division, available at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB> accessed on 23/1/09; ICC, Appeals Division, available at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/appeals%20division/appeals%20division?lan=en-GB> accessed on 23/1/09; also Wikipedia, Luis Moreno-Ocampo, From Wikipedia, the free encyclopedia, available at <http://en.wikipedia.org/wiki/Luis_Moreno-Ocampo> accessed on 08/02/09.
[67] Art. 42(1) and (2) of Rome Statute.

non-professional activities that might conflict with their independence as judicial officers.[68] When it comes to the professional life of all the prosecutors and the full-time judges they are not expected to avoid conflicts of interest as they are totally prohibited from participating in professional activity outside their respective roles within the ICC.[69] Recognizing that it is not possible to make human beings independent of their own interests and prejudices the Rome Statute allows prosecutors and judges to excuse themselves from cases in which they might have a personal stake and provides for a procedure under which they might be disqualified on a case by case basis.[70] And finally disciplinary measures and removal from office are provided as tools of last resort in case where a prosecutor or a judge does not keep to the rules and disregards the safeguards provided for. What is more interesting; however, is that the enforcement of these rules is not left to political control, since the Rome Statute provides for a procedure which combines professional self-regulation with some political oversight of the Assembly of States Parties.[71]

And finally there are some specific points that vividly show how the drafting of the Rome Statute was informed by the experience of previous institutions and that of the European Court of Human Rights in particular. For instance the dilemma between incurring high running costs and having full-time judges is resolved by a combined system whereby all judges are elected on the understanding that they are to work as full-timers although the President is given some discretion to decide how many of the judges will actually work on that basis based on the work load of the Court.[72] This will in practice mean that if the court has its hands full with cases it can have all eighteen of its full-time judges work to alleviate its burden. And it can reduce their number once the case-load begins to decline. And since it is only those judges who are actually working as full-timers who are prevented from engaging in part-time activities, the other judges who are relived of full-time engagement can undertake other professional activities while allowing the ICC to reduce the costs it would have incurred had they been engaged on a full-time basis.[73] If the ICC is faced with congestion that is limited to the Pre-Trial Division the Rome Statute

[68] Arts. 39(1) and 42(5) of Rome Statute.
[69] Arts. 39(2) and 42(5) of Rome Statute.
[70] Art. 41 and 42(7) of Rome Statute.
[71] Ibid
[72] See Art. 35 of the Rome Statute.
[73] See Arts. 35(3), (4) and 40 of Rome Statute.

provides for a possibility whereby the Pre-Trial Chamber can allow the designation of Single Judge Chambers which will no doubt speed up the conduct of pre-trial hearings.[74] Furthermore; the Rome Statutes also envisages a time in which the ICC is so overwhelmed with cases that 18 judges might not be capable of coping with the overload and the consequent delay. The Rome Statute provides that the number of judges could be increased beyond its original number upon a reasoned recommendation of the Presidency and the approval of the Assembly of Heads of State.[75]

One certainly cannot say that either the European Court of Human Rights or the ICC is better disposed in this regard as both are operating in different circumstances and responding to their respective problems. The Europeans Court has found it challenging to cope with overflow although it has 47 judges whose number might increase if the number of states parties to the ECHR increases. The ICC, on the other hand, does not have enough cases in its docket to engage even eighteen judges.[76] But while the number of judges and its relation to the volume of cases might vary from case to case, one has to remember that the European Court is at a substantial advantage of having a link with or an agent from every state party's domestic legal system. The Rome Statute attempts to limit this weakness in the pursuit of legitimacy by requiring that the judges should always be from one of the states parties and that no two judges should be from the same state.[77] An even stronger legitimacy enhancing provision is contained in article 36(8) which requires that the composition of the judges should fairly represent the major legal systems and geographical regions of the world.[78] The Rome Statute also provides that there is a need for a fair representation of female and male judges, a need to appoint judges with specialized legal expertise on violence against women and children and a requirement that the prosecutor appoint expert legal advisors on sexual and gender violence and violence against children.[79] The last

[74] Art. 39(2)(b)(iii) of the Rome Statute; Rule 7 of the RPE, *infra note* 88.
[75] Art. 36(2) of Rome Statute.
[76] As late as the 17th of February 2009 only one case (The Prosecutor v. Thomas Lubanga Dyilo) is being considered by the Trial Chamber while the other cases (which number only 9 cases regarding four different situations) are at the Pre-Trial phase, International Criminal Court, Situations and Cases, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> accessed on 17/02/09.
[77] Art. 36(4); the legitimization factor could have been strengthened if states accepting the Court's jurisdiction temporarily (on an *ad hoc* basis) were allowed to participate in the process by appointing their national to the ICC either to be a judge in that case or generally during the state's interaction with the Court.
[78] Art. 36 (7) of Rome Statute.
[79] Arts. 36(8) of Rome Statute. According to Art. 43(6) the registrar is also required to appoint to the Victims and Witnesses Unit staff with expertise on trauma and related crimes of sexual violence.

point might be of importance for the ICC's legitimacy; first, because it recognizes the need for representing the otherwise under-represented female judges of international tribunals; and second, because it recognizes that gender based violence has always been a part of situations of gross violations and international crimes.[80]

A final point on the legitimacy boosting composition of the ICC concerns the way in which the ICC's judges are distributed based on their educational background. We have seen that the judges of the Court are either criminal law judges with extensive domestic experience or are international legal experts with relevant experience. Article 36(5) allows the Assembly of States Parties to appoint more domestically well-known judges with criminal law and procedure expertise who, according to article 39(1), will be placed in the Pre-Trial Division and are more likely to be engaged in the first few years of the Court's existence. This will be important in allowing the ICC to get the attention of domestic practitioners and politicians thereby achieving the purpose of publicity within domestic systems. But as time passes and the Court (through its domestic law oriented judges) will have made its grand entrance into the memories of legal practitioners of member states and as the Court has had the chance to have appellate cases the need for domestic oriented judges should decline with a parallel rise in the demand for international law and jurisprudence oriented judges. That seems to be the reason why the Rome Statute demands the appointment of at least 9 criminal justice oriented judges on the first term while the discretion is left open for the Assembly of States Parties for subsequent terms.[81]

6.2.3 Neutrality of Procedures

We shall take up the issue of the neutrality of the ICC's procedures in three different contexts. We will first consider how the Court's establishment as a neutral and permanent court through a treaty rather than the Security Council's Chapter VII procedures might bear on the ICC's legitimacy. Second, we will consider the regularized rules of procedure and evidence and their

[80] See Booth, *supra note* 39, at 161-176; generally also Pam Spees, *Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power*, 28 Journal of Women in Culture and Society 1233, passim (2003).
[81] See Art. 36(5) of Rome Statute.

bearing on the neutrality of the ICC. And the third point relates to a closely linked issue of victim friendly procedures and rules.

We have seen that the Numbering and Tokyo Tribunals were established by the allies to prosecute war criminals from the defeated side and that the only alternative to the establishment of the tribunals was to summarily execute those accused of the crimes. Thus, even though the allies preferred to handle the vanquished in a more civilized manner there is no doubt that Nuremberg and Tokyo were instances of the victors putting their adversaries to account. And had the outcome of the war been otherwise, we might have had a history in which the 'London' and 'Moscow' tribunals tried Allied leaders. We have also seen that the Yugoslav and Rwandan tribunals have not escaped criticism of being instances of the victor's justice. The legal mandate of the Security Council to establish tribunals has also been severally criticized. We will not have to make any conclusions as to whether the allegations of victor's justice or as to whether the Security Council has the legal mandate to establish such tribunals. And it is so particularly because the ICC is, for the main part, able to doge such criticisms.[82]

The process of the ICC's establishment, unlike its *ad hoc* predecessors, did not involve any particular conflict and therefore there are no particular losers or winners concerned with its establishment. For this reason the ICC steers free of the potential for diminishing its legitimacy due to a perception that it is established by the victors or the powerful to punish their foes.[83] And since it is not only in the realm of perception that the ICC is not a victor's court the likelihood of its prosecuting only one side in a conflict is consequently reduced at least when compared to its predecessors. Furthermore, unlike the Nuremberg and Tokyo tribunals which were conducted by the allies unilaterally and unlike the ICTY and ICTR which were created by the Security Council by a Chapter VII executive order, the ICC has a firm treaty basis on which to stand.[84] This certainly provides a firm basis for its legitimacy and the ICC cannot be accused of not conforming to the principle of the rule of law and that of the retroactive application of criminal law as it enforces criminal provisions clearly prescribed in the Rome Statute and only to

[82] The resolution of the questions raised regarding the Nuremberg/Tokyo Tribunals or the ICTY and ICTR will not at any rate add value to the issue at hand.
[83] The same conclusion is reached by Matas, *supra note* 2, at 8-9; and Spyros Economides, *supra note* 2, at 43.
[84] See Crawford, *supra note* 33, at 133-135, 141.

situations that have taken place after the date the Rome Statute came into effect or the date a state ratifies the Statute.[85]

In addition to being established through a procedure that will not have it compromise its legitimacy from the beginning, the ICC also has neutral and regularized rules of procedure and evidence ensuring that a perception of neutrality of the Court's decisions is maintained. To begin with, the Rome Statute clearly defines the substantive jurisdiction of the ICC ensuring that states and potential defendants will not fear an over-zealous pursuit on the side of the prosecutor and the judges.[86] Not only is this important to ensure that the court will be limited in terms of exercising its interpretative discretion but it will also ensure that the court adheres to the principle of legality. This aspect of the ICC is reinforced by the 'Elements of Crimes' which is adopted by two-thirds majority of the members of the Assembly of states parties.[87] The Rules of Procedure and Evidence[88] regulate in detail the powers of the prosecutor, procedures for the removal and disciplining of judges, the role of victims in trials, factors for the determination of sentences and rules applicable to appeals.[89] These detailed rules on the elements of the crimes making up the court's substantive reach and the procedures should go to great lengths in ensuring the court's neutrality.[90] The fact that the rules and procedures of the ICC fairly represent ideas from the adversarial and inquisitorial legal systems should also boost the ICC's legitimacy as it will be able to relate to legal practitioners in most member states.[91]

A little earlier we have seen that the gender composition of the ICC and its emphasis on expertise on gender and sexual violence matters could hold great potential for enhancing its

[85] Art. 11 of Rome Statute.
[86] See Arts. 5-8 of Rome Statute.
[87] See Art. 9 of Rome Statute; See KUNT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT SOURCES AND COMMENTARY 1-8 (2002).
[88] International Criminal Court, Rules of Procedure and Evidence, U.N Doc. PCNICC/2000/1/Add.1 (2000). (Hereinafter RPE)
[89] Id. generally See Arts 15, 23-32, 53, 46-50,104-105, 63-84, 85-99, 131-148, 76-78, 149-161.
[90] The fact that these rules are detailed does not mean that the judges are left without any discretion although such discretion is very limited and principled. See ICCLR, International Criminal Court Rules of Procedure and Evidence: Implementation Considerations, International Centre for Criminal Law Reform & Criminal Justice Policy (ICCLR) 1-4 (April 2002); See also B. G. Ramcharan, *Strategies for the International Protection of Human Rights in the 1990s,* 13 Human Rights Quarterly 51 (May, 1991).
[91] See Weller, *supra note* 55, at 376 See also LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 334 (1997).

legitimacy.[92] A similar conclusion could be reached regarding the Rome Statute's contribution to the jurisprudence of victim's rights in international law.[93] The ICC is expected to be sensitive to victim's rights and interests starting from the beginning of investigations as the prosecutor is required to respect the interests and personal circumstances of victims and witnesses (including age and gender) and is expected to take into account the nature of the crimes being investigated where violence against women and children is involved.[94] The Rome Statute goes beyond setting up principles of witness protection during proceedings[95] and provides for the establishment of the "Victims and Witnesses Unit" under the Registry for the provision of protection and counseling for victims and witness.[96] Not only is witness protection, especially for sexual violence witnesses, provided for during the course of the trial,[97] victims are even allowed to "participate" in proceedings by presenting their views and concerns at all stages of the trial.[98] Finally; the ICC is also provided with the most elaborate mechanism of victims' reparations under which tort remedies are provided against violators[99] and the establishment of a victims trust fund for the benefit of victims and their families.[100]

6.2.4 Formal Authority and Enforceability of Decisions

We have seen that the formal authority of international mechanisms and the legal nature or bindingness of their decisions is one of the factors to lookout for in assessing their effectiveness. We have seen that the European Court of Human Rights is in a better position than the other

[92] A similar point could be made about the court's substantive jurisdiction. That is; the definitions contained in Articles 5-8 of the Rome Statutes and their corresponding articles in the Elements of Crimes take note of the gender aspects of international crimes as developed in the jurisprudence of the ICTY and ICTR. Generally see, Booth, *supra note* 39, at 161-176; WIGJ, Gender Report Card on the International Criminal Court 2006, 1, 15 (2006).
[93] WIGJ, *supra note* 92, at 1,16; Cherif Bassiouni concludes that the Rome Statute reflects "the most advanced position that exists in established international criminal justice" M. Cherif Bassiouni, International Recognition of Victims' Rights, 6 Human Rights Law Review 203, 230 (2006); compare with: Jo M Pasqualucci; Victim Representations in the Inter-American Human Rights System: A Criminal Assessment of Current Practice and Procedure , 18 Michigan Journal of International Law 1, 1-58 (Fall 1996).
[94] Art. 54(1) and (6) of Rome Statute.
[95] Art. 68 of Rome and Rules 87-88 of RPE.
[96] Arts. 43(6) and 68 (4) of Rome Statute.
[97] Rules 63(4) and Rules 70-72 of RPE.
[98] Art. 68 of Rome Statute and Rules 16(1) (d) and 89-93 of RPE.
[99] Art 75 of Rome Statute, compare this with Art. 106 of the Rules of Procedure and Evidence of the ICTY and ICTR which allow only the return of stolen property.
[100] Art. 79 of Rome Statute. For a detailed discussion of the activities of the Victim's Trust Fund see International Criminal Court, Victims Trust Fund, available at <http://www.icc-cpi.int/vtf.html> accessed on 19/09/08.

mechanisms as it is at least spared the struggle of the other mechanisms to be more authoritative as its decisions are biding and automatically enforceable in domestic legal systems. Excepting the Security Council, the other Charter based mechanisms can either only voice their concern or make recommendations as they do not have the power to make binding decisions with the full force of international law. Faced with the same problem, the more professional treaty based and regional mechanisms have put much effort into their work in order to avoid being ignored as mere opinion giving institutions. Claiming to give binding decisions and attempting to follow up on state compliance have thus become the ways in which these institutions have struggled for more authority.

As a general observation or conclusion it can be asserted that the formal authority and enforceability of the ICC's decisions under international law is as solid as that of the European Court of Human Rights. This, in other terms, means that the ICC will not waste any time or effort in asserting a stronger legal form for its decisions. The ICC's binding authority emanates from or can be derived from three sources. The first of these sources is Article 86 of the Rome Statute which declares that parties to the Statute "**shall**… **cooperate fully** with the court in its investigation and prosecution of crimes within the jurisdiction the Court." The second source can be established from a cumulative reading of Articles 12(3) and 87(5) of the Rome Statute which provides for the Court's authority over states not party to the Rome Statute but that accept the Court's jurisdiction on an *ad hoc* basis through a referral of a case to or through a specific agreement with the court. The third source is the Security Council's power to refer cases to the ICC.[101] It is interesting enough that the ICC can exert cooperation not only from states but also from regional and international intergovernmental organizations including the INTERPOL which is specifically mentioned by the Rome Statute.[102] Furthermore; the Statute clearly defines the forms, sizes and shapes in which the ICC may seek cooperation. In addition to requiring states to enact domestic procedures that enhance cooperation with the ICC, the Rome Statute lays down in an open-ended manner that cooperation may be sought in the area of : arrest and surrender, transit of prisoners, identification and whereabouts of persons and items, gathering of evidence,

[101] Arts. 13(b) cum 87 (5) and (7) of the Rome Statute.
[102] Art. 87 (1)(b) and (6) of the Rome Statute.

provision of records and documents, search and seizures, freezing of assets, witness protection, surrender and extradition, sharing of confidential information and waiver of immunity.[103]

We have seen that the ICC is in a better position than most of the mechanisms discussed in this paper in terms of the formal authority granted to it by its constitutive treaty. Wisdom (or experience!) however; informs us that a warning sign with a picture of a fierce dog might not always be an accurate description of the animal inside, that is, if there is an animal inside at all. And if the history of the ICTY and ICTR is to be any indication of what the ICC will face, we can learn that formal authority on paper is only the better part of a larger and less optimistic reality. Both the ICTY and ICTR had as much formal power as the ICC since their statutes made it obligatory for states to cooperate with them.[104] Unfortunately though; neither had, similar to the ICC, independent enforcement powers. And because of the lack of an independent enforcement power both institutions deepened on the good will cooperation of concerned states or on the capacity of the international community to put enough pressure to evoke cooperation.

Whereas the situation in Rwanda presented a more favorable condition because the group that instigated the 1994 genocide had been militarily defeated and disempowered by the time the ICTR was established, the ICTY had to deal with states in which suspects and their support base wielded significant power.[105] For this reason the ICTY had, especially at the beginning of its work, been utterly ineffective at attaining state cooperation for the investigation and arrest of major suspects. Whatever small gains the ICTY achieved at the initial stages was due to the cooperation of NATO and international troops on the ground in the Former Yugoslavia.[106] Later gains, on the other hand, were due to international pressure from Europe and the USA.[107] Even states that had democratic, pro-ICTY governments had intentionally avoided cooperating with the ICTY where there was not enough diplomatic political and economic pressure from the

[103] Arts. 72, 73, 88, 89, 93 and 98 of the Rome Statute.
[104] See Arts. 29 and 28 of ICTY and ICTR respectively.
[105] See generally: Akhavan, *supra note* 37, at 509; Victor Peskin and Mieczysław P. Boduszyński, *International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia*, 55 Europe-Asia Studies 1117, 1122-1123 (Nov., 2003); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW BEYOND THE NUREMBERG LEGACY 160 (1997).
[106] Peskin and Boduszyński, *supra note* 105, at 1117-1120; Weller, *supra note* 55, at 383; Ratner and Abrams, *supra note* 105, 159-160.
[107] Peskin and Boduszyński, *supra note* 105, at 1117-1120; Weller, *supra note* 55, at 383; Ratner and Abrams, *supra note* 105, 159-160.

west.[108] Thus, we can see that the success of the ICC will depend on the good will cooperation of concerned states (like the ICTR) or on the concerted effort of western states in applying diplomatic, political and economic pressure.[109] The hope that the ICC will get strong diplomatic and political support from the west (or the international community in general) might be diluted because the ICC will more likely be engaged in more than one state or more than one situation at any given time; thus, diluting the lobbying capacity of the international community. Furthermore, one can imagine what a difference it could make if the ICC were to deal with situations in the far and dark concerns of the world as contrasted to the comparatively ineffective ICTY which was dealing with countries at the heart of Europe. It appears as if it is because of this realization that the Rome Statute opts for a regime of complementarity that recognizes the importance of the primacy of national legal systems over ICC jurisdiction.

The lack of independent enforcement powers might be a constant challenge rather than just a small limitation of or an irritant to the ICC since its success as an institution that is supposed to deter potential criminals will depend on its constant perception of effectiveness. Therefore, it is imperative that the ICC be able to have states cooperate with its requests for the investigation of alleged crimes and the arrest of suspected individuals. If the ICC were to fail to convict or even arrest suspects of gross violations and other international crimes after publicly attempting to do so, it can only send one message to potential violators across the world: You too, can get away with it! We have yet to see how the ICC will do in mustering state cooperation and international support. But the practice so far indicates that it is doing well especially in light of the fact that a state that voluntarily assents to ICC jurisdiction would naturally cooperate even through there might still be a possibility for such a referral to be driven by non-altruistic motives.[110]

[108] Peskin and Boduszyński, *supra note* 105, at 1119-1120.
[109] Note that our reference to pressure assumes that the situation being handled by the ICC could be one in which the Security Council is or is not involved. The ICTY and ICTR are good examples of the first situation because one will not ask 'what if the Security Council is involved?' The conclusion in this paragraph has also been reached by: Weller, *supra note* 55, at 383; Donoho, *supra note* 2, at 48; Peskin and Boduszyński, *supra note* 105, at 1117-1120; Sunga, *supra note* 91, at 300-301; Ratner and Abrams, *supra note* 105, at 187; Crawford, *supra note* 33, at 113.
[110] See Weller, *supra note* 55, at 374; but also Mahnoush H. Arsanjani and W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 The American Journal of International Law 385, 394 (Apr., 2005) Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 The American Journal of International Law 403, passim (Apr., 2005).

6.2.5 Politicization and Assertiveness

We have seen that the assertiveness of the professionals manning the mechanisms dealing with gross violations of human rights has a significantly positive consequence for the effectiveness of those mechanisms. This can be evinced by the legally weak treaty based mechanisms that earned their place as significant international players in their areas of specialization because of their professional assertiveness. But that assertiveness will contribute to effectiveness is not an invariable truth which is secure at all times and under all circumstances. For instance the undefined jurisdiction of the UN Commission on Human Rights combined with its very assertive but politicized membership has led to a perception that it is a case study of how not to establish an international human rights institution. Thus we will set out with a point of view that sees assertiveness as an asset for effectiveness so long as such assertiveness is not politically driven and/or does not cause such a perception.

Earlier in this chapter we have concluded that one of the strengths of the ICC is that it has a very distinctly marked jurisdiction and a neutral and detailed procedure in addition to being filled with professionals of the highest caliber. While this can give some assurance of a politically unbiased court, we can add to this that the advantages of the clarity of the court's jurisdiction is strengthened further by the fact that the ICC's jurisdiction is limited to what Sunga calls the "hard core violations."[111] Thus unlike the UN Commission on Human Rights which can present any political issue as a human rights concern, the ICC will not be feared for or suspected of interfering with domestic matters in the name of human rights. It will not be accused of carrying the ideology of any political group or bloc because its jurisdiction extends to the violations of human rights and humanitarian norms on which there is not much ideological, political or civilizational controversy.[112]

What the Rome Statute does in fact is not just to circumscribe the ICC to international norms on which there is general agreement. It circumscribes the ICC to the most serious crimes of concern to the international community.[113] Therefore, any anxiety over the assertiveness of the ICC is

[111] Sunga, *supra note* 91, at 333.
[112] Ibid; Ratner and Abrams, *supra note* 105, at 22-23, but also see Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan,* 106 Columbia Law Review 182 (January, 2006).
[113] See 4th paragraph of the preamble and Arts. 5(1) 17(1)(d) and 53(1)(b), 53(2)(b) of the Rome Statute.

less likely to emanate from a genuine concern that the ICC will interfere with legitimate domestic political, cultural or religious sensitivities. In other words, states are unlikely to argue that it is part of their domestic prerogative to torture, rape and wipe out their opponents or their minorities in a genocidal spree. Whatever small space is left out for the possibility of the actual or perceived politicization of the ICC will be discussed after a point is made about the role of complementarity in cementing the depoliticization of the ICC.

One of the ways in which the ICC avoids politicization is through assuming a role that is complementary to the domestic system of states parties or states over which it exercises jurisdiction by virtue of a non-party or Security Council referrals. The Rome Statute provides that the primary role of prosecuting perpetrators of gross violations lies with domestic mechanisms while the ICC only enhances international cooperation and prosecutes suspects only where the domestic system concerned is unwilling or unable to do so.[114] Since this means that the ICC Prosecutor will not prosecute unless there is ample evidence showing unwillingness or inability on the state's side to prosecute, states can always avoid ICC encroachment by investigating and prosecuting suspects of gross violations. The ICC's current prosecutor Moreno Ocampo has confirmed this principle in his prosecution policy according to which the effectiveness of the ICC is to be measured by the absence of cases in the ICC as a result of national prosecution rather than the intrusiveness of his office.[115] This and the Prosecutor's preference of avoiding the use of his *proprio motu* powers[116] should promote the ICC's legitimacy by decreasing the fears of a politically charged and an over reaching ICC.[117]

---

[114] See Preamble and Arts. 1, 5 and 17 (2) of Rome Statute; See generally also, Mohamed M. El Zeidy, The Principle of Complementarity: *A New Machinery to Implement International Criminal Law*, 23 Michigan Journal of International Law 897-905 (Summer 2002); Informal Expert Paper: The Principle of Complementarity in Practice, ICC-OTP (2003), pp. 3-4, available at <http://www.icc-cpi.int/library/organs/otp/complementarity.pdf> accessed on 10/12/08.

[115] See Arsanjani and Reisman, *supra note* 110, at 386; Lipscomb, *supra note* 112, at 199; International Criminal Court Office of the Prosecutor, The Office of the Prosecutor Report on the Activities Performed During the First Three Years, (June 2003- June 2006) 12 September 2006 The Hague; available at <http://www.iccnow.org/documents/3YearReport%20_06Sep14.pdf> accessed on 10/12/08; Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, available at <http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf> accessed on 10/12/08.

[116] Ibid

[117] Arsanjani and Reisman, *supra note* 110, at 386; Weller, *supra note* 55, at 374; Donoho, *supra note* 2, at 50; Crawford, *supra note* 33, at 139-140.

Despite the safeguards created by a clearly defined and circumscribed jurisdiction, a focus on hard core violations and a guarantee of domestic primacy there are two aspects of the ICC that might create a risk of politicization. The first, which is actually within the assertive discretion of the ICC, has to do with the fact that the ICC is likely to face situations in which its decisions could have grave political consequences inside countries in which violations have taken place. Article 17 (1) (b) and article 53 (1) and (2) envisage a possibility whereby the prosecutor exercises some discretion in deciding whether to prosecute or not to prosecute based on considerations that require her/him to make subjective judgments. We are particularly interested in situations in which the state has used transitional mechanisms such as truth commissions in order to avoid prosecuting suspects who wield significant political power.[118] In these cases the prosecutor's decision as to whether to prosecute or not will have a great impact on that state's politicians' capacity to determine the political direction of the country sometimes resulting in their inability to bring about peace and stability to their country. The second risk of politicization is posed by the ICC's association with the Security Council. Article 13 of the Rome Statute provides that the Security Council has the power to refer cases to the ICC by virtue of its Chapter VII powers. Article 16, on the other hand, provides that the Security Council can defer any ICC investigation or prosecution on a twelve month per resolution basis. This Provision might raise a jurisprudential as well as practical problem since it purports to limit the Security Council's powers without amending the UN Charter. Thus; is it possible to argue that the UN Security Council is no more capable of passing a Chapter VII resolution prohibiting the ICC from prosecuting a case for more than 12 months (say for 13 months or two years)? Such an argument is unlikely to hold any water as the Security Council has already passed a binding resolution that

[118] Although we are not interested in the legal positivistic or jurisprudential aspect of the issue it may be important to indicate that a cumulative reading of Arts. 17 (1) (b) and 53 (1) (c) and (2) (c) seems to give the prosecutor some leverage to in deciding whether to prosecute or not where a transitional mechanism has been used. Generally see, Fröhlich, *supra note* 42, at 302, Lipscomb, *supra note* 112, at 201; Hans-Peter Kaul, *Construction Site for More Justice: The International Criminal Court after Two Years*, 99 The American Journal of International Law 375 (Apr., 2005); Danesh Sarooshi, *The Statute of the International Criminal Court*, 48 The International and Comparative Law Quarterly 393 (Apr., 1999); GLOBAL: Interview with Chief Prosecutor Moreno Ocampo, In-Depth: Justice for a Lawless World? Rights and reconciliation in a new era of international law, humanitarian news and analysis, UN Office for the Coordination of Humanitarian Affairs. Available at: <http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59458> accessed on19/06/08.

clearly violates article 115 of the Rome Statute by refusing to pay for the ICC's expenses on its Darfur investigations.[119]

A situation under which the prosecutor's decision whether to exercise the ICC's complimentary powers hinges upon a determination as to whether a state that gives an amnesty to or pardons suspects of gross violations was 'unwilling or unable' to utilize its domestic system to give a just solution is a tricky dilemma for the prosecutor. On the one hand, not exercising jurisdiction might defeat the whole idea of a criminal court as it will water down the deterrence aspect of the court. On the other hand, exercising jurisdiction might spell a dual catastrophe as it may cause a perception or fear that the ICC can prevent or at least try to prevent states from determining their own political destiny and in the process resulting in the prolongation of armed conflicts and civil strife. The purposes of the ICC could also be defeated in this way as there cannot practically be any possibility for prosecuting violators if the conflict and therefore the violations are allowed to continue.

Proponents of the view that the prosecutor should always pursue suspects irrespective of the situation on the ground argue that international law imposes a duty to prosecute suspects of gross violations and that the ICC risks its legitimacy by considering political factors and not playing its deterrent role.[120] Those who propose that the prosecutor should respect domestic political solutions argue in two ways. There are those who suggest transitional mechanisms are best suited to countries in transition and the prosecutor ought not interfere or insist on prosecution where transitional mechanisms are legitimately applied under appropriate circumstances.[121] Others

[119] See W. Michael Reisman, *On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court*, 99 American Journal of International Law 615, 615-618 (Jul., 2005); SC/RES/1593 (2005), Adopted by the Security Council at its 5158th meeting, on 31 March 2005, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement> accessed on 05/01/09.

[120] Weller, *supra note* 55, at 374; Naomi Roht-Arriaza, Combating Impunity: Some Thoughts on the Way Forward, 59 Law and Contemporary Problems [AUT Law & Contemp. Probs.] 93, 93-101 (Fall, 1996); Bassiouni, *supra note* 93, at 263; Fröhlich, *supra note* 42, at 278; also Diane F. Orentlicher, *Settling Accounts, The Duty to Prosecute Human Rights Violations of a Prior Regime,* 100 YALE Law Journal 2537 (1991); Gunnar Theissen, *Amnesty for Apartheid Crimes? The South African Truth and Reconciliation Commission and International Law*, University of the Western Cape Faculty of Law [LL.M. Programme in International and Human Rights Law] 27 November 1998; Emily W. Schabacker, Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses, 12 New York International Law Review (Summer, 1999).

[121] See Steiner, *supra note* 2, at 770; Evelyn Bradley, In Search for Justice - A Truth and Reconciliation Commission for Rwanda, 7 Journal of International Law and Practice 129, 138 and ff (Summer, 1998), Kristin Bohl, Breaking the

argue that the prosecutor should not try to start prosecution proceedings in cases where a conflict is still going on and especially if the suspects are party to a possible peace deal to end the conflict. The general proposition of such proponents is that by taking away the capacity of negotiators to offer amnesties in return for a peace deal the prosecutor could prolong armed conflicts which usually also means that the gross violations will continue.[122]

Although the current prosecutor has not taken any of the two arguments as a singularly correct view on the legal interpretation of his role under the Rome Statute his policies in general and his actions regarding the Ugandan referral in particular seem to suggest that he has preferred a more assertive role. Although the prosecutor was willing to maintain a low profile while peace talks were being held with the LRA he was nevertheless unwilling to recognize any peace talks that could offer an immunity to top LRA leaders.[123] It is clear that the prosecutor's decision would have been criticized had he taken any other course of action as the matter is inherently political.

The first criticism waged against the prosecutor is that his eagerness to take up a state referred case has led him to start proceedings without considering whether the referring state was unwilling or unable to prosecute.[124] Thus the argument is that the Ugandan government invited the ICC to start investigations despite a fully functioning judicial system only to use the ICC as a political tool against the LRA.[125] The second criticism, which was raging against the ICC at the time of writing both from local Alcoli population (and leadership) and external observers is that the war in Uganda would have been cut short as early as 2006 had the LRA leadership been guaranteed that it would not be prosecuted by the ICC after surrendering the group's arms.[126]

Rules of Transitional Justice, 24 Wisconsin International Law Journal 557, 572 -577 (Spring 2006), Lipscomb, *supra note* 112, at 195-97; Vicencio, *supra note* 2, at 211; Ratner and Abrams, *supra note* 105, at 160, 202 -203.

[122] Lipscomb, *supra note* 112, at 193; Vicencio, *supra note* 2, at 209; Czarnetzky, *supra note* 2, at 125 -126; Arsanjani and Reisman, *supra note* 110, 385, Ratner and Abrams, *supra note* 105, at 189; Akhavan, *supra note* 110, at 416.

[123] International Criminal Court Office of the Prosecutor, *supra note* 105, at 4, 8; Global, *supra note*118.

[124] Arsanjani and Reisman, *supra note* 110, at 394; Akhavan, *supra note* 110, at 411, 413-15, Sverker Finnstro¨m, ''No-peace-no-war in Uganda,'' News from the Nordic Africa Institute 1 (January 2005), p. 11; available at <www.nai.uu.se/publications/news/documents/news1_2005.pdf.> accessed on 19/06/08.

[125] Ibid

126 Akhavan, *supra note* 37, at 415-420; Lucy Hovil and Zachary Lomo, ''Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation,'' Refugee Law Project Working Paper No. 15 (Kampala, Uganda: February 2005); available at <http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP15.pdf.> accessed on 19/06/08; UN IRIN, ''Uganda: ICC Indictments to Affect Northern Peace Efforts, Says Mediator,'' October 10, 2005; available at <www.irinnews.org/report.aspx?reportid¼56654.> accessed on 29/06/08; See also a statement by David Onen Acana a Major Chief of Northern Uganda's Acholi people) "What do we want?... Peace at any cost." Sudan Tribune,

Although there are those who argue that the LRA was using the ICC only as a pretext[127] the ICC should carefully apply its discretion to prosecute where there is a risk of prolonging a conflict together with its horrible consequences. That is why it should not come as a surprise that the fiercest opponents of the ICC in Uganda are the very victims who suffered and continue to suffer at the hands of the LRA.[128]

As we have seen earlier the second aspect of the ICC that creates a risk of politicization, despite the legal safeguards discussed in this section, is the ICC's connection with the Security Council. Being by far the most politicized institution compared to all of the institutions discussed in this paper the Security Council will no doubt put the ICC's legitimacy at risk by creating an impression that the ICC is but a tool for pursuing the interests of the very same states that control the Security Council. We have seen that the Security Council's decisions were highly influenced by the political interests of the permanent five and their allies throughout the existence of the institution. Even in cases that are considered the triumphs of the Security Council in the protection against gross violations, the Council's over-politicization was manifest in every case. Thus every time the Security Council refers a case to the ICC one can be assured that the decision will have the backing of one or more permanent members who support that decision because it conforms to other secular interests of those states. In the case of the Darfur referral, for example, it is easy to see that the same state(s) that sponsor the Darfur rebels and are the sworn enemies of the Sudanese regime are also the states that decided to refer the case to the ICC. While there is a sensible perception that America (or the West in general) has armed and trained the Darfur rebels in response to the Sudanese government's refusal to grant oil concessions to western companies, the concurrence of the Sudanese government's being pursued

---

Hopes for peace in Uganda, Monday 26 June 2006 06:10, <http://www.sudantribune.com/spip.php?article16381&var_recherche=kony> accessed on 19/06/08; Aljazeera, Uganda talks with LRA 'fail', available at <http://english.aljazeera.net/news/africa/2008/06/200861503952441624.html> accessed on 19/06/08; The Sudan Tribune, Hopes for peace in Uganda, Monday 26 June 2006, available at <http://www.sudantribune.com/spip.php?article16381&var_recherche=kony> accessed on 19/06/08; The Sudan Tribune, Ugandan double stand and ICC threaten Juba talks, Sunday 1 October 2006, available at <http://www.sudantribune.com/spip.php?article17887&var_recherche=kony> accessed on 19/06/08.

127 Dr Justin Ambago Ramba, Western Equatoria becoming a breeding ground for LRA, Sudan Tribune (Sunday 25 May 2008), available at < http://www.sudantribune.com/spip.php?article27274> accessed on 19/06/08.

128 Arsanjani and Reisman, *supra note* 110, 385, Akhavan, *supra note* 37, at 415-420.

by the ICC will no doubt contribute to the secular interests of the West in Sudan.[129] This perception makes it very easy to associate the ICC with a pre-conceived plan of the West to deal with detractors such as the Al-Bashir government in the Sudan.

Although the fact remains that gross violations are being committed by the Al-Bashir regime (and the Jangaweed), knowing the Security Council, one can see that the real factors for its decisions may be the political interest of some of the permanent five rather than the facts on the ground. Thus if and when the Security Council (in the future) decides not to refer a comparable situation to the ICC it is likely that the ICC will be implicated of applying double-standards together with the Security Council.[130] Although a conflict comparable to the Darfur has fortunately not presented itself, an example of double standards can be sampled by the relationship of the ICC to the Sudanese and American governments. While the Sudanese government's top people including its president are to face prosecution before the ICC as a result of the efforts of the west and that of the US, no American will face such a trial even if she were to participate in comparable acts elsewhere in the world or even in the Sudan itself for the simple reason that the later are capable of preventing the prosecution of their own.[131]

This will not only create a perception that presents the ICC as politically partial but it will also imply that the ICC prosecutes only the poor and weak while the rich and powerful are immune. This perception is likely to be stronger and more dangerous if it is to be put in a civilizational, regional or nationalistic perspective as it will portray an image wherein the ICC is merely a tool

[129] See Rainer Chr. Hennig, UN Darfur Vote Turns Scramble for Sudan's Oil [afrolnews,10 Sept, 2009], available at <http://www.afrol.com/articles/13921> accessed on 20/02/09; Sara Flounders, The U.S. Role in Darfur, Sudan Oil Reserves Rivaling those of Saudi Arabia? [Global Research, June 6, 2006], available at <http://www.globalresearch.ca/index.php?context=va&aid=259> accessed on 20/02/09; BBC News, Head-to-Head: Darfur Situation [27 October 2006], available at <http://news.bbc.co.uk/2/hi/africa/6058920.stm> accessed on 20/02/09. Note that the facts claimed in these news outlets are inherently very hard to confirm. However for the purpose of this study it is enough that such a perception exists among the Sudanese population and other observers from the African and generally non-Western perspective.

[130] The role of the narrow interests has already been seen in the Darfur case where the Security Council has been criticized for being unwilling to commit troops while at the same time implying that a violation as serious as genocide is taking place. See generally: Steven C. Roach, *Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and UN Security Council*, 6 International Studies Perspectives 431, 432 (2005).

[131] See Art. 6 of Security Council Resolution 1593(2005), *supra note* 119, which immunizes non-states parties that have contributed troops from investigation/prosecution connected with the Darfur case; see also SC Res 1422 & 1484 (both on *supra note* 50) that protect US forces on UN peace keeping missions against the ICC's jurisdiction.

created by the west to punish its enemies and nonconformists in the South and East.[132] The issue in fact is not about whether such a perception will be created and more about how to manage such a perception. The role of the Security Council in the ICC has been controversial between geo-political groups right from the beginning at the Rome Conference[133] to the issuing of the Al-Bashir arrest warrant.[134]

6.2.6 The Role of Political Organs

The political organs of the organizations within which human rights mechanisms exist also play an important role in the effectiveness of these mechanisms. We have seen that this is because the political organs have some role in the enforcement of the mechanisms' decisions and because the political organs' participation is important in the evolution of the mechanisms into more dynamic ones. The unconstructive role of the UN political organs can be contrasted with the role of the Council of Europe, the Committee of Ministers and the EU which go even farther than the European continent in their role of promoting human rights and reacting to gross violations. The amount of attention given to human rights by the wider organization's constitutive document and the powers and role given to the political organ have been used to gauge what role these organs had in the effectiveness of the mechanism.

If the amount of attention given to human rights by the constitutive document is any indication as to the effectiveness of a mechanism, the ICC is indeed destined for success. The prosecutorial mechanism and all the organs of the ICC including its political organ, i.e. the Assembly of States

[132] See Lipscomb, *supra note* 112, at 194-95; Hajjar, *supra note* 2, at 5. No wonder then that most Arab states opposed the Security Council's powers of referral during the Rome Conference, Steven C. Roach, Arab states and the Role of Islam in the International Criminal Court, 53 Political Studies 143, 144-145 (2005).
[133] Roach, *supra note* 132, at 144-145.
[134] The Arab League and the African Union seem to be unified in opposing the ICC's arrest warrant. See AU supports Sudan's rejection of ICC decision, ChinaView, available at <http://news.xinhuanet.com/english/2009-03/10/content_10979303.htm> accessed on 13/03/09; Marlise Simons, Court Issues Arrest Warrant for Sudan's Leader, New York Times, available at <http://www.nytimes.com/2009/03/05/world/africa/05court.html> accessed on 13/03/09; Arrest warrant draws Sudan scorn, <http://news.bbc.co.uk/2/hi/africa/7924982.stm> accessed on 13/03/09; Inter Press Service, Sudan: African Union against indictment of Al-Bashir, available at <http://www.afrika.no/Detailed/17897.html> accessed on 13/03/09; News Africa, Bashir seeks Arab League support, available at <http://english.aljazeera.net/news/africa/2008/07/200871212151131714 6.html> accessed on 13/03/09.

Parties and the Bureau, are established for one and only one purpose: the deterrence of international crimes. Although one does not see the Rome Statue going as far as declaring that its norms are an intrinsic part of member states' common political and cultural heritage the fact that its whole raison d'être and that of the institutions that it creates is to respond to gross violations makes the ICC an institution concerned with gross violations when compared to any of the institutions discussed so far. Nevertheless we have not concluded that the amount of attention given to human rights in the constitutive document is a factor that can conclusively and invariably determine whether a mechanism is going to be effective or not. The European system is a good case in point of how the founding fathers' declared allegiance to human rights can positively affect the political organ's pro human rights practices. However; one can also see that the declared allegiance of the founding fathers of the UN and the OAU has been confirmed neither by the powers nor by the practice of the political organs. Therefore; we cannot be certain that the attention given by the Rome Statute to human rights and humanitarian law will guarantee the political organ's undivided contribution to the effectiveness of the ICC. We can however argue or conclude that a great potential lies in this attentiveness.

It is difficult to make concrete conclusions about the actual role that has been or is being played by the political organ of the ICC in causing or contributing to its effectiveness. Like most of the political organs discussed in the paper the Assembly of States Parties can only offer the mobilization of shame as a weapon to induce compliance with the decisions of the ICC. For this reason it is imperative that the Assembly of States Parties be responsive to the demands of the Court in ensuring that it applies its public pressure quickly and without creating the impression that it is making politically biased decisions. Another area in which the Assembly can contribute for the effectiveness of the ICC is in lobbying for membership to the Rome Statute. The Assembly as a group as well as its members individually can work towards building a positive image for the ICC and towards using diplomatic means of lobbying for membership.

It is undoubted that the ICC can also have the UN Security Council as its political organ where it is dealing with Security Council referred cases. This makes the ICC an institution with the strongest political organ at least when it is dealing with Security Council referred cases. This aspect of the ICC is strengthened by the fact that the ICC deals only with a willing Security Council since, unlike the UN system which has to live with the Security Council both when it is

willing unwilling, the ICC's nexus is maintained only when the Security Council is willing enough to refer the case to the ICC. But as we have seen earlier this strong political organ is highly biased and makes its decisions based on the political interests of its permanent members. This aspect of the ICC has been discussed in the previous section and will not be taken up here.

6.2.7 Diversity of Means of Enforcement

The diversity of the means of enforcement was raised in terms of such diversity aiding in the raising the stakes of non-compliance. Before we can talk about diversifying the means of enforcement we naturally have to confront the issue of whether the least common denominator but most common means; public shame, is being properly utilized. We have seen that except for the UN Charter based system that is endowed with an inherent media luster and the European system that is backed by an all rounded and well funded public relations apparatus, most of the mechanisms and institutions evaluated in the study have been struggling to put more into their ill funded publication efforts.[135] It is therefore very important to highlight that the ICC, as an institution that relies on deterrence, has to work on the publicity of its existence and its achievements so that its effectiveness is possible at all. It is only then that we can talk about diversifying its means of enforcement so as to achieve even better compliance than is possible with public shame.[136]

It looks like this point has been taken cognizance of by the ICC. The ICC's "Integrated Strategy for External Relations" is an all rounded approach whereby the external relations, public information and outreach works of different organs of the ICC is coordinated for maximum impact.[137] Although the methodologies used differ based on whether the intention is to reach the

[135] Even the ICTY and ICTR suffered from a lack of media attention and or negative media coverage. Generally see, Ratner and Abrams, at 187, Christina M. Carroll , *supra note* ___, at 163,181-5 Kingsley Chiedu Moghalu, *The Evolving Architecture of International Law: Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda,* 26 Fletcher F. World Affairs 25-26,38,42-43 (Fall 2002).

[136] See generally International Criminal Court, Press and Media, <http://www2.icc-cpi.int/nr/exeres/13cd3142-7459-48f0-b26a-da45723f8482.htm> 08/02/09.

[137] International Criminal Court, Integrated Strategy for External Relations, Public Information and Outreach 1 <http://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf> accessed on 3/01/09.

general public, populations of areas being investigated or other specific target groups the message that the ICC wants to disseminate is that it is "judicial; impartial; effective; efficient; mindful of context; responsive to victims."[138] The ICC's publicization efforts are well planned and clearly defined in terms of what is expected, how it is to be implemented and how its achievement is to be evaluated.[139] The ICC's website seems to be easily accessible and is being used quite remarkably in terms of circulating information about the ICC and its work.[140] Furthermore its "legal tools project" is sure to make the ICC's work easily accessible to academic and even professional purposes in member and non-member states.[141]

The UN Security Council, the AU Assembly of Heads of States and the European institutions are the only institutions that can use means of enforcement and pressure other than the mobilization of shame. We have discussed the European system in greater detail wherein both "carrots" and "sticks" are applied to ensure complaisance. The "carrots" aspect is created by European integration and membership that is attached to a "stick" that is pointed towards states that exhibit low levels of respect for human rights standards. The stick is provided by the possibility of suspension of membership rights and benefits, as well as a risk of expulsion from Council or Union membership. Looking at the powers given to the Assembly of States Parties and the organs of the ICC one can see that the diversification of its means of enforcement is a far cry from those of the European system. Armed only with the mobilization of shame it will be unlikely to influence states especially where the states concerned are not responsive to public shame. We have seen that governments or elites that depend on gross violations to maintain domestic power relations are in fact less likely to respond to public shame as public shame will not weigh against a desperate grip on power. And since it is highly likely that it is such states that are the potential customers of the ICC the lack of diversity of means of enforcement will adversely affect the ICC's effectiveness.

---

[138] Ibid (among the methods indicated are "creating a supportive enabling environment through raising awareness, managing expectations, engaging in dialogue and obtaining feedback…understand and act upon the information needs of affected populations, to build understanding and to foster a local sense of engagement … Increasing the broader impact of the Court by increasing deterrence … Producing info in local languages … opposition from some sources; deliberate or inadvertent misinformation."

[139] ICC, Strategic Plan for the Outreach of the ICC, available at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB> accessed on 3/01/09.

[140] See <http://www.icc-cpi.int>

[141] See generally International Criminal Court, Legal Tools Project (2007) ; International Criminal Court, The Case Matrix (2007)

Because of the ICC's dependence on domestic executive power (i.e. its lack of independent enforcement powers) the ICC will be unlikely to compel states to cooperate with it unless these states are willing to cooperate in the first place.[142] This will leave the ICC with two choices. Either to stay fallow for prolonged periods or to work with the UN Security Council in having both members and non-members to the Rome Statute to cooperate with its decisions. Although cooperation with the Security Council will add many "sticks" to the ICC's arsenal, such a partnership will bring the ICC closer and closer to the Security Council. This of course, is not necessarily a good thing as it implies an association with the most politicized organ in the international community. The ICC should operate with great care in dealing with the Security Council. It should for instance focus on cases that are initiated by the ICC itself based on concrete facts on the ground when it intends to use the Security Council's capacity to diversify the means of enforcing its decisions.

6.2.8 Uncontrollable Factors

The experience of the European system relative to all the other systems has shown that the nature of violations that confront the system and the human rights culture of member states can play a significant role in whether the mechanism is going to be effective. We have seen that any mechanism that has to deal with a good number of states that practice gross violations of human rights is unlikely to earn the compliance of these states. This is particularly true because gross violations are caused primarily by domestic political factors and international political phenomena (such as the cold war and recently the global 'war' on terror) and because governments and regimes that practice gross violations are unlikely to respond to public shame as ceasing the violations might affect power relations within the states.

In light of this observation the most logical conclusion that can be reached is that the ICC will face insurmountable challenges as it will; by definition, deal with the worst cases of gross violations of human rights and humanitarian law. To put this conclusion in perspective two

[142] For instance in the Uganda & DRC cases the states were willing to cooperate as they referred their cases to the ICC willingly.

characteristics of the ICC have to be emphasized. One of the most important principles that guide the practice of the ICC, the principle of complementarity, ensures that the ICC will deal with states that are unwilling or unable to prosecute alleged violators. Add to this the fact that the ICC, like its *ad hoc* predecessors, does not have independent enforcement powers therefore leaving the enforcement of its decisions at the mercy of the executive organs of the "unwilling or unable". Therefore, unless it continues to be blessed with state referrals such as the Ugandan and DRC cases where the states are willing to cooperate, the ICC's typical customers will be states that are either too weak or too unwilling to apprehend suspects or protect victims or witnesses. The Sudanese state is a case that can be cited as one that is unlikely to willingly cooperate with the ICC.

When it comes to the human rights culture of member states the ICC can be put in a more optimistic light as most of its members so far have very good human rights records. Although there is no decisive way of weighing the human rights records of the member states to the Rome Statute short of surveying the records of all these countries it shall, for our purpose, suffice here to use the ratings of Freedom House[143] in its "2008 Survey on Freedom in the World."[144] According to Freedom House's categorization of countries one can see that 68 of the 108 members of the Rome Statute are states that can be categorized as "free countries".[145] Thirty-two member states, on the other hand, qualify as "partly free countries" while only six qualify as "not free".[146] According to this count only 5.5 percent of ICC members have awful human rights records while the rest either have good human rights records or their records are not so bad.

From the foregoing assessment one can see that most member states will be willing to either prosecute their own violators or where, in exceptional circumstances, they are not able or willing

[143] Not only can one find that many writers take Freedom House's ratings as generally authoritative (at least two dozen such writings come to mind although there is no need to cite them here) but only this NGO seems to have a research database(to the best of my knowledge) that rates states in accordance with their human rights records. See generally, Wikipedia, Freedom House from Wikipedia the free encyclopedia, available at <http://www.wikipedia.org/wiki/freedom_house.htm> accessed on 27/01/09.

[144] Freedom House, Map of Freedom 2008, available at <freedomhouse.org/uploads/fiw08launch/mof2008.pdf> accessed on 25/01/09.

[145] Ibid, those countries in which citizens enjoy a "high degree of political freedom."

[146] Ibid, while those countries that are "characterized by some restrictions on political rights, often in a context of corruption, weak rule of law, ethnic strife, or civil war," are considered "partly free" those in which "political process is tightly controlled and basic freedoms are denied," are defined as "not free". For information on the states parties to the Rome Statute see: International Criminal Court, The States Parties to the Rome Statute, available at <http://www.icc-cpi.int/asp/statesparties.html> accessed on 21/02/09.

to prosecute they will hand over the suspects to the ICC. But the problem here is that rather than those that have found it politically safe to ratify the Rome Statue the more likely states to commit the crimes within the ICC's jurisdiction are those that have found it wise not to become parties to the statue. And thus we find ourselves in a paradox wherein the ICC is an exclusive club of upright states that would not have committed the crimes which the ICC purports to prevent even if the ICC did not exist.[147] If we see the ICC's customers as all states not party to the Rome Statue by virtue of the powers of the Security Council we will have a different and less optimistic picture about voluntary compliance. In this case, the ICC will have customers with bad human rights records and that are unlikely to cooperate. Whatever cooperation can be squeezed out from such states will not only raise the politicization problem but it will also create a picture or a perception whereby the ICC is seen as a tool of the upright members and that of the Security Council to impose their wishes on states that have not consented to the ICC's jurisdiction.

6.2.9 Hegemonic Role of the USA

We have seen that the effectiveness of mechanisms dealing with gross violations can also be affected by the role of hegemonic powers. Not only was the role of hegemonic powers evident in the formation of the UN and the norm setting and the practice that followed, but the Inter-American system was offered as a practical example of how a hegemon can influence the effectiveness of a mechanism despite all odds. Under this section we will look at how the United States of America, the same hegemonic power that contributed to the effectiveness of the Inter-American system, has assumed a counterproductive (or a regime breaking) role in the functioning of the ICC.

Although the US was supportive of the idea of an international criminal court form the end of the cold war and had played a positive role in the establishment of ICTY and ICTR, its position was

[147] See Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 University of Chicago Law Review 89-92 (2003).

turned on its head during the Rome Conference.[148] In addition to presenting the Rome Statue as a treaty that threatens the role of the UN Security Council in the maintenance of international peace and security the US argued that the statute contradicts a number of constitutional safeguards and principles and that it violates its sovereignty.[149] Whatever the reasons for its opposition might have been the US did not ratify the Rome Statue despite the fact that major concessions were made by the Rome Conference to accommodate its concerns.[150]

Rather than just avoiding the ratification of the Rome Statue the US has taken up an aggressive approach in attempting to avoid the impact of the ICC's establishment. As a first step the American Congress passed a budgetary bill that prohibits the US government from supporting the ICC.[151] This was followed by the "American Service-Member's Protection Act" which prohibits the US from participating in international peace keeping operations unless the states in which the operations are conducted are not party to the Rome Statute or if the US does not obtain a permanent or *ad hoc* exemption from ICC jurisdiction.[152] The Service Members' Protection Act also contains what has been dubbed the "Hague Invasion Act", a provision that allows the president to take military measures to rescue its military personal or that of its allies from ICC captivity.[153] Even worse was the US threat to veto the renewal of the mandates of UN forces in

[148] Kirsch, *supra note* 2, at 7.
[149] For a detailed account of the United States' oppositions and concerns see: Under Secretary of State of Political Affairs Marc Grossman, American Foreign Policy and the International Criminal Court: Remarks to the Centre for Strategic and International Studies, Washington, DC May 6, 2002, available at <http://ww.state.gov/p/9949.htm accessed on 13/6/07> accessed on 13/6/07; President Clinton, Statement on Signature of the International Criminal Court, Dec 31, 2000, available at <http://www.amicc.org/docs/clinton_sign.pdf> accessed on13/6/07; Gary T. Dempsey, *Reasonable Doubt The Case against the Proposed International Criminal Court,* Cato Policy Analysis No. 311, available at <http://www.cato.org/pubs/pas/pa-311.html> accessed on 24/03/08**;** Roach, *supra note* 130, at 435-436 ; Weller, *supra note* 55, at 697; Spyros Economides, *supra note* 2, at 46.
[150] Philippe Kirsch, Canadian diplomat and Chairperson of the Rome Conference who is currently the president of the ICC, points out that the concessions made for the US at the Rome Conference remain to be some of the defining aspects of the ICC as the concessions were not reverted on after the US failed to ratify the Statute. He explains that obligatory deference to sates with functioning legal systems, the requirement that the prosecutor cooperate with domestic systems in giving them the chance to first prosecute on their own, the requirement that the ICC's jurisdiction be restricted to the most serious international crimes, the inclusion of many procedural safeguards against prosecutorial or judicial abuse and the high caliber of judges and other officials of the court was incorporated in response to concerns raised by the USA. Roach, *supra note* 149, at 10; the seven years opt out provision in article 124 of the Rome statue was also a concession for the US along with France, Marler, *supra note* 42, at 834.
[151] Weller, *supra note* 55, at 705.
[152] Sec. 2005 of American Service-Members' Protection Act, U.S. Department of State – Bureau of Political-Military Affairs, Washington, DC (Hereinafter ASPA), available at <http://www.state.gov/t/pm/rls/othr/misc/23425.htm> accessed on 16/9/08; See AJIL, *American Servicemembers' Protection Act*, The American Journal of International Law, Vol. 96, No. 4., passim (Oct., 2002)
[153] ASPA, *supra note* 152, Sec 2008; See generally Dutch Ministry of Foreign Affairs, The United States and the ICC, <http://www.minbuza.nl/en/themes,international-legal-order/international-criminal-court/why-an-international-

East-Timor and Bosnia unless its peace keeping forces around the world were exempted from ICC prosecution.[154] Considering the fact that the US had only three soldiers in East-Timor and could have withdrawn its troops from both operations[155] trying to prevent other countries from participating in the peace keeping operations in these countries unless it is granted protection elsewhere clearly shows how far the US is willing to go to avoid its citizens being prosecuted before the ICC. It was in this way that the US was able to force the Security Council to pass Resolution 1422 (2002) and 1487 (2003) which exempt from the ICC's jurisdiction not only American servicepersons but all forces that are sent on UN peacekeeping missions by non-members to the Rome Statue.[156] In addition to having its peace keeping troops protected from the ICC, the US has sought to protect the rest of its foreign based troops by bilateral "Status of Forces Agreements" that prohibit the states concerned from cooperating with the ICC in the arrest or transfer of US troops.[157] Furthermore, even though the US gave up on trying to have the Security Council establish a competing international criminal court for Darfur it ensured that the cost of the Darfur investigations and prosecutions would be borne by states parties to the Rome Statue and any voluntary donors rather than by the Security Council as is provided in article 115 of the Rome Statue.[158]

In as much as the US remains to be a singular international hegemon of our uni-polar world its attack on the ICC is sure to undermine the effectiveness of the ICC especially if it keeps up the ferocity of its attacks in the years to come. Although the ICC has European States as significant

---

criminal-court-/United-States-and-the-ICC.html> accessed on 20/1/09; Statement of the U.S. Embassy, The International Criminal Court & Reaction to the American Service-members' Protection .Act (June 12. 2002). *at* <http://www.usemb.nl/061202.htm> accessed on 20/1/09.

[154] Id. At 706; See also Sean D. Murphy, Contemporary Practice of the United States, 96 American Journal of International Law 725 passim (2002).

[155] See Roach, *supra note* 149, at 435-36; Weller, *supra note* 55, at 705-709.

[156] Article1of SC/RES/1422 (2002), Adopted by the Security Council at its 4572nd meeting, on 12 July 2002, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement> accessed on 05/01/09 (also pledges to annually renew the exemption for as long as necessary); SC/RES/1487 (2003), Adopted by the Security Council at its 4772nd meeting, on 12 June 2003, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement> accessed on 05/01/09 (renews 1422 (2002) and again pledges to do the same annually).

[157] **S**ee for ex., American Journal of International Law, *U.S. Bilateral Agreements Relating to ICC*, The American Journal of International Law, Vol. 97, No. 1. 200, 200-203 (Jan., 2003) (contains the SOFA agreement of the US with East-Timor as a sample).

[158] Article 7 of SC/RES/1593 (2005), Adopted by the Security Council at its 5158th meeting, on 31 March 2005, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement> accessed on 05/01/09; Reisman, *supra note* 119, at 615-618.

supporters and regime makers[159] the likelihood of US success if it persists in undermining the ICC is quite high as it can count on states such as China, Russia, Israel, Iran, Syria, Turkey, Pakistan and India, i.e. most of the other regional powers, to support it in this endeavor.[160] Furthermore, in addition to the fact that the ICC will face legitimacy problems because of its association with the Security Council the fact that American troops are unlikely to be prosecuted by the ICC even if they commit serious crimes within its jurisdiction will certainly have an impact on the ICC's legitimacy.[161] Even if US troops never commit these crimes, other perpetrators of gross violations can always use this fact as a propaganda tool in arguing that the ICC is a tool of the Americans or the west that is designed to prosecute only and only their enemies.[162]

[159] See generally Sibylle Scheipers & Daniela Sicurelli, Normative Power Europe: A Credible Utopia?, JCMS Volume 45. Number 2., 435, 339-444 (2007) (describing the role of the EU in the establishment of the ICC and counterbalancing US measures to undermine it).
[160] Spyros Economides, *supra note* 2, at 49-50.
[161] See Roach, *supra note* 149, at 436; Weller, *supra note* 55, at 78; Lipscomb, *supra note* 112, at 191.
[162] Such sentiment is certainly already developing. See ex., Lipscomb, *supra note* 112, at passim; Hajjar, *supra note* 2, at 5.

CONCLUSIONS AND RECOMMENDATIONS

Even though a checklist of factors to measure the potential for the effectives of the ICC or any international mechanism dealing with gross violations of human rights has been attempted one important limitations of the study's approach needs to be acknowledged. While studying factors that influence the effectiveness of these mechanisms one doubts if one can grasp all such factors. It is true that the study reviewed the experiences of the relevant institutions that were in existence before the creation of the ICC. But that review was based only on what is made available to the public. So the problem is; how much of the information on the day to day practice of these mechanisms is accessible to the public is not apparent.

Surely, dozens of more factors could have been identified had the personal, political, organizational facts that do not get to see the light of day had been divulged. Nevertheless, since such information is normally not accessible for the researcher one can only rely on public information to evaluate the experience of these mechanisms. Therefore it is with full knowledge of such a limitation and with a sense of humility that the study tries to inductively analyze the experiences of past institutions and transform these experiences into wisdom that mechanisms of the present and the future can use.

This part of the paper begins with a summary of the ICC's strengths that can be counted on to further its effectiveness. It then moves on to considering what can be identified as its assets that have to be consolidated upon or reinforced so as to achieve optimal effectiveness. The paper winds up after outlining the flaws of the ICC and making recommendations on how to mitigate the ill effects of these flaws.

It would not be an exaggeration to conclude that the ICC is a strong institution with the greatest potential for effectiveness as its founders have taken stock of the international community's experience with mechanisms dealing with gross violations of human rights before drafting the Rome Statute. The ICC has been based on firm a ground that allows it to build its legitimacy as the international community's criminal court that deals with massive human rights and humanitarian atrocities. Part of the groundwork that allows the ICC to build a good reputation

are the clearly delimited and the complementary nature of its jurisdiction, its neutrality, its highly professional composition and its independence.

The factors that will contribute to the ICC's effectiveness can be viewed as a multi-layered structure of characteristics that will contribute to the acceptance of the ICC as a legitimate judicial organ of the international community. We find that the ICC's strength first lies in that its mechanism is least threatening without prejudice to the fact that the ICC is an international criminal court that can pass binding decisions. The ICC's jurisdiction is narrowly delimited to a clearly defined set of international crimes that are widely recognized as such by the international community. Its jurisdiction is in fact limited to a 'hard-core' of very serious and morally undisputable norms the violation of which no sensible state, culture or civilization will condone. What is even less threatening about the ICC is that it does not propose to appear in shining armor whenever these crimes are committed. Not only do the crimes have to be grave enough to deserve the ICC's attention but the ICC can begin to disturb the tranquil safety provided by state sovereignty only when the state concerned is clearly unwilling or unable to prosecute these crimes.

What is more, the ICC has other strengths that could give it the potential for achieving acceptance even if its jurisdiction were not so clearly and narrowly defined. Notable in this respect is the neutrality of the process through which it was established and the procedures that it utilizes in the course of its investigations and trials. It is particularly important that the ICC is established as a neutral and permanent institution that did not follow any particular conflict in which the side that lost in the conflict is prosecuted. Its rules of procedure and evidence are set down in detail and are in agreement with due process standards set by international human rights law. The opening of the ICC's hearings to the public and the fact that the ICC is operational throughout the year are also important strengths. That the bar for the professionalism and independence of the ICC's judges, prosecutors and registrar is set quite high is also a factor that will contribute immensely to the ICC's effectiveness. The great amount of expertise within its offices on matters of sexual violence and gender issues and its sensitivity to victim's rights should contribute to the ICC's effectiveness by making it more acceptable to groups interested in this field as well as by bringing it in tune with the reality of international crimes.

Another strength that this study has established is that the ICC cannot be dubbed a fire brigade mechanism as it combines elements of both prevention and post-fact reaction. Nevertheless this does not mean that the ICC cannot work on its preventive aspect. In addition to boosting its preventive mandate through the popularization of its work, the ICC could develop a mandate whereby it gets involved in situations before they deteriorate into the chaotic situations in which gross violations are committed. But since other mechanisms already in existence have such a role it is important that the ICC does not establish an overlapping mandate. The ICC could, through a revision of the Rome Statute or through an expansion of its public relations endeavor, engage in preventive activities that are related to its deterrence mandate. It could for instance engage in reminding parties to a conflict of their obligations under international law where there is evidence showing that gross violations might be inevitable. Although such an undertaking is important in enhancing the effectiveness of the ICC it is important to note that such an effort should not be carried out until the ICC has ensured its legitimacy in the international community. It is only when it has ensured that it has come out a successful institution in its prosecutorial mandate that it should consider preventive activities that can make it even more effective.

Another possibility of strengthening the ICC that cannot be pursued right away relates to increasing the Court's allure and consequent legitimacy in the eyes of the public residing in member states. One of the lessons offered by the European Court of Human Rights is that the number of judges of an international Court can be made equivalent to the number of states parties[1] thereby giving the Court direct access to professional and public attention in the states parties. Although the ICC could learn from the ECHR in this regard one cannot conclude, at this point in time, that the ICC ought to increase the number of its judges. Since the eighteen judges of the ICC are not yet fully engaged as a result of the smallness of the number of cases on its docket, it is not yet time to consider increasing the number of judges. But as its caseload rises and the number of states parties to the Rome Statute goes up the ICC should consider applying the lessons learned from the ECHR. The ICC should not worry, when considering the increment of the number of judges, that it will waste resources by having too many idle judges as its Statute allows it to quickly cope with both short and long term over or under supply of cases. But since the possibility of a significant increase in the number of cases handled by the ICC is contingent

[1] Note that the judges are the nationals of the states parties.

upon its perceived effectiveness and legitimacy in the future, this recommendation cannot be effected any time in the near future.

The ICC seems to have solved most of the problems associated with jurisdictional overlap and competition. It generally avoids competition with almost all of the mechanisms discussed in this study except with the Security Council. Nevertheless; there is also a possibility for the ICC and the other mechanisms to spend valuable resources in investigating the same fact situations consequently leading to an inefficient use of scarce resources. We have seen that the ICC has tried to tackle this problem by entering into relationship agreements with the UN and the EU. Since such agreements can go to great lengths in allowing the ICC and these institutions to decrease their costs and increase cooperation between them, it is commendable for the ICC to enter into similar agreements with the Council of Europe, the AU and the OAS.

Since the ICC is one of the strongest mechanisms in the world to date in terms of the formal authority and enforceability of its decisions one can be assured that the ICC will not waste any precious time or effort in struggling to establish its authority. Although this puts the ICC ahead of most of the mechanisms discussed in this study the fact that it has no independent powers to enforce its decisions leaves it at the mercy of the consent of the very same states that might at times be involved or implicated by the Court's investigations. The ICC cannot realistically be encouraged to aspire for independent enforcement powers as the international community has not yet moved away far enough from the system of state sovereignty to allow a court with such sweeping powers. That is why the ICC should consider options that will aid the practical enforceability of its decisions without striving for independent enforcement powers. The ICC and its supporters should in this regard be reminded of the need to strive to increase the number of states parities to the Rome Statute, universal ratification being the ultimate target. Short of acquiring independent enforcement powers the ICC should take steps to enhance consensual compliance of member states to the Rome Statute. The ICC should in the short run strive to ensure that states parties have made the necessary domestic legal arrangements and reforms that will allow them to ensure the domestic enforceability of the ICC's decisions.[2]

[2] Although how this will be done is a technical-operational matter that we will not take up, it should be noted that attention should be given to the logistical and skilled personnel needs of developing countries in reforming their legal systems in a way that fulfills the requirements of the Rome Statute and the RPE. It is also important to stress

The ICC's lack of independent enforcement powers is not compensated by the role of the Assembly of States Parties in diversifying the ways in which it enforces its decisions. Although the ICC has an all-rounded public relations policy that can enhance its deterrence effect it does not possess enough 'carrots' or 'sticks' other than the mobilization of shame. The mere fact that the ICC has prosecutorial powers in addition to the capacity to mobilize public shame does make it better equipped than the mechanisms explored in this study. Nevertheless, left to its own, the ICC can only apply public pressure in order to enforce its prosecutorial powers. It thus seems inevitable that the ICC should rely on the Security Council to diversify the means of enforcing its decisions in addition to any diplomatic support it can garner from individual states. How the ICC should trade with the Security Council in seeking the long arms of the later shall be taken up next.

Except for the ECHR and the ICC which have formally binding powers, other human rights mechanisms dealing with gross violations have strengthened their powers through an unbiased and professional assertiveness. Although there is no need for the ICC to assume an assertive role for the sake of strengthening its powers there is a small exception wherein it (and specially the prosecutor) has the discretion to be assertive in pursuing international justice in situations where peace has not yet been ascertained. Whether assertiveness is the best choice is a very difficult call to make because either choice will have serious consequences for ongoing conflicts and transitional situations. If the prosecutor chooses to aggressively pursue international justice without heeding domestic calls for reconciliation he may risk the prolongation or recommencement of the very same conflicts that had given rise to the gross violations in the first place. But by giving in to local demands for reconciliation in lieu of international justice he could be encouraging perpetrators or potential perpetrators elsewhere in the world to take local populations hostage so as to escape the ICC's justice. So the problem here is whether the prosecutor can avoid being torn on the horns of this dilemma.

Although this dilemma can only be addressed with due regard to the circumstances created by each situation, some general suggestions can be made regarding how the prosecutor can give priority to international justice without destroying the prospects for peace. The prosecutor

the need to ensure state parties' procedural compliance as soon as feasible in order to avoid situations in which such states are not able to comply with the ICC's requests despite their willingness to do so.

should, as a primary option, calculate the potential for undermining the bargaining power of perpetrators in order to move to prosecute them. The ICC's capacity to mobilize international public shame can be the most important tool for this purpose. By the 'mobilization of shame' we are not referring here to the shaming of violators but that of the international allies of the violators and the Security Council. Such a redirection of shame should be aimed at; first, the isolation of violators by forcing their allies and their trading partners to cut ties with them; and second, forcing the Security Council to take stronger action (even enforcement action) so that violators are weakened to the extent that they are left without enough power to negotiate their way out of prosecution. Where the prosecutor takes such line of action he should (so as to optimize his shaming potential) be assertive enough to explicitly point out that the allies of violators and the Security Council are, albeit indirectly, morally responsible for the violations if they do not act to isolate or neutralize the perpetrators.

Any ICC action in this direction is certain to have significant political consequences as it may, in addition to hurting the economic interests of states trading with the violators, affect situations to the extent that it may weaken a party to a conflict or contribute to its demise. But such action should nevertheless be pursued with full force as its politicization is both unavoidable and the better of all the possible evils in this context. It should be noted that such a policy should be pursued persistently and with a high level of success so that it results in putting out a message that the likelihood of success for pursuing a policy that involves gross violations in close to nil.

The option of isolating perpetrators raises a problem that has been warned against in this study. That the ICC has to rely on the Security Council in order to overpower and strip violators of their negotiating capacity may raise the question as to whether it would be wise for the ICC to be seen partnering with the Security Council. In order to minimize the opportunity cost of its inevitable association with the Security Council the ICC should apply two cardinal rules to its assertive enterprise. It should first make sure that it applies the assertive option only to member states to the Rome Statute. And second, it should ensure that it invokes the aid of the Security Council only after it has investigated a situation and has enough evidence to initiate prosecutions. Both rules are meant to ensure that evidence of gross violations and not the interests of the members of the Security Council is stimulating international action. The ideal situation is one in which the ICC is successful in shaming the Security Council into action even where the secular interests of

its permanent members does not support such action. Nevertheless, even where members of the Security Council have some secular interests to gain from an intervention, the ICC should ensure that such interests are satisfied in the course of its action and based on its findings of fact and not vice versa.

In cases where the prosecutor can accurately predict that he cannot pursue prosecution without prolonging conflicts and the suffering that they cause or where he has pursued the first option but has failed to secure the defeat of violators, he should recognize that it is time for plan B. It was noted above that the assertive option should be pursued persistently and with a high rate of success. Therefore the resort to plan B should be exceptional and should be applied only where it is clear that assertiveness will only prolong the suffering of civilians. In line with the proposition that priority should be given to international justice the prosecutor should consider three options to be applied depending on how much leverage he has in influencing the circumstances and on the suspects' relative position to negotiate a deal that excludes their prosecution. The first thing that the prosecutor should do is to contemplate the possibility of creating a drift between the leadership of an organization that is responsible for the gross violations and the average foot soldier by assenting to the amnesty of the lower and middle level members and leadership while choosing a few top people (commonly referred to as the "big fish") or to single out only the leader for international prosecution. Alternatively and in appropriate circumstances the prosecutor could prefer to create the drift between the military and civilian (political) leadership of the organization.[3] Where such an approach is unlikely to or does not succeed the prosecutor can throw in a deal for the top leadership which offers mitigated punishments in return for a peace deal. And as a last resort the prosecutor could accept some form of a transitional mechanism that complies with a set of criteria of justice as pre-defined by the prosecutor or preferably by the Assembly of Heads of States.

When taking the measures described above the prosecutor should bear in mind that every step that he takes is being carefully observed by leaders around the world. He should particularly be

[3] Focusing his prosecution on the military wing and assenting to the amnesty of the civilian leadership the prosecutor could create a possibility whereby the military wing is made to answer to its atrocious acts by the decision of the civilian wing to 'sacrifice' their generals for the sake of peace. Although the reverse of this method is a theoretical possibility it is highly unlikely that the civilian wing is more responsible than the military one. Therefore one can hardly envision a situation in which the civilian leadership is prosecuted in return for the amnesty of the military wing.

mindful of two categories of audiences. The first of these consists of the permanent members of the Security Council. Since the Security Council has an overlapping jurisdiction with the ICC and since the former has an obvious upper hand in case the two compete, the prosecutor should make sure that he trades carefully with the Security Council. Although the prosecutor's attempts to isolate gross violators will no doubt set the ICC into a collision course with the interests of one or more permanent members, the prosecutor should not worry about such inevitabilities as the moral upper-hand which he wields will be convincing enough to compel these interests to be foregone.[4] But the prosecutor should still be very careful not to create an impression that the strengthening of the ICC or even its continued existence is a constant threat to the long-term strategic interests of the permanent members of the Security Council as a group, or that of a significant bloc or hegemon among them.

The second category of audiences that the prosecutor should be mindful of are potential members of the Rome Statute. Although it has been suggested that the prosecutor ought to be consistent and assertive in pursuing international justice this should not be done at the expense of creating an impression that membership to the Rome Statute necessarily entails waiving the right or the capacity to put an end to a seemingly incessant conflict by offering amnesties or by promising pardons. The prosecutor should therefore make sure that those situations such as the one in Uganda wherein neither a negotiated peace nor a convincing defeat and a subsequent prosecution resulted because of the ICC's involvement. It is important to point out in this respect that the situation in the Sudan poses a risk whereby the ICC could acquire such a negative image. The situation in the Sudan is of course a Security Council referred headache over which the ICC may not have had much control. Nevertheless if the ICC were presented with the dilemma which is posed by the situation of Sudan it should consider going for the second option especially if it is unlikely that the current Al-Bashir regime will be easily defeated or ousted from power. Furthermore; in light of the fact that the LRA's weakening was achieved primarily by dissuading Sudan from supporting the group, the possibility that the Sudanese government may resume its support for the LRA should also be considered in the ICC's undertaking with the Sudan. As it is not our aim here to study the Sudanese or Ugandan situations in detail suffice it to say that the ICC should in such circumstances give peace a better chance not just to avoid the consequences

[4] The prosecutor should of course be 200% sure that his decisions are supported the facts in his hands lest it be later found that the economic interests that were sacrificed were not based on concrete evidence.

of a prolonged war but also to give out a message to potential members of the Rome Statute that membership does not come at the cost of weakening their capacity to determine their own political future or at the cost of their peace.

Among the vulnerabilities of the ICC is that it will have difficulties in presenting itself as a politically unbiased and legitimate institution because of its association with the Security Council of the UN. The fact that the Security Council can bar ICC activities on particular situations and the possibility that the Security Council can refer situations concerning states not parties to the Rome Statute can create a perception that the ICC is a tool of the stronger Western states standing behind the Security Council facade. Since the Security Council makes these decisions based on the political calculations and tradeoffs among the permanent five rather than a quasi-judicial or judicial investigation of the facts of a situation by the ICC, a perception that implies that the interests of the permanent five is the more important determinant of whether there should be an investigation is not far off the mark. This would make it easier for the detractors of the ICC to argue that the ICC is not the unbiased institution that is claims to be. Such an argument could be strengthened by emphasizing on the fact that the states against whom Chapter VII referrals are made are not party to the Rome Statute.

Although the ICC cannot avoid its involvement with the Security Council or the risk of decreased legitimacy created by its association with the later there are certain measures that it can take to reduce the perception of politicization from transferring to it. The first of such measures is to make sure that it initiates an investigation or a prosecution before the Security Council is able to make a referral where the situation concerns states parties to the Rome Statute. It would be a missed opportunity of distancing itself from the Security Council if a case which the ICC could have taken up without the involvement of the former is referred to it via Chapter VII of the UN Charter. The second measure that the ICC can take to reduce the perception of political bias is to try to depoliticize a case even if it was referred to it by the Security Council. Where the ICC finds that the facts of a Security Council referred case do in fact deserve to be prosecuted, it should make maximum public relations efforts to show that the prosecution of the case is indeed justified by the facts of the case rather than the biased interests of any state that might have sponsored the referral. The ICC should also consider prosecuting the violations of all sides that have participated in atrocities as far as the facts of the case allow it to do so. It should

in addition consider delaying the announcement of an investigation or an arrest warrant against a person on one side of a conflict where a similar announcement against a person on a competing side(s) is forthcoming so that he can announce both at the same time. Such actions should reinforce the ICC's image as a neutral organ.

Another of the limitations of the ICC is that it does not have a constitutional mandate to speak for the whole international community. There could be two potential solutions for this particular limitation. It could be suggested that the UN charter be amended to anoint the ICC as a Charter-based organ. This could no doubt have given the ICC the luster and aura that represents the moral force of the international community thereby giving the ICC a head start in building its legitimacy. But given the rules for the amendment of the UN Charter (especially the role of the permanent members of the Security Council) it is unlikely that the ICC will be made a Charter organ without having to compromise some of its independence. Furthermore given the bad repute and a damaged legitimacy of the UN in general and the Security Council in particular in the area of human rights protection, a great deal of skepticism creeps in about whether it is a good idea to strive to make the ICC a Charter organ. Therefore it is far more appropriate to strive for universal ratification in order to make the ICC more representative of the international community.

Achieving universal or near universal membership to the Rome Stature is a process that will take a great amount of effort that will be exerted over a long period of time. During the course of this time the ICC and its supporters could pursue some effectiveness enhancing strategies in addition to trying to increase the number of members to the Rome Statute. One such strategy is to give priority to lobbying the United States and regional hegemonic powers to sign or to ratify the Rome Statute. Such an approach is very important since the membership of states such as the United States of America, China, Russia, India, Pakistan, Israel, Turkey, Syria and Iran will be a significant achievement by itself. Additionally the membership of these states should create a significant momentum for the membership other less powerful states that can be influenced by the ratification of the former. But even if the membership of these states cannot be achieved a great amount of effort should be expended in ensuring that these states will support the ICC's aspirations or that they will not at least oppose it. This approach should be directed at the United

States in particular as its support or opposition to the ICC will have enormous consequences for the ultimate effectiveness of the ICC.

The last of the factors that is likely to challenge the effectiveness of the ICC is that its jurisdiction looms large over practices or crimes that some states or groups (especially those that commit them) might consider necessary for their survival or even victory. The likelihood of such groups' being responsive to public shaming is very minimal as any rational dictator or warlord would be unlikely to prefer honor and respectability over a position of power. The disadvantage associated with the nature of violations that the ICC has to deal with is partly offset by the fact that the states parties to the Rome Statute have relatively good human rights records. The reason that the disadvantage is only partly made up for is that even if these member states' likelihood of prosecuting their own gross violators is quite high, the ICC's mandate also extends to states that have found it politically unsafe to ratify the Rome Statute and at the same time do not have respectable human rights records. To make things worse the later group of states can fall within the ICC's jurisdiction only through a Security Council referral. Therefore they will have a negative impact on the ICC's effectiveness in addition to posing a challenge to the ICC's legitimacy by associating it with the Security Council both in practice and in their propaganda campaigns.

Bibliography

Books

1. Black Henry Campbell (The Pub. Editorial Staff, Rev.), Black's Law Dictionary, West Publishing Co. St. Paul Minnesota (1968)
2. Bloed Arie et. al. (eds.), Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms, Martinus Nijhoff Publishers, Dordercht, The Netherlands (1993)
3. Bowett D. W., The Law of International Institutions, Universal Law Publishing Co. Pvt. Ltd., New Delhi (Fifth Indian Reprint 2003).
4. Buergenthal Thomas, International Human Rights: in a Nutshell (West Nutshell Series)
5. Cary, John, United Nations Protection of Civil and Political Rights, Syracuse University Press, New York (1970)
6. Cassese Antonio, International Criminal Law, Oxford University Press, Oxford (2003)
7. Donnelly Jack, International Human Rights, Westview Press Inc., Colorado (1993)
8. Dormann Kunt (with contributions from Louise Doswald-Beck and Robert Kolb), Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary, Cambridge University press, Cambridge UK (2002)
9. Evans Tony (ed.) Human Rights Fifty Years On: A Reappraisal. (1998) Manchester University Press, Manchester.
10. Flood Patrick James, The Effectiveness Of UN Human Rights Institutions, Praeger Publishers, Westport, Conn (1998)
11. Gearty Conor and Tomkins Adam (eds.), Understanding Human Rights, Mansell Pub. Ltd., London (1996).
12. Green James Frederick, The United Nations and Human Rights, The Brooklings Institution [place of pub] (1958)
13. Henry Campbell Black (The Pub. Editorial Staff, Rev.), Black's Law Dictionary (1968).
14. Hey Hilde, Gross Human Rights Violations: A Search for Causes, A Study of Guatemala and Costa Rica, 43 International Studies in Human Rights (1995) Kluwer Law International.
15. ICCLR, International Criminal Court Rules of Procedure and Evidence: Implementation Considerations, International Centre for Criminal Law Reform & Criminal Justice Policy (ICCLR) Van Cover, Canada (April 2002)
16. Kalshoven, Fritz, and et Yves (eds.), Implementation of International Humanitarian Law, Martinus Nijhoff Publishers, Dordecht The Ntherlands (1989).
17. KELSEN HANS, THE LAW OF THE UNITED NATIONS, A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS, Fredrick A. Praeger Inc., Publishers, New York; USA (5th Printing 1966)
18. Lawson Rick and Matthijs de Blois (eds.) The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers, Martinus Nijhoff Publishers (1994)
19. Lawson Rick and Matthijs de Blois (eds.), The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers, Martinus Nijhoff Publishers (1994).
20. Malanczuk Peter (ed.), Akehurst`s Modern Introduction to International Law, (7th ed, 1997) Routledge, UK .
21. Malcolm Evans (ed.) International Law, (Oxford University Press, 2003).
22. Philip Alston (ed.) The United Nations and Human Rights: A Critical Appraisal, Clarendon Press, London (1992).
23. Philippe Sands (ed.) From Nuremberg to the Hague the Future of International Justice, (2003)
24. Ratner Steven R. and Abrams Jason S., Accountability for Human Rights Attrocities in International Law Beyond the Nuremberg Legacy, Oxford University Press, Oxford (1997).
25. Sands Philippe (ed.) From Nuremberg to the Hague the Future of International Justice, Cambridge University Press, Cambridge UK (2003).
26. Schabas William A., *Preventing Genocide and Mass Killing: The Challenge for the United Nations*,

Minority Rights Group International, UK (2006)
27. Shaw M.N., International Law, Cambridge University Press, Cambridge UK (Fourth Ed. 1997).
28. Steiner Henry J. and Alston Philip, International Human Rights in Context, Law Politics and Morals (2000) Oxford University Press Inc., New York.
29. Stoessinger John G., The United Nations and the Superpowers, Random House, Inc. (1966).
30. Sunga Lyal S., The Emerging System of International Criminal Law Developments in Codification and Implementation, Kluwer Law International, The Hague, The Netherlands (1997).
31. The New Webster's Dictionary of the English Language College Edition, Surjeet Publications (Fifth Reprint 1989) Delhi, India.
32. WIGJ, Gender Report Card on the International Criminal Court 2006, Women's Initiatives for Gender Justice, The Hague, The Netherlands (2006).

Journal Articles

1. Abbott Kenneth W. and Snidal Duncan, *Why States Act through Formal International Organizations*, 42 The Journal of Conflict Resolution 8 (Feb., 1998).
2. Adjami Mirna E., African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence? 24, Michigan Journal of International Law (Fall 2002).
3. Akhavan Payam, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 The American Journal of International Law 501 (Jul., 1996)
4. Akhavan Payam, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 The American Journal of International Law 504 (Jul., 1996).
5. Akhavan Payam, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 The American Journal of International Law 403 (Apr., 2005).
6. Aldrich George H., *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 The American Journal of International Law 64-69 (Jan., 1996).
7. Alexandrowicz Charles Henry, *The Secretary-General of the United Nations*, 11 The International and Comparative Law Quarterly 1109 (Oct., 1962).
8. Alston Philip, *The Alleged Demise of Political Human Rights at the UN: A Reply to Donnelly*, 37 International Organization (Summer, 1983).
9. Alston Philip, The UN's Human Rights Record: From San Francisco to Vienna and beyond, *Human Rights Quarterly*, Vol. 16, No. 2. Johns Hopkins University Press. (May, 1994).
10. Alvarez Jose E., *Judging the Security Council***,** 90 The American Journal of International Law 1 (Jan., 1996).
11. American Journal of International Law, *U.S. Bilateral Agreements Relating to ICC*, The American Journal of International Law, Vol. 97, No. 1. 200 (Jan., 2003).
12. Baimu Evarist, *The African Union: Hope for better protection of human rights in Africa?* 1 African Human Rights Law Journal 299 (2001).
13. Bassiouni M. Cherif , International Recognition of Victims' Rights, 6 Human Rights Law Review 203 (2006)
14. Bassiouni M. Cherif, *International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"*, Law and Contemporary Problems, Vol. 59, No. 4 (Autumn, 1996).
15. Bassiouni M. Cherif, The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), The American Journal of International Law, Vol. 88, No. 4, (Oct., 1994)
16. Berge George Wendell, *The Case of the S. S. "Lotus"*, Michigan Law Review, Vol. 26, No. 4 (Feb., 1928)
17. Bohl Kristin, Breaking the Rules of Transitional Justice, 24 Wisconsin International Law Journal 557 (Spring 2006).
18. Bradley Evelyn, In Search for Justice - A Truth and Reconciliation Commission for Rwanda, 7 Journal of International Law and Practice 129 (Summer, 1998),

19. Bridge John W., The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law, *The International and Comparative Law Quarterly*, Vol. 13, No. 4. British Institute of International and Comparative Law (Oct., 1964).
20. Brown Philip Marshall, *International Criminal Justice,* The American Journal of International Law, Vol. 35, No. 1. (Jan., 1941).
21. Buergenthal Thomas, *Remembering the Early Years of the Inter-American Court of Human Rights*, Center for Human Rights and Global Justice Working Paper, NYU School of Law, New York (Number 1, 2005)
22. Buergenthal Thomas, The Evolving International Human Rights System, *The American Journal of International Law*, Vol. 100, No. 4. The American Society of International Law (Oct., 2006).
23. Buergenthal Thomas, *The Revised OAS Charter and the Protection of Human Rights*, 69 The American Journal of International Law 829 (Oct., 1975).
24. Cabranes José A., Human Rights and Non-Intervention in the Inter-American System, Michigan Law Review, Vol. 65, No. 6 (Apr., 1967).
25. Caloyanni M. A., An International Criminal Court, *Transactions of the Grotius Society*, Vol. 14, Problems of Peace and War, Papers Read before the Society in the Year 1928. Oxford University Press (1928).
26. Caroll Christina M., *An Assessment of the Role and Effectiveness of the International Criminal Tribunal of Rwanda and the Rwandan Criminal Justice system in dealing with Mass Atrocities of 1994*, 18 Boston University International Law Journal 163 (2000).
27. Cassese Antionio, *A New Approach to Human Rights: The European Convention for the Prevention of Torture*, 83 American Journal of International Law 128 (1989).
28. Charles G. Fenwick, *When Is There a Threat to the Peace?-Rhodesia*, American Journal of International Law Vol. 61 753 (1967).
29. Charnovitz Steve, *Rethinking WTO Trade Sanctions*, 95 The American Journal of International Law *passim* (Oct., 2001)
30. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 Journal of International Economic Law 133 (2002);
31. Cook Walter Wheeler, *Hohfeld's Contributions to the Science of Law,* The Yale Law Journal, Vol. 28, No. 8. (Jun., 1919).
32. *Craven Matthew,* Humanitarianism and the Quest for Smarter Sanctions, European Journal of International Law, Vol. 13 No. 1, available at <http://www.ejil.org/journal/Vol13/No1/ab2.html> accessed on Last accessed on [10/07/08]
33. Crawford James, *The ILC Adopts a Statute for an International Criminal Court***,** The American Journal of International Law, Vol. 89, No. 2. (Apr., 1995).
34. Czarnetzky John M. & Rychlak Ronald J. , *An Empire of Law?: Legalism and the International Criminal Court*, 79 Notre Dame Law Review 55 (December, 2003).
35. De Winter L. I., *Excessive Jurisdiction in Private International Law,* The International and Comparative Law Quarterly, Vol. 17, No. 3. (Jul., 1968).
36. Dickinson Laura A., The Promise of Hybrid Courts, The American Journal of International Law, Vol. 97, No. 2 (Apr., 2003).
37. Doman Nicholas, *Political Consequences of the Nuremberg Trial,* Annals of the American Academy of Political and Social Science, Vol. 246, Making the United Nations Work (Jul., 1946)
38. Donnelly Jack, Human Rights at the United Nations 1955-85: The Question of Bias, *International Studies Quarterly*, Vol. 32, No. 3. (Sep., 1988).
39. Donnelly Jack, *International Human Rights: A Regime Analysis*, 40 International Organization 618 (Summer,1986).
40. Donnelly Jack, *Recent Trends in UN Human Rights Activity: Description and Polemic*, 35 International Organization (Autumn, 1981).

41. Donnelly Jack, *The Human Rights Priorities of the UN: A Rejoinder to Alston*, 37 International Organization (Summer, 1983).
42. Donoho Douglas, Human Rights Enforcement in the Twenty-First Century, 35 Georgia Journal of International and Comparative Law 1 (2006)
43. Elsheikh Ibrahim Ali Badawi, *The Future Relationship between the African Court and the African Commission,* 2 African Human Rights Law Journal 252 (2002).
44. Ena Robert Wundeh, *The Jurisdiction of the African Court of Human and Peoples' Rights*, 2 African Human Rights Law Journal 223 (2002).
45. Evatt Elizabeth, *Reflecting on the Role of the International Communications in Implementing Human Rights*, 20 Australian Journal of Human Rights (1999) available at <http://www.austlii.edu.au/au/journals/AJHR/1999/20.html> accessed on 28/07/08.
46. Fionnuala Ni Aoláin, Looking Ahead: Strategic Priorities And Challenges For The United Nations High Commissioner For Human Rights, 35 Columbia Human Rights Law Review 469
47. Fischer Dana D., *Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee*, 76 The American Journal of International Law 148 (Jan., 1982).
48. Forsythe David P., The United Nations and Human Rights, 1945-1985, *Political Science Quarterly*, Vol. 100, No. 2. The Academy of Political Science (Summer, 1985)
49. Franck Thomas M., *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?* 86 The American Journal of International Law.
50. Fröhlich Anita, *Reconciling Peace with Justice: A Cooperative Division of Labor*, 30 Suffolk Transnational Law Review 271 (Summer 2007).
51. Frost Lynda E., *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judge*s, 14 Human Rights Quarterly 173 (May, 1992)
52. Goldsmith Jack, *The Self-Defeating International Criminal Court*, 70 University of Chicago Law Review 89-92 (2003).
53. Gowlland-Debbas Vera, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case,* 88 The American Journal of International Law 643 (Oct., 1994).
54. Grant Thomas D., *The Security Council and Iraq: An Incremental Practice*, 97 The American Journal of International Law 823-842 (Oct., 2003).
55. Grossman Claudio, Strengthening The Inter-American Human Rights System: The Current Debate, The Future of the Inter-American System for the Promotion and Protection of Human Rights, 92, American Society of International Law Proceedings, (April 1-4, 1998)
56. Gutto Shadrack, The Reform and Renewal of the Regional Human and Peoples' Rights System, 1 African Human Rights Law Journal 175 (2001).
57. Hajjar Lisa, *Alternatives to an International Criminal Court*, Middle East Report, No. 207, Who Paid the Price? 50 Years of Israel (Summer, 1998).
58. Hall Christopher Keith, *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court,* The American Journal of International Law, Vol. 91, No. 1. (Jan., 1997).
59. Hall Christopher Keith, *The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court,* The American Journal of International Law, Vol. 92, No. 3. (Jul., 1998).
60. Hall Christopher Keith, *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court,* The American Journal of International Law, Vol. 92, No. 1. (Jan., 1998).
61. Harrington Julia, *Special Rapporteurs of the African Commission on Human and Peoples' Rights*, 1 African Human Rights Law Journal 247 (2001).
62. Harris Jonathan, *Choice of Law in Tort – Blending in with the Landscape of Conflict of Laws?* 61 The Modern Law Review 33 (1998).

63. Helfer Laurence R. & Slaughter Anne-Marie, *Toward a Theory of Effective Supranational Adjudication*, 107 The Yale Law Journal (Nov., 1997).
64. Henderson Conway, Human Rights and Regimes: A Bibliographical Essay, Human Rights Quarterly, Vol. 10, No. 4 (Nov., 1988).
65. Henkin Louis, The United Nations and Human Rights, *International Organization*, Vol. 19, No. 3, The United Nations: Accomplishments and Prospects. (Summer, 1965).
66. Heyns Christof, *The African Regional Human Rights System: In Need of Reform?* 1 African Human Rights Law Journal 155 (2001);
67. Heyns Christof, The African Regional Human Rights System: The African Charter, 108 Penn State Law Review (Winter 2004).
68. Hohfeld Wesley Newcomb, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* The Yale Law Journal, Vol. 23, No. 1., (Nov., 1913).
69. Horng Der-Chin, *The Human Rights Clause on the European Union's External Trade and Development Agreements*, 9 European Law Journal 677-701 (December 2003).
70. Hudson Manley O., *The Proposed International Criminal Court,* The American Journal of International Law, Vol. 32, No. 3. (Jul., 1938).
71. Humphrey John P., *Response to Farrokh Jhabvala's Article, "The Practice of the Covenant's Human Rights Committee 1976-82: Review of State Party Reports,"* 6 Human Rights Quarterly 539 (1984)
72. Jhabvala Farrokh, *Response to John P. Humphrey's Letter in 6 Human Rights Quarterly 539 (1984)*, 7 Human Rights Quarterly 242 (May, 1985).
73. Jhabvala Farrokh, *The Practice of the Covenant's Human Rights Committee, 1976-82: Review of State Party Reports*, 6 Human Rights Quarterly 104 (Feb., 1984).
74. John Carey, UN Protection of Civil and Political Rights, Volume 8, Procedural Aspects of International Law Series, 25 (1st ed. 1970).
75. Joyner Christopher C., Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability, 26, Denver Journal of International Law and Policy, 591 (Summer, 1998)
76. Kamali Maryam, *Accountability for Human Rights Violations: A Comparison of Transitional Justice In East Germany and South Africa*, 40 Columbia Journal of Transnational Law (2001).
77. Keith Linda Camp, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior*? 36 Journal of Peace Research (Jan., 1999)
78. Kirgis Jr., Frederic L., *The Security Council's First Fifty Years, The United Nations At Fifty*, 89 American Journal of International Law 512 (July, 1995).
79. Kirsch Philippe and Holmes John T., *The Rome Conference on an International Criminal Court: The Negotiating Process,* The American Journal of International Law, Vol. 93, No. 1. (Jan., 1999).
80. Kirsch Philippe, The International Criminal Court: Current Issues and Perspectives, *Law and Contemporary Problems*, Vol. 64, No. 1, The United States and the International Criminal Court. Duke University School of Law (Winter, 2001).
81. Knorr Stephen J., *Deterrence and the Death Penalty: A Temporal Cross-Sectional Approach*, 70 The Journal of Criminal Law and Criminology (1973-) 235 (Summer, 1979).
82. Koshy Susan, *From Cold War to Trade War: Neocolonialism and Human Rights,* Social Text, No. 58., (Spring, 1999).
83. Lai Hongyi Harry, *Behind China's World Trade Organization Agreement with the USA,* 22 Third World Quarterly 237 (Apr., 2001).
84. LaRue L. H., *Hohfeldian Rights and Fundamental Rights,* The University of Toronto Law Journal, Vol. 35, No. 1. (Winter, 1985).
85. Lawrence Justice, *The Nuremberg Trial,* International Affairs (Royal Institute of International Affairs 1944-), Vol. 23, No. 2 (Apr., 1947).
86. Lillich R. B., The U.N. and Human Rights Complaints: U Thant as Strict Constructionist, The American

Journal of International Law, Vol. 64, No. 3, American Society of International Law (Jun., 1970)
87. Lipscomb Rosanna, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan,* 106 Columbia Law Review 182 (January, 2006).
88. Luftglass Scott, Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge, Virginia Law Review, Vol. 90, No. 3 (May, 2004).
89. Maier Harold G., *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law,* The American Journal of International Law, Vol. 76, No. 2. (Apr., 1982).
90. Mariano Aznar-Gomez, *A Decade of Human Rights Protection by the Security Council: A Sketch of Deregulation?* 13 European Journal of International Law 223 (2002); available at < http://www.ejil.org/journal/Vol13/No1/ab14.html> accessed on 10/07/08.
91. Marler Melissa K., The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute, *Duke Law Journal*, Vol. 49, No. 3. (Dec., 1999).
92. Marler Melissa K., *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute***,** 49 Duke Law Journal 825, 829 (Dec., 1999).
93. Martin Lisa L.; Simmons Beth A., Theories and Empirical Studies of International Institutions, *International Organization*, Vol. 52, No. 4, International Organization at Fifty: Exploration and Contestation in the Study of World Politics. (Autumn, 1998).
94. Matas David, *From Nuremberg to the International Criminal Court*, AIUSA Lawyers' Conference, University of Washington School of Law (February 18, 2006).
95. McCrudden Christopher, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of "Selective Purchasing" Laws Under the WTO Government Procurement Agreement*, 2 Journal of International Economic Law, (1999).
96. Mei AP van der, *The Advisory Jurisdiction of the African Court on Human and Peoples' Rights,* 5 African Human Rights Law Journal 27 (2005).
97. Meier Robert F. & Johnson Weldon T., *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 American Sociological Review, 292 (Apr., 1977).
98. Méndez Juan E., Accountability for Past Abuses, 19 Human Rights Quarterly 270 (May 1997).
99. Moghalu Kingsley Chiedu, The Evolving Architecture of International Law: Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda, 26 Fletcher F. World Affairs 25 (Fall 2002).
100. Mohamed Abdelsalam A., Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights, 43 Journal of African Law 201 (1999).
101. Morton Jeffrey S., The International Legal Adjudication of the Crime of Genocide, 7 International Law Students Association Journal of International and Comparative Law International Law Weekend Proceedings (Spring, 2001).
102. Murphy Sean D., Contemporary Practice of the United States, 96 American Journal of International Law 725 (2002).
103. Nalbandian Elise, The Challenges Facing African Court of Human and Peoples' Rights, Mizan Law Review, Vol. 1 No. 1 (June 2007).
104. Nmehielle Vincent O., The African Union And African Renaissance: A New Era For Human Rights Protection In Africa? 7 Singapore Journal of International and Comparative Law (2003).
105. O'Connell Mary Ellen, Debating the Law of Sanctions, 13 European Journal of International Law 99 (2002)
106. O'Shea Andreas, A Critical Reflection on the Proposed African Court of Human and Peoples Rights, 1 African Human Rights Law Journal 285 (2001).
107. Odinkalu Anselm Chidi, Proposals for Review of the Rules of Procedure of the African Commission of Human and Peoples' Rights, Human Rights Quarterly, Vol. 15, No. 3. (Aug., 1993).

108. Okechukwu Oko, Confronting Transgressions of Prior Military Regimes Towards A More Pragmatic Approach, 11 Cardozo Journal of International and Comparative Law 89 (2003).
109. Orentlicher Diane F., Settling Accounts, The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE Law Journal 2537 (1991).
110. Pasqualucci Jo M., The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law 26 University of Miami Inter-American Law Review (Winter 1994-1995).
111. Pasqualucci Jo M; Victim Representations in the Inter-American Human Rights System: A Criminal Assessment of Current Practice and Procedure , 18 Michigan Journal of International Law 1 (Fall 1996).
112. Pella Vespasian V., Towards an International Criminal Court, The American Journal of International Law, Vol. 44, No. 1. (Jan., 1950).
113. Peskin Victor and Boduszyński Mieczysław P., International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia, 55 Europe-Asia Studies 1117 (Nov., 2003).
114. Piquero Alex R. et.al, Developmental Trajectories of Legal Socialization among Serious Adolescent Offenders, 96 The Journal of Criminal Law and Criminology (1973-) 267 (Autumn, 2005).
115. Ramcharan B. G., The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts; Conference-The American Red Cross-Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts April 12-13, 198333 American University Law Review 99 (Fall, 1983).
116. Ramcharan B.G., The Good Offices of The United Nations Secretary-General In The Field of Human Rights, 76 American Journal of International Law 137 (January, 1982);
117. Ramcharan, B. G., Strategies for the International Protection of Human Rights in the 1990s, Human Rights Quarterly, Vol. 13, No. 2. Johns Hopkins University Press (May, 1991).
118. Rancilio Peggy E., From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation, 77 University of Detroit Mercy Law Review 160 (Fall 1999).
119. Rancilio Peggy E., From Nuremberg to Rome: Establishing an International Criminal Court and The Need For U.S. Participation, 77 University of Detroit Mercy Law Review (Fall 1999).
120. Ratner Steven R., Belgium's War Crimes Statute: A Postmortem, The American Journal of International Law, Vol. 97, No. 4 (Oct., 2003).
121. Reisman W. Michael, Haiti and the Validity of International Action, The American Journal of International Law, Vol. 89, No. 1, (Jan., 1995)
122. Reisman W. Michael, On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court, 99 American Journal of International Law 615 (Jul., 2005).
123. Reisman W. Michael, The Constitutional Crisis in the United Nations, 87 The American Journal of International Law 83 (Jan., 1993).
124. Reisman W. Michael, The Law-in-Action of the International Criminal Court, 99 The American Journal of International Law 385, (Apr., 2005).
125. Roach Steven C., Arab states and the Role of Islam in the International Criminal Court, 53 Political Studies 143 (2005).
126. Roach Steven C., Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and UN Security Council, 6 International Studies Perspectives 431 (2005).
127. Roht-Arriaza Naomi, Combating Impunity: Some Thoughts on the Way Forward, 59 Law and Contemporary Problems [AUT Law & Contemp. Probs.] 93 (Fall, 1996).
128. Ruffert Matthias, The Administration of Kosovo and East-Timor by the International Community, 50 The International and Comparative Law Quarterly 613 (Jul., 2001).
129. Sarooshi Danesh, The Statute of the International Criminal Court, The International and Comparative

Law Quarterly, Vol. 48, No. 2. (Apr., 1999).
130. Schabacker Emily W., Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses, 12 New York International Law Review (Summer, 1999).
131. Scheffer David J., The United States and the International Criminal Court, The American Journal of International Law, Vol. 93, No. 1. (Jan., 1999).
132. Scheipers Sibylle and Sicurelli Daniela, Normative Power Europe: A Credible Utopia? JCMS 2007 Volume 45. Number 2.
133. Scott Leckie, The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking? 10 Human Rights Quarterly (May, 1988).
134. Slow Progress on Establishing the International Criminal Court, Journal of African Law, Vol. 45, No. 1. (2001)
135. Slye C. Ronald, The Legitimacy of Amnesties under International Law and General Principles Of Anglo-American Law: Is a Legitimate Amnesty Possible? 43 Virginia Journal of International Law 247, n.2 (Fall 2002)
136. Sohn Louis B., The Improvement of the UN Machinery on Human Rights, International Studies Quarterly, Vol. 23, No. 2, Special Issue on Human Rights:International Perspectives, (Jun., 1979).
137. Spees Pam, Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power, 28 Journal of Women in Culture and Society 1233 (2003).
138. Spyros Economides, The International Criminal Court: Reforming the Politics of International Justice, Spyros Economides, Government and Opposition Ltd 29 (2003).
139. Stephens Beth, Conceptualizing Violence Under International Law: Do Tort Remedies Fit The Crime?, Panel I: Human Rights & Civil Wrongs at Home and Abroad: Old Problems and New Paradigms, 60 Albany Law Review (1997).
140. Stone Lee, The 38th Ordinary Session of the African Commission on Human and Peoples' Rights, November 2005, Banjul The Gambia, 6 African Human Rights Law Journal 225 (2006).
141. Theissen Gunnar, Amnesty for Apartheid Crimes? The South African Truth and Reconciliation Commission and International Law, University of the Western Cape Faculty of Law [LL.M. Programme in International and Human Rights Law] 27 November 1998.
142. Timothy Longman, Church Politics and the Genocide in Rwanda, Journal of Religion in Africa, Vol. 31, Fasc. 2, Religion and War in the 1990s (May, 2001).
143. Tittemore Brian D., Ending Impunity in The Americas: The Role of The Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law, 12 Southwestern Journal of Law and Trade in the Americas (2006).
144. Tolley, Jr.Howard, The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications, 6 Human Rights Quarterly 426 (Nov., 1984).
145. U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC, 99 The American Journal of International Law 501 (Apr., 2005).
146. Udombana Nsongurua J., Can the Leopard Change its Spots? The African Union Treaty and Human Rights, 17, American University International Law Review(2002)
147. Vagts Detlev F., Repealing the Cold War, 88 The American Journal of International Law (Jul., 1994)
148. Vászquez C. M., Trade Sanctions and Human Rights - Past, Present, and Future, 6 Journal of International Economic Law 797 (2003);
149. Viljoen Frans and Louw Lirette, State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004, 101 The American Journal of International Law (Jan., 2007).
150. Viljoen Frans, Recent Developments in the African Regional Human Rights System, 4 African Human Rights Law Journal 344 (2004).
151. Viljoen Frans, State Reporting under the African Charter on Human and Peoples' Rights: A Boost from the South, 44 Journal of African Law 111 (2000).

152. Villa-Vicencio Charles, Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet, 49 Emory Law Journal 205 (Winter 2000).
153. Vogelgesang Sandy, Diplomacy of Human Rights, 23 International Studies Quarterly, Special Issue on Human Rights: International Perspectives (Jun.1979).
154. Vokes Richard, The Arusha Tribunal: Whose Justice?, 18 Anthropology Today 1 (Oct, 2002).
155. Waldo Gordon P. & Chiricos Theodore G., Perceived Penal Sanction and Self-Reported Criminality: A Neglected Approach to Deterrence Research, 19 Social Problems 522 (Spring, 1972).
156. Welch Claude E. Jr., The Organisation of African Unity and the Promotion of Human Rights, The Journal of Modern African Studies, Vol. 29, No. 4. (Dec., 1991)
157. Weller Marc, Undoing the Global Constitution: UN Security Council action on the International Criminal Court, 78, 4 International Affairs 693 (2002).
158. Weston Burns H., Human Rights, 6 Human Rights Quarterly 259-262 (Aug., 1984).
159. Wheeler Ron, The United Nations Commission on Human Rights, 1982-1997: A Study of "Targeted" Resolutions, Canadian Journal of Political Science, Vol. 32, No. 1, (Mar., 1999), pp. 75-101. Canadian Political Science Association and the Société québécoise de science politique
160. William T. D'Zurilla, Individual Responsibility for Torture under International Law, 56 Tulane Law Review, 186 (1981).
161. Woolsey H., The "Uniting for Peace" Resolution of the United Nations, The American Journal of International Law, Vol., No. 1. American Society of International Law (Jan., 1951)
162. Wright Quincy, Proposal for an International Criminal Court, The American Journal of International Law, Vol. 46, No. 1. (Jan., 1952).
163. Yntema Hessel E., The Historic Bases of Private International Law, The American Journal of Comparative Law, Vol. 2, No. 3. (Summer, 1953).

News Articles

1. Aljazeera, Uganda talks with LRA 'fail', available at <http://english.aljazeera.net/news/africa/2008/06/200861503952441624.html> accessed on 19/06/08.
2. Barbara Crossette, *China Tries To Deflect Criticism on Rights* (New York Times, March 7, 2000) available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE3DE1338F934A35750C0A9669C8B63> accessed on 05/12/08.
3. BBC News, Head-to-Head: Darfur Situation [27 October 2006], available at <http://news.bbc.co.uk/2/hi/africa/6058920.stm> accessed on 20/02/09.
4. *Flouting Bush, House Votes to Withhold UN Dues* (2001) available at <http://www.unwire.org/unwire/20010511/14704_story.asp?> accessed on 4/12/08.
5. Latest news on the EU anti-racism legislation (article 13), accessed on <http://www.icare.to/antidiscrimination19.05.2000.html> accessed on 6/9/08.
6. Rainer Chr. Hennig, **UN Darfur Vote Turns Scramble for Sudan's Oil [afrolnews,10 Sept, 2009], available at <http://www.afrol.com/articles/13921> accessed on 20/02/09.**
7. Sara Flounders, The U.S. Role in Darfur, Sudan Oil Reserves Rivaling those of Saudi Arabia? [Global Research, June 6, 2006], available at <http://www.globalresearch.ca/index.php?context=va&aid=259> accessed on 20/02/09.
8. Sudan Tribune, Hopes for peace in Uganda, Monday 26 June 2006 06:10, <http://www.sudantribune.com/spip.php?article16381&var_recherche=kony> accessed on 19/06/08.
9. Sverker Finnstro¨m, ''No-peace-no-war in Uganda,'' News from the Nordic Africa Institute 1 (January 2005), p. 11; available at <www.nai.uu.se/publications/news/documents/news1_2005.pdf.> accessed on 19/06/08.
10. The 1999 Parliamentary Elections and The European Union Members' Sanctions, available at

<http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_1/04_TXT.htm> accessed on 6/9/08.
11. The Sudan Tribune, Hopes for peace in Uganda, Monday 26 June 2006, available at <http://www.sudantribune.com/spip.php?article16381&var_recherche=kony> accessed on 19/06/08.
12. The Sudan Tribune, Ugandan double stand and ICC threaten Juba talks, Sunday 1 October 2006, available at <http://www.sudantribune.com/spip.php?article17887&var_recherche=kony> accessed on 19/06/08.
13. UN IRIN, ''Uganda: ICC Indictments to Affect Northern Peace Efforts, Says Mediator,'' October 10, 2005; available at <www.irinnews.org/report.aspx?reportid¼56654.> accessed on 29/06/08.
14. AU supports Sudan's rejection of ICC decision, ChinaView, available at <http://news.xinhuanet.com/english/2009-03/10/content_10979303.htm> accessed on 13/03/09.
15. Marlise Simons, Court Issues Arrest Warrant for Sudan's Leader, New York Times, available at <http://www.nytimes.com/2009/03/05/world/africa/05court.html> accessed on 13/03/09.
16. Arrest warrant draws Sudan scorn, <http://news.bbc.co.uk/2/hi/africa/7924982.stm> accessed on 13/03/09.
17. News Inter Press Service, Sudan: African Union against indictment of Al-Bashir, available at <http://www.afrika.no/Detailed/17897.html> accessed on 13/03/09.
18. Africa, Bashir seeks Arab League support, available at <http://english.aljazeera.net/news/africa/2008/07/200871212151131714 6.html> accessed on 13/03/09.

Laws, Documents & Publications of International Institutions

1. ICTY, Kunarac and others, ICTY Trial Chamber III, judgement of 22 Feb 2001 (case no. IT-96-23-T) available at <http://www.un.org/icty/foca/trialc2/judgement/index.htm> accessed on 06/02/09.
2. Report of the International Law Commission on the work of its twenty-eighth session, 3 May - 23 July 1976, Official Records of the General Assembly, Thirty-first session, Supplement No. 10, available at <http://untreaty.un.org/ilc/documentation/english/A_31_10.pdf> accessed on 05/08/08.
3. International Law Commission's (ILC) 'Draft Code of Crimes against the Peace and Security of Mankind, available at <http://untreaty.un.org/ilc/texts.7_4.htm> accessed on 04/03/08.
4. ILC Draft rules on the Responsibility of States for Internationally Wrongful Acts (2001) *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10).
5. SC/RES/1593 (2005), Adopted by the Security Council at its 5158th meeting, on 31 March 2005, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement> accessed on 05/01/09.
6. SC/RES/1487 (2003), Adopted by the Security Council at its 4772nd meeting, on 12 June 2003, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement> accessed on 05/01/09.
7. SC/RES/1422 (2002), Adopted by the Security Council at its 4572nd meeting, on 12 July 2002, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement> accessed on 05/01/09.
8. International Criminal Court, The States Parties to the Rome Statute, available at <http://www.icc-cpi.int/asp/statesparties.html> accessed on 21/02/09.
9. International Criminal Court, Legal Tools Project (2007) ; International Criminal Court, The Case Matrix (2007).
10. ICC, Strategic Plan for the Outreach of the ICC, available at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB> accessed on 3/01/09.

11. International Criminal Court, Integrated Strategy for External Relations, Public Information and Outreach 1
12. <http://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf> accessed on 3/01/09.
13. International Criminal Court, Press and Media, <http://www2.icc-cpi.int/nr/exeres/13cd3142-7459-48f0-b26a-da45723f8482.htm> 08/02/09.
14. SC/RES/1593 (2005), Adopted by the Security Council at its 5158th meeting, on 31 March 2005, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement> accessed on 05/01/09.
15. Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, available at <http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf> accessed on 10/12/08.
16. International Criminal Court Office of the Prosecutor, The Office of the Prosecutor Report on the Activities Performed During the First Three Years, (June 2003- June 2006) 12 September 2006 The Hague; available at
17. <http://www.iccnow.org/documents/3YearReport%20_06Sep14.pdf> accessed on 10/12/08.
18. International Criminal Court, Victims Trust Fund, available at <http://www.icc-cpi.int/vtf.html> accessed on 19/09/08.
19. Criminal Court, Rules of Procedure and Evidence, U.N Doc. PCNICC/2000/1/Add.1 (2000).
20. International Criminal Court, Situations and Cases, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> accessed on 17/02/09.
21. ICC, Appeals Division, available at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/appeals%20division/appeals%20division?lan=en-GB> accessed on 23/1/09.
22. ICC, Trial Division, available at < http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB> accessed on 23/1/09.
23. ICC, Pre-Trial Division, available at < http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/pre%20trial%20division/pre%20trial%20division?lan=en-GB> accessed on 23/1/09.
24. ICC, Prosecutor's Office, available at < http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor.htm> accessed on 23/1/09.
25. Common Position and Action Plan of the EU on the ICC on External Relations of the EU, The International Criminal Court & the fight against impunity, available at <http://ec.europa.eu/external_relations/human_rights/icc/index.htm> 06/01/09.
26. Agreement between the International Criminal Court and the European Union, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:115:0050:0056:EN:PDF> accessed on 06/01/09.
27. Coalition for the International Criminal Court, Cooperation with the United Nations, available at <http://www.iccnow.org/?mod=agreementsun> accessed on 06/01/09.
28. SC/RES/1487 (2003), Adopted by the Security Council at its 4772nd meeting, on 12 June 2003, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement> accessed on 05/01/09.
29. SC/RES/1422 (2002), Adopted by the Security Council at its 4572nd meeting, on 12 July 2002, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement> accessed on 05/01/09
30. Informal Expert Paper: The Principle of Complementarity in Practice, ICC-OTP (2003), available at

<http://www.icc-cpi.int/library/organs/otp/complementarity.pdf> accessed on 20/02/09.
31. International Criminal Court, The Chambers, available at <http://www.icc-cpi.int/organs/chambers.html> accessed on 19/09/08.
32. Rome Statute of the International Criminal Court, Preamble, paras. 4 and 6; available at <www.un.org/law/icc/statute/romefra.htm.> accessed on19/06/08.
33. Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III). available at <http://www1.umn.edu/humanrts/africa/courtprotocol2004.html> accessed on 04/10/08.
34. Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Ethiopia, African Commission on Human and Peoples' Rights, Comm. No. 233/99 (2003) available at <http://www1.umn.edu/humanrts/africa/comcases/233-99.html> accessed on 26/29/08.
35. African Commission on Human and Peoples' Rights, Rules of Procedure of the African Commission on Human and Peoples' Rights, *adopted on* October 6, 1995, available at <http://www1.umn.edu/humanrts/instree/africancomrules.html> accessed on 5/10/08.
36. African Commission on Human and Peoples' Rights, Status on Submissions of State Initial/Periodic Reports To The African Commission (Updated: March 2008) available at <http://www.achpr.org/english/_info/statereport_considered_en.html> accessed on 04/10/08.
37. African Commission on Human and Peoples' Rights, History, available at <http://www.achpr.org/english/_info/history_en.html> accessed on 4/10/08.
38. Inter-Am. Ct H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Series A. No. 5, 86 (1985), at para. 25, available at <http://www.corteidh.or.cr/seriea_ing/index.html> accessed on 24/09/08.
39. Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 93 (1992); available at <http://www1.umn.edu/humanrts/oasinstr/zoas4cms.htm> accessed on 18/09/08.
40. Statute of the Inter-American Commission on Human Rights and the Regulations of the Commission, the Statute of the Inter-American Court of Human Rights and the Rules of Procedure of the Court, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the Inter-American Convention on Forced Disappearance of Persons and the Inter-American Convention to Prevent and Punish Torture, available at <http://www1.umn.edu/humanrts.htm> and <http://www.oas.org/juridico/English.html> both accessed on 18/09/08.
41. American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992); available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> accessed on 18/09/08.
42. University of Minnesota Human Rights Library, Inter-American Court of Human Rights, Advisory Opinions Of The Inter-American Court Of Human Rights, available at < http://www1.umn.edu/humanrts/iachr/seriesa.html> accessed on 19/02/09.
43. University of Minnesota Human Rights Library, Inter-American Court of Human Rights, Series A: Judgments And Opinions, available at <http://www1.umn.edu/humanrts/iachr/series_A.html> accessed on 19/02/09.
44. American Declaration of the Rights and Duties of Man, available at <http://www.hrcr.org/docs/OAS_Declaration/oasrights.html> accessed on 20/06/09
45. Charter of The Organization of American States, General Secretariat Organization of American States Washington, D.C., (1997) available at <http://www.oas.org/juridico/English/charter.html> accessed on 18/09/08.
46. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

(Strasbourg, 26.XI.1987) available at <http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm> accessed on 18/09/08.

47. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention,[1](Strasbourg, 13.V.2004) available at <http://conventions.coe.int/Treaty/en/Treaties/Html/194.htm> 17/09/08.
48. Council of Europe, The European Convention on Human Rights and national case-law, 2006, Supplement to Human Rights Information Bulletin,No.71, Directorate General of Human Rights and Legal Affairs, Council of Europe (August 2007).
49. Human rights information bulletin No. 42, an update on human rights activities within the Council of Europe, November 1997-February 1998, Directorate of Human Rights (April 1998).
50. Council of Europe, Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, available at <http://www.coe.int/t/e/human_rights/execution/02_ documents/CMrules2006.asp> accessed on 18/09/08.
51. European Court Of Human Rights Competence to Give Advisory Opinions, (Strasbourg, 6.V.1963; available at <http://www.pfc.org.uk/node/328> accessed on 9/9/08.
52. EU support for civil society- Regulation (EC) No 1889/2006 of 20 December 2006; available at
53. <http://ec.europa.eu/europeaid/where/worldwide/eidhr/documents/reg_1889_2006_jo_l386_en.pdf.> accessed on 9/9/08.
54. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Official Journal C 340, 10 November 1997, at <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html> accessed on 9/9/08.
55. Council of Europe, Committee of Ministers, Procedure For Implementing the Declaration Of 10 November 1994 On Compliance With Commitments Accepted By Member States Of The Council Of Europe (Adopted by the Committee of Ministers on 20 April 1995 at the 535th meeting of the Ministers' Deputies) available at <https://wcd.coe.int/ViewDoc.jsp?id=525835&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> accessed on 9/9/08.
56. Statute of the Council of Europe, London, 5.V.1949. available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/001.htm> accessed on 9/9/08.
57. The International Convention on the Suppression and Punishment of the Crime of Apartheid, Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) available at <http://www.unhchr.ch/html/menu3/b/11.htm> accessed on 22/o8/o8.
58. Committee on the Elimination of Racial Discrimination, Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination, (CERD/C/67/1) 14 October 2005; available at <http://www2.ohchr.org/english/bodies/cerd/docs/indicators_for_genocide.doc> accessed on 24/o8/o8.
59. The Committee on the Elimination of Racial Discrimination, Declaration on the Prevention of Genocide, (CERD/C/66/1) 17 October 2005; available at <http://www2.ohchr.org/english/bodies/cerd/docs/declaration_genocide.doc> accessed on 24/o8/o8.
60. *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 18* (A/48/18), annex III. Available in: Office of the United Nations High Commissioner for Human Rights, About the early-warning measures and urgent procedures, available at <http://www2.ohchr.org/english/bodies/cerd/discussions.htm> accessed on 22/o8/o8.
61. How To Complain About Human Rights Treaty Violations, The Four Principal UN Human Rights Treaties Containing Complaint Mechanisms – Overview, available at <http://www.bayefsky.com/complain/7_overview_cerd.php> accessed on 24/02/09.
62. Convention on the Elimination of All Forms of Racial Discrimination and United Nations Declaration on the Elimination of All Forms of Racial Discrimination, Proclaimed by General Assembly resolution

1904 (XVIII) of 20 November 1963, available at <http://www.unhchr.ch/html/menu3/b/9.htm> accessed on 22/o8/o8.
63. International Convention on the Elimination of All Forms of Racial Discrimination (1966), available at <http://www.hrweb.org/legal/cat.html> accessed on 22/o8/o8.
64. Election of the members of the Subcommittee on Prevention of Torture to replace those whose terms are due to expire on 31 December 2008, available at <http://www2.ohchr.org/english/bodies/cat/opcat/elections2008.htm> accessed on 24/02/09.
65. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199; available at <http://www.unhchr.ch/html/menu2/6/cat/treaties/opcat.htm> accessed on 30/08/08.
66. Committee Against Torture, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, Rules of Procedure, CAT/C/3/Rev.4, 9 August 2002, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.3.Rev.4.En?OpenDocument> accessed on 30/08/08.
67. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, available at <http://www.hrweb.org/legal/cat.html> accessed on 06/02/09.
68. Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, available at <http://www.unhchr.ch/html/menu3/b/a_opt.htm> accessed on 27/07/08.
69. International Covenant on Civil and Political Rights, available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> accessed on 02/06/09.
70. Resolution 940 (1994) Adopted by the Security Council at its 3413th meeting, on 31 July 1994; available at <http://daccessdds.un.org/doc/UNDOC/GEN/N94/312/22/PDF/N9431222.pdf?OpenElement> accessed on 13/07/2008.
71. Resolution 875 (1993) Adopted by the Security Council at its 3293rd meeting, on 16 October 1993 available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/560/55/PDF/N9356055.pdf?OpenElement> accessed on 13/07/2008.

72. Resolution 873 (1993), Adopted by the Security Council at its 3291st meeting, on 13 October 1993, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/555/41/PDF/N9355541.pdf?OpenElement> accessed on 13/07/2008.
73. Resolution 841 (1993), Adopted by the Security Council at its 3259st meeting, on 16 June 1993, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/523/41/PDF/N935341.pdf?OpenElement> accessed on 13/07/2008.
74. Resolution 1272 (1999) Adopted by the Security Council at its 4057th meeting on 25 October 1999; available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/TL%20SRES1272.pdf> accessed on 28/07/08.
75. Security Council RESOLUTION 935 (1994) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N94/273/51/PDF/N9427351.pdf?OpenElement> accessed on 12/10/08.
76. Security Council Resolution 918 (1991), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N94/218/36/PDF/N9421836.pdf?OpenElement> accessed on 12/10/08
77. Security Council Resolution 713 (1991) available at

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/596/49/IMG/NR059649.pdf?OpenElement> accessed on 12/10/08.

78. Security Council Resolution 780 (1992) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N92/484/40/IMG/N9248440.pdf?OpenElement> accessed on 12/10/08.
79. Security Council Resolution 955 (1994). available at <http://daccessdds.un.org/doc/UNDOC/GEN/N94/273/51/PDF/N9627351.pdf?OpenElement> accessed on 12/10/08.
80. Security Council RESOLUTION 827 (1993) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement> accessed on 12/10/08.
81. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), *entered into force* 29 June 1995, available at <http://www1.umn.edu/humanrts/africa/RWANDA1.htm> on 22/09/08.
82. International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), *entered into force* 14 March 1994, *amendments adopted* 8 January 1996; available at <http://www1.umn.edu/humanrts/icty/ct-rules7.html> accessed on 22/09/08;
83. UN General Assembly Resolution 1761, available at <http://daccess-ods.un.org/access.nsf/get?open&DS=A/RES/1761(XVII)&Lang=E&Area=RESOLUTION> accessed on 24/02/09.
84. Office of the High Commissioner for Human Rights, Human Rights Council Complaint Procedure, available at <http://www2.ohchr.org/english/bodies/chr/complaints.htm> accessed on 01/12/08.
85. Resolution 1503(XLVIII) of the Economic and Social Council; available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/9fb315fdda618e28802567d000550d12?Opendocumen> accessed on 12/07/08.
86. Office of the High Commissioner for Human Rights, Special Procedures of the Human Rights Council, available at <http://www2.ohchr.org/english/bodies/chr/spexial/index.htm> accessed on 01/12/08.
87. Sub-Commission on the Promotion and Protection of Human Rights, available at <http://www.unhchr.ch/html/menu2/2/sc.htm> accessed on 20/8/08.
88. Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc. S/1999/1257 (Dec 16, 1999) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement> accessed on 28/11/08.
89. The United Nations Charter, available at <http://www.un.org/aboutun/charter.htm> accessed on 05/03/08.
90. UN Information Service, Countries Trade Barbs Over "Selectivity" in Human Rights, Debate Justifications of War in Iraq Independent Expert on Extreme Poverty Presents Report to Commission on Human Rights, HR/CN/1015 (2 April 2003) available at <http://www.unis.unvienna.org/unis/pressrels/2003/hrcn1015.html> accessed on 05/12/08.
91. UN News Center, Time for new UN rights body is now as status quo cannot continue, says top official, available at <http://www0.un.org/apps/news/story.asp?NewsID=14053&Cr=commission&Cr1=rights> accessed on 4/12/08.
92. UN News Center, Ban Ki-moon calls for equal scrutiny of all countries by UN human rights organ; available at <http://www.un.org/apps/news/story.asp?NewsID=25819&Cr=human&Cr1=rights> accessed on 01/12/08.
93. UN Human Rights Council, 7th session of the Human Rights Council (Geneva, 3 - 28 March 2008) available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/index.htm> accessed on 01/12/08.
94. One of the Council's emergency sessions was also dedicated to Israel, see: UN Human Rights Council,

2nd Special session of the Human Rights Council, Geneva, 11 August 2006, available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/2/index.htm> accessed on 01/12/08

95. General Assembly, Report of The Human Rights Council on its Second Special Session (Geneva, 11 August 2006) available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.S-2.2_en.pdf> accessed on 01/12/08.
96. The Situation of human rights in the East of the Democratic Republic of Congo, (Friday 28 November 2008) available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/8/index.htm> accessed on 01/12/08.
97. Committee on Economic, Social and Cultural Rights, General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights (Seventeenth session, 1997), U.N. Doc. E/C.12/1997/8 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 50 (2003). available at <http://www1.umn.edu/humanrts/gencomm/escgencom8.htm> accessed on 4/12/08.
98. OHCHR, The Human Rights Impact of Economic Sanctions on Iraq, Background Paper prepared by the Office of the High Commissioner for Human Rights for the meeting of the Executive Committee on Humanitarian Affairs (5 September 2000) available at <http://www.casi.org.uk/info/undocs/sanct31.pdf> accessed on 4/12/08.
99. Supplement to An Agenda for Peace: Position Paper of The Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, Report of the Secretary-General on the Work of the Organization, A/50/60 - S/1995/1 (3 January 1995) available at <http://www.un.org/Docs/SG/agsupp.html> accessed on 10/3/07.
100. Office of the High Commissioner for Human Rights, Special Procedures of the Human Rights Council, available at http://www.ohchr.org/EN/HRBodies/UPRmain.aspx> accessed on 01/12/08.
101. United Nations, Yearbook of the United Nations (1972) *Office of Public Information, United Nations, New York, available at* <*http:*//domino.un.org/unispal.nsf/fd807e46661e3689852570d00069e918/de9be8e9630430da8525631c0067f2e4!OpenDocument> accessed on 6/11/07,

102. United Nations, Yearbook of the United Nations (1974) *Office of Public Information, United Nations, New York, available at* <http://domino.un.org/UNISPAL.NSF/1ce874ab1832a53e852570bb006dfaf6/37688b2b2252853c85256332006e88ec!OpenDocument> accessed on 6/11/07,
103. United Nations, Yearbook of the United Nations (1976) *Office of Public Information, United Nations, New York, available at* <http://domino.un.org/UNISPAL.NSF/1ce874ab1832a53e852570bb006dfaf6/295767025a94cb1f85256396004f101b!OpenDocument> accessed on 6/11/07.
104. United Nations, 'Risk of Genocide Remains Frighteningly Real', Secretary-General Tells Human Rights Commission as He Launches Action Plan to Prevent Genocide, Press ReleaseSG/SM/9245 AFR/893 HR/CN/1077, available at <http://www.un.org/News/Press/docs/2004/sgsm9245.doc.htm> accessed on accessed on 6/11/07.
105. OHCHR "who we are" <http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx> and "What we do" <http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx> accessed on 28/10/08.
106. International Convention on the Suppression and Punishment of the Crime of Apartheid, Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) available at <http://www.unhchr.ch/html/menu3/b/11.htm> accessed on 22/o8/o8.
107. Treaty on European Union (92/C 191/01) available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html> accessed on 9/9/08.
108. Council of Europe, Human Rights Information Bulletin: No. 73, 1 November 2007 – 29

February 2008, Directorate General of Human Rights and Legal Affairs, Council of Europe, Strasbourg (April 2008)

109. The Treaty of Maastricht, *Official Journal C 191, 29 July 1992* (1992) available at <http://www.historiasiglo20.org/europe/ maastricht.htm> accessed on 9/9/08.
110. U.N. Doc. SG/SM/9245-AFR/893-HR/CN/1077 (Apr. 7, 2004), available at <http://www.un.org/News/Press/docs/2004/sgsm9245.doc.htm.> accessed on 16/07/08.
111. A/Res/60/251 (3 April 2006) A/RES/60/251, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf> accessed on 01/12/08.
112. Furundzija (case no. IT-95-17/1-A) / European Court of Human Rights, Press release issued by the Registrar, JUDGMENT IN The Case of Selmouni V. France, available at <http://www.echr.coe.int/Eng/Press/1999/Jul_Aug/Selmouni.eng.htm> accessed on accessed on 06/02/09.
113. Human Rights Council Resolution 5/1. Institution-building of the United Nations Human Rights Council; available at <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_5_1.doc> accessed on 20/8/08.

Internet Resources

1. Amnesty International, European Union Amnesty International's Recommendations on Improving the Effectiveness of International Justice, available at <http://www.amnesty.org.ru/library/Index/ENGIOR530102007?open&of=ENG-385> accessed on 06/01/09.
2. Amnesty International, Press Release, News Service No: 120 (11 May 2004) available at <http://www.amnesty.org/en/library/asset/IOR30/013/2004/en/dom-IOR300132004en.html> accessed on 18/09/08.
3. Ban on Torture Is Absolute and Universal, Amnesty International, Press Release, News Service No: 132 (11 July 2007) available at <http://www.amnesty.org/en/library/asset/IOR30/016/2007/en/dom-IOR300162007en.html> accessed on 18/09/08.
5. Coalition for the International Criminal Court, Cooperation with the United Nations, available at <http://www.iccnow.org/?mod=agreementsun> accessed on 06/01/09.
6. Diverging Views on the Human Rights Council: The Developing Nations and the United States, available at <http://www.centerforunreform.org/node/49> accessed on 01/12/08.
7. Dutch Ministry of Foreign Affairs, The United States and the ICC, <http://www.minbuza.nl/en/themes,international-legal-order/international-criminal-court/why-an-international-criminal-court-/United-States-and-the-ICC.html> accessed on 20/1/09.
8. Freedom House, Map of Freedom 2008, available at <freedomhouse.org/uploads/fiw08launch/mof2008.pdf> accessed on 25/01/09.
9. Gary T. Dempsey, *Reasonable Doubt The Case against the Proposed International Criminal Court,* Cato Policy Analysis No. 311, available at <http://www.cato.org/pubs/pas/pa-311.html> accessed on 24/03/08.
10. GLOBAL: Interview with Chief Prosecutor Moreno Ocampo, In-Depth: Justice for a Lawless World? Rights and reconciliation in a new era of international law, humanitarian news and analysis, UN Office for the Coordination of Humanitarian Affairs. Available at:
11. <http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59458> accessed on19/06/08.
12. Hakima Abbas, Africa's long road to rights (2007-11-13) available at <http://www.pambazuka.org/en/category/features/44412> accessed on 26/29/08.
13. HREA, The European Human Rights System, available at <http://www.hrea.org/index.php?base_id=143> accessed on 9/9/08.
14. Human Rights Council, Resolution 7/19. Combating Defamation of Religions, available at

<http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_19.pdf> accessed on 01/12/08

15. Jackson Peter and Faupin Mathieu, The Long Road to Durban: The United Nations Role in Fighting Racism and Racial Discrimination, UN Chronicle, available at <http://www.un.org/Pubs/chronicle/2007/issue3/0307p07.html> accessed on 8/6/08.
16. Lucy Hovil and Zachary Lomo, ‘‘Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation,’’ Refugee Law Project Working Paper No. 15 (Kampala, Uganda: February 2005); available at <http://www. refugeelawproject.org/resources/papers/workingpapers/RLP.WP15.pdf.> accessed on 19/06/08.
17. Mahle Anne E., The International Criminal Court, Justice and the Generals: Around the World, available at <http://www.pbs.org/wnet/justice/world_issues_int.html> accessed on 08/02/09.
18. Murray Rachel, 0521839173 - Human Rights in Africa: From the OAU to the African Union, Cambridge University Press, available at <www.cambridge.org> accessed on 30/9/08.
19. Paper on the Agreement between the ICC and the European Union, available at <http://www.amicc.org/docs/EU-ICC-Agreement.pdf> accessed on 06/01/09.
20. Paper Prepared for CODESRIA’s 10TH General Assembly on "Africa in the New Millennium", Kampala, Uganda, (8-12 December 2002) available at <http://www.codesria.org/Archives/ga10/Abstracts%20Ga%206-11/Regionalism_Adejo.htm> accessed on 30/9/08.
21. Philip Alston, Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council, 9 Melbourne Journal of International Law, available at <http://www.austlii.edu.au/au/journals/MelbJIL/2006/9.html> accessed on 16/11/08
22. President Clinton, Statement on Signature of the International Criminal Court, Dec 31, 2000, available at <http://www.amicc.org/docs/clinton_sign.pdf> accessed on13/6/07.
23. Role of the Special Committee against Apartheid, available at <http://www.anc.org.za/un/reddy/struggle2.html> accessed on 8/6/08.
24. South Africa’s Promotion of National Unity and Reconciliation Act of 1995, Law No. 34 (July 26, 1995) available at <http://www.doj.gov.za/trc/legal/act9534.htm> accessed on 8/04/2008.
25. Statement of the U.S. Embassy, The International Criminal Court & Reaction to the American Service-members' Protection .Act (June 12. 2002). *at* <http://www.usemb.nl/061202.htm> accessed on 20/1/09.
26. The United Nations Charter, available at <http://www.un.org/aboutun/charter.htm> accessed on 05/03/08.
27. The Versailles Treaty (June 28, 1919) available at <http://history.sandiego.edu/gen/text/versaillestreaty/all440.html> accessed on 13/9/2007.
28. Treaty of Versailles, From Wikipedia, the free encyclopedia; available at <http://en.wikipedia.org/wiki/Treaty_of_Versailles> accessed on 13/9/2007.
29. Under Secretary of State of Political Affairs Marc Grossman, American Foreign Policy and the International Criminal Court: Remarks to the Centre for Strategic and International Studies, Washington, DC May 6, 2002, available at <http://ww.state.gov/p/9949.htm accessed on 13/6/07> accessed on 13/6/07.
30. Wikipedia, African Commission on Human and Peoples' Rights, available at <http://en.wikipedia.org/wiki/African_Commission_on_Human_and_Peoples'_Rights> accessed on 4/10/08.
31. Wikipedia, American Law Institute, From Wikipedia, the free encyclopedia available at <http://en.wikipedia.org/wiki/American_Law_Institute> accessed on 26/05/08.
32. Wikipedia, European Court of Human Rights From Wikipedia, the free encyclopedia, available at <http://en.wikipedia.org/wiki/European_Court_of_Human_Rights> accessed on 9/9/08.
33. Wikipedia, Freedom House from Wikipedia the free encyclopedia, available at <http://www.wikipedia.org/wiki/freedom_house.htm> accessed on 27/01/09.
34. Wikipedia, Luis Moreno-Ocampo, From Wikipedia, the free encyclopedia, available at

<http://en.wikipedia.org/wiki/Luis_Moreno-Ocampo> accessed on 08/02/09.

35. Wikipedia, the free encyclopedia, available at <http://en.wikipedia.org/wiki/United_Nations_Human_Rights_Council> accessed on 01/12/08.
36. Wikipedia, United Nations Commission on Human Rights, From Wikipedia the free encyclopedia, available at <http://en.wikipedia.org/wiki/United_Nations_Commission_on_Human_Rights#Criticism> accessed on 30/1108.
37. Wikipedia, War in Darfur, From Wikipedia the free encyclopedia, available at <http://en.wikipedia.org/wiki/war_in_darfur> accessed on 28/11/07.
38. Wikipedia, War in Darfur, From Wikipedia the free encyclopedia, available at <http://en.wikipedia.org/wiki/war_in_darfur> accessed on 28/11/07.