Potential Barriers to Indonesia’s Participation in
the International Criminal Court

Ferry Junigwan MURDIANSYAH

LL.M (Rotterdam), B.A (Bandung)

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Abstract

The Indonesian government has planned to accede to the Rome Statute of the International Criminal Court (ICC) for a long time. However, it has been reluctant in practice to do so.

One reason for this appears to be concern on the part of Indonesian government officials is that the United States, being one of the permanent members of the UN Security council, is not itself a party to the Rome Statute. Further, there appears to be a belief among some government officials in Indonesia that there might have been some sort of political intrusion into the Rome Statute during its drafting resulting in provisions designed to favour the United States.

This suspicion, coupled with the status of the United States as a non-member to the Rome Statute while also being a permanent member of the UN Security council, creates serious concerns for Indonesia in deciding whether to join the Rome Statute.

This thesis is a case study focusing on Indonesia in order to understand why it has not ratified the Rome Statute. While this work has been conducted as a country specific case study, the thesis seeks to contribute more generally to considering how non-parties to the ICC could become more confident that the ICC is an independent institution. It does this by identifying barriers from Indonesia’s perspective. As a result, this thesis proposes an alternative solution for a new confidence building mechanism, which may encourage countries to join the Rome Statute of the ICC.
Declaration

This thesis contains no materials which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of the author's knowledge and belief, this thesis contain no materials previously published or written by another person, except where due reference is made in the text of the thesis.

Signature

Print name : Ferry Junigwan Murdiansyah

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Chapter 1

Rome Statute: Reluctance in Southeast Asia

This thesis tries to understand the reluctance to ratify the Rome Statute\(^1\) of the International Criminal Court (‘ICC’) by Indonesia. Through a combination of library research and interviews, the thesis identifies some current reasons for the lack of uptake of the Rome Statute by Indonesia.

By a consideration of these factors, together with the history of international criminal law, the thesis arrives at a new proposal for the future development of the Rome Statute This introductory chapter sets out some of the concepts that inform the work and provides a brief overview of the structure of the thesis.

Introduction

Research conducted by Valerie Toon suggests that the main concern of most South East Asian countries, including Indonesia, in deciding whether to join the Rome Statute is their sovereignty.\(^2\) For example, Vietnamese official Nguyen Ba Son stated that ‘the principle of primacy of national jurisdiction...has broadly been accepted in international law. It is therefore considered by our Government that any activity of the (ICC) without prior consent of the States concerned constitutes an encroachment of state sovereignty’.\(^3\)

Toon suggests that some countries might adopt an approach of waiting to see what the experience of other countries will be in implementing the Rome

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\(^3\) ibid., 222.
Statute before deciding whether to join. Toon quotes Eddy Setiabudi, an Indonesian official at the Directorate of Security and Regional Affairs of the Ministry of Home Affairs, who stated that Indonesia would apply this approach. He elaborated that it was of no immediate urgency for Indonesia to join the Rome Statute, as countries like the United States, China, Russia, Japan and India had not joined either.

Toon also gives the example of the Philippine government’s experience, whereby it was subject to both political and economic pressures from the United States (US) to discourage the country’s course towards ratification of the Rome Statute. The Vice President of the Philippines, Teofisto Guingona, acknowledged the pressure that his government endured when the United States warned that the Philippines would lose military aid amounting to around US$30 million if it decided to join the Rome Statute. At the same time, the European Union (EU), a supporter of the ICC, offered financial assistance to the Philippine’s totaling 50 million Euros over five years, if the Philippines did join the Rome Statute. Toon further emphasises that the ‘...Philippines Cabinet Oversight Committee was sandwiched between supporting the US’s anti-ICC stance and the EU’s pro-ICC stance because of the ‘need to balance the consequence’ of both their relationship with the US and how they would be perceived by the international community’.

Toon also quotes Laotian diplomats who indicated that their country would rather ‘invest more time in assessing’ the Rome Statute because their government considered it to be ‘complicated, politically sensitive and legally contentious’. Roy S. Lee affirms that the Rome Statute is a complex treaty and suggests that as a multilateral instrument, the Rome Statute ‘must incorporate compromises [that] may be internally inconsistent [but indispensable] to gain the minimum support necessary for passage’. Lee also comments that, ‘The

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4 Toon, above n.2, 227.
5 Ibid. This perception is an insight for this thesis that will be discussed later on Chapter 4.
6 The Philippines successfully joined the Rome Statute in 2007.
7 Toon, above n.2, 228-9.
8 ibid., 229.
9 ibid.
10 ibid., 227.
11 W. Michael Reisman, ‘Scenarios of Implementation of the Statute of the International Criminal Court’ in Mauro Politi and Giuseppe Nesi (eds), The Rome Statute of the International Criminal Court: A
[Rome] Statute is by no means perfect. It is a product of multilateral negotiations amongst 160 states with different values, interests and concerns...each made concessions and compromises in order to make the instrument generally acceptable'.12

What these examples seek to demonstrate is that it is thus rational for countries to be cautious regarding accession to the Rome Statute. Features of the Rome Statute may touch upon matters of constitutional significance within a state or impinge on the sovereign rights of the country, and thus generate resistance. This is one among other issues that this thesis tries to address: to investigate the kinds of hesitations among Southeast Asian states noted by Toon, especially from the perspective of Indonesia.

The central question addressed by this research is to identify possible reasons as to why certain countries may remain reluctant to join the Rome Statute. Using the specific experience of Indonesia, it is hoped that this thesis will be able to provide insights as to how to improve the degree of acceptance the Rome Statute by states such as Indonesia.

To do so, this thesis does not attempt to address each individual country's concerns regarding the Rome Statute. Instead, this thesis will undertake interview to identify the kinds of concerns that continue to circulate among certain key stakeholders in the Indonesian government, and use this to help formulate a new reform mechanism that may address such concerns.

This thesis also requires sufficient understanding of origins and forces that influence the drafting of the Rome Statute. It will trace back to the development of international criminal law to see the politics of various great powers towards it. In this respect, the policy of the United States towards the development of permanent international criminal court is particularly relevant; these issues will be addressed later in chapter 2 and 3.

Set against this history, the thesis goes on to review existing literature on the reasons that Southeast Asian states such as Indonesia are reluctant to join the ICC. It puts forward the hypothesis that this reluctance might be driven by suspicion on the part of some states as to the privileges accorded to permanent members of the Security Council, particularly the United States, under the Rome Statute; coupled with lack of universality of the ICC in terms of universal ratification by states. Embarking from this hypothesis, the project engaged in fieldwork to confirm whether or not this hypothesis was correct. The results of this fieldwork are set out in chapter 4 of this thesis.

In response to the problems identified in the thesis as barriers to Indonesia joining the ICC, this thesis then goes on to suggest a new procedural mechanism might provide a way forward. Specifically, in chapter 5 the potential of a joint committee established between the United Nations General Assembly and the International Criminal Court’s Assembly of State Parties is explored. This joint committee might be relevant to address the concerns of Southeast Asian countries, such as Indonesia, regarding the Rome Statute and may help to encourage and stimulate wider acceptance of the Rome Statute by countries in the region, especially Indonesia.

Indonesia has concerns regarding several articles of the Rome Statute. Prior to the writing of this thesis, one respectable official from the Indonesian government told the author that some high level officials in Indonesia consider that there are some sorts of political intrusion to the Rome Statute of the ICC.13

This idea of political intrusion is a useful concept for understanding the concerns of states like Indonesia regarding the ICC. The following section of this chapter explains the concept of political intrusion as used in this thesis. To do so, it first sets out Steven C Roach’s discussion of politics in international criminal tribunals. It will also provide examples as to what this thesis means when it uses the term ‘political intrusion’. Following this discussion, further section will provide a test case between article 12 and 124 of the Rome Statute,

13 It may be that some officials in Indonesia have the view that the United States has inserted several safeguards in the Rome Statute that may affect the performance of the ICC. This will be discussed later in chapter 4.
in order to show that the United States has, indeed, inserted safeguards into the Rome Statute that works favorably only to them and might be troublesome for other countries. At the end, this chapter concludes that the establishment of a joint committee between the Assembly of States parties and the UN General Assembly might be the solution needed by countries like Indonesia.

The Concept of Political Intrusion

Steven C. Roach\textsuperscript{14} differentiates between internal and external politicisation.\textsuperscript{15} In the context of the ICC, he characterises external politicisation as 'politicization of the ICC by Western interests, or in this case, the determination of the UN Security Council's permanent members of when, [for example], an act of aggression has taken place'. By comparison, he refers to internal politicisation as 'the role of [the ICC]'s institutional mechanism [such as] the Assembly of States Parties and the many forms of checks and balances of the Prosecutor's power in formulating political and policy strategies'. Roach further proposes that 'such internal form of politicization will allow the ICC to counter external attempts to politicise it, whether this involves the political agenda of a state hegemon, or the geopolitical interest of the UN Security Council permanent members'.\textsuperscript{16}

This thesis uses the term 'political intrusion' to express Roach's idea of 'external politicisation' in the sense of the potential for exploitation of several safeguards in the Rome Statute by the Security Council to protect the interest of a hegemon - the United States.

What may be one of the best illustrations of the meaning of 'political intrusion' for the purpose of this thesis is the example of Article 227 of the Versailles Treaty. Article 227 was carefully designed 'within the Treaty'\textsuperscript{17} by the dominating powers so that they could influence the performance of the trial,

\textsuperscript{15} ibid. xix-xx.
\textsuperscript{16} ibid., xiii.
\textsuperscript{17} Will be discussed later on Chapter 3.
and create a loophole to allow the Kaiser to escape justice. This shows that political intrusion may be embedded within a Treaty to protect or achieve the interest of the dominating powers.

However, ‘political intrusion’ for the purpose of this thesis refers to any forms of politicisation of the ICC through the intrusion of geopolitical interest “within” the system of the Rome Statute to allow certain powers to continually control the ICC.

An illustration of how a political intrusion may be embedded in the Rome Statute is the operation of Article 124. Kirsch describes article 124 as an example of compromise in the Rome Statute, which allowed an exclusion of seven years for the ICC’s jurisdiction over war-crimes provisions. The travaux preparatoires show that this article was carefully designed to provide an incentive for countries to join the Rome Statute. Originally, the United States had suggested at the Rome Conference that there be a 10-year grace period, not only for war crimes, but also for crimes against humanity. The reason given by the United States was that it wished to see the ICC operational for 10 years before accepting jurisdiction over such crimes. France, which was concerned about politically motivated prosecution of their peacekeeping operations, supported this proposal. The final drafting of article 124 was agreed to during a last-minute call, with compromises reached to reduce the grace period to seven years, and with coverage of war crimes only. However, the reading of article 124 in connection with article 12 of the Rome Statute might be troublesome. Here, we can see the influence of countries involved in peacekeeping operations on the drafting of article 124 and the possibility of article 124 be interpreted as a political intrusion if one reading it in connection to article 12 of the Rome Statute. On this matter, Arsanjani perceives article 12 as one of the most controversial articles in the Rome Statute. The fact that it

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18 See chapter 3 for more on this matter.
21 Kirsch, above n. 19.
22 Ibid.
23 Mahnoush H. Arsanjani, The Rome Statute of the International Criminal Court: Exceptions to the
was under negotiation even on the last day posed uncertainties in relation to other provisions in the Statute, including article 124.24

From the above example, using the concept proposed by Steven C. Roach, the United States' approach toward the Rome Statute might constitute an act of politicization of the ICC. Insertion of safeguard into several articles of the Rome Statute coupled with the use of the Security Council to protect the interests of the United States is where the problems appear for Indonesia. From Valerie Toon's research we understand that one reason Indonesia is yet join because not all permanent members of the Security Council join the ICC.25 This is a common perception in Indonesia that will be further shown by result of the interview in chapter 4.

**Universality of the ICC**

Since 2007, the Assembly of States Parties has adopted ten Plans of Action to promote universality of the ICC.26 According to the Assembly, universality is 'imperative if we are to end impunity for the perpetrators of the most serious crimes of international concern'.27 Yet, as of 1 May 2017, only 124 countries have ratified the Rome Statute. Of those, 34 are African, 19 are Asia-Pacific states, 18 are Eastern European, 28 are Latin American and Caribbean states and 25 are Western European or other.28

Of the ASEAN countries, only two – Cambodia and the Philippines – have ratified the Rome Statute.29 The only country in South East Asia that has

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24 According to Arsanjani, other articles that might raise inconsistencies with the reading of article 12 are articles 11(2) and 121. However, as inconsistencies with article 11(2) and 121 might not be relevant with the aim of this thesis, it will not be discussed here.

25 Toon, above n.2, 227.


27 Ibid.


publicly declared an intention of not ratifying the Statute is Myanmar.30 However, in November 2016, Philippine President, Rodrigo Duterte, made a statement that his country may withdraw from the Rome Statute.31 A month prior Burundi formally withdrew from the ICC.32 This trend is clearly counterproductive. The joint committee that this thesis proposes may operate as a further mechanism to promote universal ratification of the Rome Statute, or at least, may be a confidence building tool for Indonesia, and other similarly situated states, to mitigate their concerns towards the Rome Statute.

**Conclusion**

The study of five Southeast Asia countries, Vietnam, Malaysia, Indonesia, Philippines and Laos and their relationship to the ICC, conducted by Valerie Toon, demonstrates that countries in some South East Asian states may be taking a wait-and-see approach to the ICC. This means that they are waiting to observe the experience of other countries in dealing with the ICC before joining the Court.

From the experience of the Philippine government, Toon points out that the United States can be very aggressive to influence the decision of a country to join the Rome Statute. On latter chapters, it may apparent that the United States has conducted multi track approach to influence the decision of a country to join the Rome Statute and to take control of the ICC. One of the United States’ approaches might fall within the definition of external politicisation by the concept of Steven C. Roach as mentioned earlier. On this matter, political intrusion, as this thesis intends to elaborate, is more like taking influence to the

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30 Toon, above n.2, 227-8.
ICC by exploiting safeguards that one already embedded within the Rome Statute.

The hypothesis that Indonesia has yet to join the ICC because of the privileges enjoyed by the United States in the Security Council might still be relevant and, in fact, may be shared by other Southeast Asia countries. Thus, this thesis will attempt to introduce the creation of a new body to address this situation. However, discussion on this new body will not be made until revisiting the history of international criminal law and the process of establishing the ICC, which shall be attempted by the next two chapters.
Chapter 2

The Historical Origins of the International Criminal Law: Early Precursors to Nuremberg and Tokyo

The ICC is the culmination of a lengthy campaign to end impunity for individuals who commit heinous crimes. One may argue that international criminal law, as practised by such a court, completes the system of international law. It can be contended that the ICC fills a gap within international judicial machinery, which previously only addressed states as subjects. With the establishment of the ICC, international criminal law is now applicable to individuals; an area that has previously been taboo within the structure of international law.

In order to fully appreciate the development of the ICC and the interactions between great powers and smaller states in shaping it, this chapter will set the development of international criminal law in context. While the International Military Tribunal of Nuremberg is often portrayed as the beginning era of contemporary international criminal justice, and to a lesser extent the Tokyo Military Tribunal, international criminal law has deeper historical roots.

This chapter will track the development of international criminal law from its early origins to the Nuremberg and Tokyo Tribunals. It will also attempt to show that during a period spanned back to 1907, the United States had started to lead an opposition to the idea to create an international criminal court. In 1899, the United States opposed the concept of a law of humanity, which remained a consistent position of the United States until 1919. This position, however, changed in 1945 with its support for the creation of the Nuremberg Tribunal. This chapter traces this history. It demonstrates that, over the period of 1899-1945, the United States had shown changing policies towards the idea to create a permanent international criminal court.
The Origins of International Criminal Law

Both international criminal law and the idea of a permanent international criminal court originated amidst the struggle of states to maintain their hegemony. Simpson argues that ‘the history of [international criminal law] can be comprehended as a series of undulations between recourse to the administration of local justice and grand gestures towards the international rule of law’. International criminal law and the ICC may still sit uncomfortably in an international arena where sovereignty, state consent, diplomacy and international politics combine to pose barriers to the full acceptance of the ICC and international criminal law. Although this state-centric notion is now diminishing, some states still give the exercise of their own sovereignty prominence over the conception of individual criminal responsibility embodied in an international criminal-law regime. This might be the case for Indonesia and the United States where state sovereignty is still highly valued.

This state behaviour to value state sovereignty is understandable when we perceive that ‘international law operates in a state-based system that is anarchical, [sic] that there is no overarching government, and...is...a horizontal system made up of sovereign equals’. According to Simpson, an anarchical system is one where the international community will tempt states to refuse the law, as states are basically not ready ‘to be dictated legally’. Thus, international law, as one may interpret it, is essentially only ‘a medium of interaction among states’, binding only when it serves the best interest of those states that agree to be bound by it. At this point, international criminal law, to a certain degree, may be considered immature in the context of world politics, because it is so easy to assume that certain external factors, such as

34 Ibid.
35 Scott argues that by definition, states in a system of international law are basically constitutionally independent of a treaty. Treaties can only bind states if they consent to be bound. For example, the operation of the International Court of Justice (‘ICJ’) is underpinned by the principle of consent, where it could only hear cases if the disputing states consented. See Shirley V. Scott, International Law in World Politics: An Introduction (Lynne Rienner Publishers, Inc, 2004), 6.
36 Ibid, 7.
38 Scott, above n.35 , 134.
state sovereignty,\textsuperscript{39} may influence its applicability, and, of course, affect the performance of the ICC in the complex structure of the international system.

Despite the increasing codification of laws, norms and customs that took place in the 20th century, the world has witnessed brutality driven by imperialistic motives of extending states’ territory for hegemonic power. These episodes have cost millions of lives and incalculable property loss. In that century, the act of war was considered normal, ‘a feature of international relations [as well as] an important attribute of the state’.\textsuperscript{40} War was an integral part of states’ sovereignty and was understood as ‘what states did’.\textsuperscript{41}

Prior to the 20th century, states conducted wars by formal measures such as armies with uniforms, flags and emblems; formalisation of war by declaration; and even closure with formal peace agreements.\textsuperscript{42} However, in the 20th century, largely as a consequence of industrialisation, weaponry advancement and infrastructure development in many countries, troops could now be mobilised and wars conducted on an unprecedented scale.\textsuperscript{43} The havoc of World War I, devastation of economic structures, profligacy of financial resources and disruption of political stability meant that war could no longer be considered a ‘rational political act’.\textsuperscript{44} Wars began to be widely condemned, and critics began to call for values such as the protection of human rights within the interaction of states. International law at this stage attempted to criminalise states, but failed, as many believed states could not commit crimes.\textsuperscript{45} However, the other option – bringing individuals to justice who were behind the action of states in warfare – was problematic.

\begin{footnotesize}
\begin{itemize}
\item Scott contends that ‘sovereignty is one of the most fundamental concepts in the international states system and in the system of international law’. See ibid., 153.
\item ibid.
\item Maogoto, above n.40, 4.
\item ibid.
\item Simpson, above n.33, 5.
\end{itemize}
\end{footnotesize}
I. The United States and International Tribunals during 1907 and 1919

The United States’ contribution to the development of the ICC has its origin in developments of international criminal law dating back to the 1850s. To understand it, this section will trace back the development of international criminal law and contribution of the United States to codify the law of war.

The conception of individual criminal responsibility in the state of armed conflict ‘came to fruition in the middle of the nineteenth century, more specifically after the Battle of Solferino in June 1859, where France defeated Austria-Hungary’.46 Henry Dunant, a Swiss businessman who witnessed the cruelty of war, was greatly distressed to see the many who suffered and died in the battlefield being given only the minimum medical treatment. In 1862, Dunant published *Un Souvenir de Solferino*, which inspired the first Geneva Convention in 1864 to formulate an agreement on the treatment of the sick and wounded during armed conflict.48 Further progress was made in 1868 with the adoption of the first multilateral agreement prohibiting the use of particular weapons in war.49 Another progress was recorded in 1863 when the United States government had issued the first modern codification of laws of war, General Order No. 100 (Instruction for the Government of Armies of the United States in the Field), more commonly known as the Lieber Code.50 It was officially adopted by the belligerents during the US Civil War.

The Lieber Code provided penalties for crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary,

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46 Simpson, above n.33, 5
fraud, forgery and rape, and for wanton violence, all destruction of property not commanded by the authorized officer and all pillage or sacking.\textsuperscript{51} The Lieber Code can thus be considered the pinnacle of 19th-century efforts to humanise war.\textsuperscript{52} The Lieber Code’s greatest contribution was its identification of military necessity as a general principle to limit violence; this principle was soon to achieve international recognition as one of the underlying principles of the modern law of war.\textsuperscript{53}

The military-necessity principle as enshrined in the Lieber Code was rapidly adopted in countries other than the United States. The military-necessity principle had many significant values, as the Code was ‘the first attempt to check the whole conduct of armies by precise written rules’\textsuperscript{54} and ‘a persuasively written essay on the ethics of conducting war’.\textsuperscript{55} In 1868, Russia applied the Code’s principle of military-necessity to prohibit its army from using small-calibre explosive bullets, and in 1870 the Prussian government guided its army during Franco-Prussian War according to the Code.\textsuperscript{56} During this time, laws of war continued to evolve, and ‘gradually codified in national military law and in international treaties’.\textsuperscript{57}

\section*{Moynier’s Proposal: Embryo of International Tribunals}

Humanitarian considerations that arose after the Franco-Prussian war inspired Gustave Moynier, one of the founders of the International Committee of the Red Cross (ICRC), to consider the creation of a permanent international court. Moynier was convinced that hostilities that had occurred during the Franco-

\textsuperscript{52} Nussbaum, above n.48, 226.
\textsuperscript{53} Michael Bothe, Karl Partsch and Waldemar Solf, \textit{New Rules for Victims of Armed Conflicts} (Martinus Nijhoff, 1982), 194-5.
\textsuperscript{54} Nussbaum, above n.48, 227.
\textsuperscript{55} Frank Freidel, \textit{Francis Lieber, Nineteenth-Century Liberal} (Louisiana State University Press, 1947), 335.
\textsuperscript{56} Maogoto, above n.40, 20.
\textsuperscript{57} Ellery C. Stowell and Henry C. Munro, \textit{International Cases: Arbitrations and Incidents Illustrative of International Law as Practiced by Independent States} (Houghton Mifflin, 1916), 222-3.
Prussian war needed the enforcement of international humanitarian law by a ‘formal supranational mechanism’.58

On 3 January 1872, Moynier presented a proposal to the ICRC for the establishment of a permanent international court. Under the proposal – the first to call for such a court – Moynier called for the establishment by treaty of an international tribunal that would act as an international enforcement mechanism of humanitarian law and laws of war.59 Moynier’s proposal was published in the Bulletin International des Sociétés de Secours aux Blessés Militaires (the predecessor of the International Review of the Red Cross) under the title Note sur la creation d’une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève.60

At first, Moynier was not in favour of the establishment of a permanent court. Rather, he was expecting that true depictions of what happened to wounded soldiers would change public perception and lead to ‘humanitarian outrage’, and that citizens would pressure states to adhere to ‘humanitarian norms and rules’.61 In his 1870 commentary on the 1864 Geneva Convention, he stated that he still believed that moral values and public pressure were sufficient to constrain how states should conduct wars.62

However, several months later, the Franco-Prussian war broke out, resulting in the fall of Paris to Prussia and the destruction of the French National Defence in January 1871.63 Although a peace treaty was signed in Frankfurt on 10 May 1871, the press and public were sceptical, and furious over the atrocities.64 This was when Moynier realised that moral sanction alone would not suffice, as no-

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58 Maogoto, above n.40, 20.
59 ibid., 21.
61 Dunant, above n.47, 118.
62 Moynier suggested that ‘public opinion is ultimately the best guardian of the limits it has itself imposed. The 1864 Geneva Convention, in particular, is due to the influence of public opinion, on which we can rely to carry out the orders it has laid down…’. Moynier also hoped that states that were parties to the 1864 Geneva Convention would voluntarily enact domestic legislation that would criminalise war crimes. See Hall, above n.60, 59.
63 The war was triggered by the unification and expansion motives of Chancellor Otto von Bismarck of Prussia at the expense of France on its northern territory. See Maogoto, above n.40, 22.
one was being held responsible and no states had enacted domestic legislation to push sanctions, as he had envisaged in his commentary.\textsuperscript{65} It was this point that Moynier developed his proposal for an international criminal court.\textsuperscript{66} However, because of the sensitivity of Moynier’s proposal in a time when state sovereignty was greatly valued, no states took up the proposal.\textsuperscript{67}

**A Proposal for a Permanent International Criminal Court**

The beginning of 19\textsuperscript{th} century was marked by two Peace Conferences to set limitations on the right of States to resort to war. During this era, the conception of law regarding crimes against humanity, later one of the ICC crimes, began to receive attention. A proposal to create a permanent international criminal court was also introduced.

The crucial 1899 Hague Peace Conference followed fifty years of conflicts that had occurred mostly in Europe as a result of imperialist and territorial ambitions. It was aimed at codifying the laws of war, with its goals being to limit the right of war, establish a mechanism for disarmament and create forums to employ alternatives to war, such as arbitration and mediation.\textsuperscript{68} The Convention regarding the Laws and Customs of War on Land adopted at the Conference was the first treaty of the modern era that addressed ‘the illegality of aggressive force’.\textsuperscript{69}

More importantly, the 1899 Hague Peace Conference introduced the concept of laws of humanity with the insertion of the Martens Clause, drafted by Fedor Fedorovitch Martens, in the 1899 Convention:

\textsuperscript{65} He further commented, ‘a treaty was not law imposed by a superior authority on its subordinates (but) only a contract whose signatories cannot decree a penalty against themselves since there would be no one to implement them. The only reasonable guarantee would lie in the creation of international jurisdiction with necessary power to compel obedience’. See Pierre Boissier, *From Solferino to Tsushima: History of the International Committee of the red Cross* (Henry Dunant Institute, 1963), 282.

\textsuperscript{66} Maogoto, above n.40, 23.

\textsuperscript{67} ibid., 24.

\textsuperscript{68} For text and commentary of the Convention, see A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Text of Convention with Commentaries* (Cambridge University Press, 1909).

\textsuperscript{69} Maogoto, above n.40, 25.
Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of public conscience.\(^{70}\)

This clause was then re-adopted in a later conference in 1907 as the Preamble of the 1907 Hague Convention. This latter conference was basically the same conference, convened to revise the 1899 Convention to ‘serve the interest of humanity and the ever progressive needs of civilization by diminishing the evils of war’.\(^{71}\) Under the revised Convention, the signatory powers agreed on the limitation of certain methods of warfare and that violations to these new laws of war would be prosecuted under their domestic jurisdiction.\(^{72}\)

At the 1907 Conference, a proposal for a permanent international criminal court resurfaced. This proposal envisaged a permanent international criminal court as a judicial forum ‘with compulsory jurisdiction that would transcend national boundaries’.\(^{73}\) The formulation of the proposal was considered revolutionary at the time but it failed to gain support as the significant powers showed reluctance to ‘submit to the jurisdiction of an international court’ to try alleged war criminals.\(^{74}\) Ultimately, it was opposed by 26 sovereign states – an opposition that was led by the United States.\(^{75}\)

Although unsuccessful in establishing a permanent international criminal court, these conferences were hailed by many as ‘forming the bedrock of modern international humanitarian law’,\(^{76}\) because both conferences were ‘a crowning achievement in the effort to humanize war through law’.\(^{77}\)

\(^{70}\) Maqguto, above n.40 , 33.
\(^{71}\) Howard Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience (University Press of Kansas, 1999), 15.
\(^{72}\) ibid., 25.
\(^{73}\) ibid., 26.
\(^{74}\) ibid., 26.
\(^{75}\) ibid., 24.
\(^{76}\) ibid., 24.
\(^{77}\) ibid., 26.
Opposition by the United States on Crimes Against Humanity

After World War I, the effort to restrain war crimes was formalised through an international penal process. World War I was ignited by the shooting of Austrian archduke, Franz Ferdinand, by Serbian nationalist, Gavrilo Princip, in Sarajevo on 28 June 1914.78

On 14 July 1914, Germany convinced Austria to send a severe ultimatum to Serbia79, and encouraged Austria-Hungary to attack Serbia. Backed by Russia, Serbia rejected the ultimatum80 and the disputing parties called on their allies for support.81 The resulting war cost $202 billion, with property destroyed in the war topping $56 billion.82 It was difficult to start reconciliation without bringing those responsible for the war to justice. At time, the horror of the war provided a catalyst for a serious attempt at international justice, and Kaiser Wilhem II of Germany was singled out as the person most responsible for World War I.

Following the war, the Western Allies set up the Paris Peace Conference, and in 25 January 1919 decided to create the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to investigate the question of penal responsibility during World War I.83 One of the Commission’s mandates was to draft a proposal for the establishment of a tribunal to try offences committed during World War I.84

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78 Maogoto, above n.40 , 37.
79 Serbia was requested to suppress all propaganda directed against the monarchy, to dissolve Narodna Obrana (the People’s Defense), to remove from the army and administration such persons as the Austrian government might stipulate, to arrest certain individuals, to punish severely frontier officials involved in illegal activity, and most importantly, to accept the collaboration in Serbia of representatives of the Austro-Hungarian government for the suppression of subversive activity against the territorial integrity of the monarchy. See ibid., 65.
80 ibid., 39.
81 Europe was now polarised between the Western Powers, led by France, Britain and Russia, and the Central Powers, dominated by Germany and the Austro-Hungarian Empire. See ibid.
83 ibid., 46.
The Commission’s final report, dated 29 March 1919, concluded that Austria-Hungary and Germany had premeditated the war. It recommended the creation of an international criminal court presided over by representatives of the victor states. Furthermore, the Commission’s final report also mentioned ‘the clear dictates of humanity’ in condemning actions ‘by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate method’, including the ‘the violations of … laws of humanity’.

In response to the Commission’s Report, representatives of the United States and Japan opposed the inclusion of the notion of ‘crimes against humanity’ on the grounds that the Commission’s mandate was ‘to investigate violation of the laws of customs of war and not the un-codified laws of humanity’. They stated:

The laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reasons, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law … [we] are unable to agree with this inclusion, in so far as it subjects to criminal and therefore, to legal prosecution, persons accused of offences against the ‘laws of humanity’ and in so far as it subjects chiefs of state to a degree of responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations.

Concerning the establishment of an international criminal court, US representatives Robert Lansing (US Secretary of State and chairman of the Commission) and James Brown Scott (an eminent international jurist), proposed that it ‘should be formed by the union of existing military tribunals or commissions of admitted competence in the premises’. The rest of the Commission, however, rejected the US proposal and insisted on the inclusion of a provision of penal responsibility under the peace treaty.

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86 Maogoto, above n.40, 48.
87 ibid., above n.40, 48.
88 ibid.
89 ibid., 50.
90 ibid.
Article 227 Versailles Treaty

The Treaty of Peace between the Allied and Associated Powers and Germany (‘Versailles Treaty’), signed on 28 June 1919 gave the Allies the authority to prosecute Kaiser Wilhelm II of Germany for ‘supreme offence against international morality and the sanctity of treaties’. Article 227 of the Treaty cleared the way for the creation of a special tribunal for his trial. However, such a tribunal for Kaiser Wilhelm II never convened, since Kaiser Wilhelm II escaped to Holland, which subsequently refused his extradition, and where he lived until his death in 1941.

Article 227 of the Versailles Treaty is an example of argument of this thesis tries to raise. In chapter 1, I took article 227 of the Versailles Treaty as example of ‘political intrusion’ that this thesis tries to compare with what the United States did with the Rome Statute. Political intrusion on article 227 was that this article was drafted so vaguely so that ones can have multiple interpretations on the article. On this note, Bassiouni suggests:

The provisions of article 227 ... were artfully drafted. They define the crime of aggression as the supreme crime against the sanctity of the law of treaties. The question that arises is what is `a crime against the sanctity of the law of treaties`? This inherent vagueness in article 227 was deliberate and was built into the article so that should the Kaiser ever be brought to trial, he would be acquitted based on the fact that his conviction would violate the principle of legality.

Maogoto similarly argues that article 227 was intended to fail. It was to show that the Kaiser was an ‘ogre of war’ and in order for French and Belgian governments ‘to humiliate Germany’. At the request of the French, the Treaty of Versailles was to include severe measures to be applied to the German government. These included the destruction of Germany’s armed forces; the giving up of Alsace-Lorraine, which Germany had obtained in the Franco-Prussian war 50 years before; heavy reparation to compensate the Western Allies; and more importantly, a prohibition against Germany’s participation in

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92 ibid.
93 Maogoto, above n.40, 54.
94 ibid.
the international system. In fact, the Allies rejected German participation in the League of Nations until 1926.

Summary

To briefly summarize, during the period of 1907 and 1919, the United States made contributions to the development of international criminal law by, among other things, the introduction of the Lieber Code and the use of the Hague Conventions on humanitarian act and limitation of the rights of war between states.

However, despite growing expectation from the international community to establish a forum to try perpetrators of heinous crimes during this period of time, the United States rejected the proposal to establish a permanent criminal court. The United States also showed resistance to the introduction of crimes against humanity. Calling such idea as something that uncommon to the practice of nations at that time. Nonetheless, during this period of time, the conceptions of individual criminal responsibility and crimes against humanity began to form.

II. Conception of the International Criminal Court

State Sovereignty

During the era of the League of Nations, countries still did not favour the concept of individual criminal responsibility. A common position was that individuals are not subject to international law and criminalizing individuals was seen as a threat to sovereignty. The concept of individual criminal responsibility, nevertheless, was introduced in 1921 when the Advisory Committee of Jurists, appointed by the Council of the League of Nations to formulate a statute of Permanent Court of International Justice, provided

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95 Maogoto, above n.40, 77.
96 ibid.
recommendations for the creation of a High Court of International Justice. The President of the Committee, Baron Descamps – a Belgian State Minister – proposed that a High Court '[to try] crimes against international public order and against the universal law of nations' should complement the proposed establishment of a Permanent Court of International Justice.

Descamps argued that the creation of a High Court would protect states from the dilemma of ex post facto jurisdiction. However, the Committee failed to endorse Descamps's proposal. One objection to the proposal was that many delegations still believed that individuals are not subject to international law, and thus cannot be brought before an international tribunal.

The League's Third Committee on the Permanent Court of International Justice responded positively to the proposal of a Permanent Court of International Justice, but was hesitant about the idea of a High Court, ‘since there was no defined notion of international crimes and no international penal law’. The Rapporteur of the Third Committee even argued that should the international community decide to create such a court, it would be a special chamber within the Permanent Court of International Justice, not an independent entity.

However, the International Law Association (ILA) was closely observing the discussion of the Third Committee, and took it further by drafting a possible statute for a new International Penal Court during its meetings between 1922 and 1926, and arguing strongly for its creation. McCormack points out that the ILA's draft statute was a serious attempt to outline the foundation for a future international criminal court. In 1937, the League succeeded in adopting a Convention for the Creation of an international criminal court that was opened for signature and ratification. However, this Convention failed to

97 McCormack, above n.84, 51.
98 ibid.
99 ibid.
100 ibid.
101 ibid.
102 ibid.
103 ibid., 53.
enter into force due to the minimum participation of states and the outbreak of World War II.

**Widespread attempts to create an ICC**

At the end of World War II, discussions on the need to create an international tribunal were widespread. For example, the Commission on Penal Reconstruction and Development held a conference in Cambridge on 14 November 1941 to establish a committee to investigate and report on the rules and procedures applicable to ‘Crimes Against International Public Order’. The committee issued a report on 15 July 1942 supporting the creation of an international criminal court.\(^\text{105}\) Another example was the London International Assembly, which in 1941 established a commission to conduct an inquiry on the matter of war crimes. The Commission strongly supported the creation of an international criminal court and produced a draft statute in 1942 that took into account ILA’s earlier draft statute.\(^\text{106}\)

In response to the work of the Commission on Penal Reconstruction and Development and the London International Assembly, the Allied governments held a conference in London in October 1943 to establish the UN Commission for the Investigation of War Crimes.\(^\text{107}\) Committee II of the Commission was mandated to assess the establishment of an international criminal court, which was followed up by the US delegation that produced a draft statute that became a basis of the Committee’s discussions. However, it soon became evident that the creation of an international criminal court would take some time.

\(^{105}\) McCormack, above n.84, 55-6.


Nuremberg Tribunal – A Change of Position by the United States

On 1 November 1943, the Allied governments issued the Moscow Declaration that Nazis criminals would be prosecuted for war crimes.108 This Declaration then was formalised in an Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis and Establishing the Charter of the International Military Tribunal, signed on 8 August 1945 by the United Kingdom, the United States, France and the Soviet Union.109

The Tribunal’s jurisdiction was confined to crimes against peace, war crimes and crimes against humanity. This jurisdiction relied for its legal basis on the Hague Convention for war crimes; the Kellog-Briand Pact of 1928110 for crimes against peace; and Martens clause as well as discussions of the Armenian massacres of World War I for that of crimes against humanity.111

At this point of time, the United States had changed its position of 1919 to now support the inclusion of crimes against humanity in the Tribunal’s jurisdiction. It was noted that no legal developments had taken place between 1919 and 1945. It is thus sensible to argue that politics was the major basis for this policy change. Moreover, not only did the US change its policy position regarding support for an international criminal tribunal, Herbert Wechsler contends that the Nuremberg trials were largely an American creation.112

Some now argue that the International Military Tribunal acted ex post facto in criminalising the Nazis,113 on the grounds of laws ‘either improvised for the trial itself or imported from the United States (conspiracy)’114 even though the

108 McCormack, above n.84, 57.
110 The Kellog-Briand Pact was a treaty that renounced the use of war as a means to settle international disputes. Its article 1 set out that its signatories condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relation with one another.
111 Benjamin N. Schiff, Building the International Criminal Court (Cambridge University Press, 2008), 24.
113 Schabas, above n.91, 6.
114 Simpson, above n.33, 115.
judges devoted much attention to the Nuremberg decisions on a *nullum crimen sine lege* argument. This resulted to the conception of non-retroactivity principle, which was one of the legacies of the Nuremberg Tribunal in the purview of international criminal law, especially with respect to crimes against humanity.

In December 1945 the Allies adopted Control Council Law No. 10, which 'omitted [linkage] between crimes against humanity and the existence of a state of war', thus allowing prosecution for pre-1939 atrocities committed against German nationals. This legislation served as the legal basis for the occupying regimes to run trials in military courts within their zones of occupation, as well as in German national courts of civil authorities. Prosecutions under the auspices of the Control Council Law No. 10 have been described as domestic prosecutions because of the exercise of power by the occupying regime as result of Germany's unconditional surrender. Nonetheless, the jurisprudence developed under Control Council Law is regularly referred to as part of the corpus of international criminal law.

**Tokyo Tribunal – A United States’ Initiative**

The International Military Tribunal for the Far East was similarly established at Tokyo to address international crimes committed against the Allies in the pacific theatre of the war, in this instance through the unilateral military order of General Douglas MacArthur as Supreme Commander for the Allied Powers (SCAP) on 19 January 1946. Article 5 of the Charter of Tokyo Tribunal confined the Tribunal’s jurisdiction to crimes against peace, war crimes and crimes against humanity. The Tribunal tried 28 Japanese leaders and finally convicted 25. It had also tried approximately 5,000 Japanese citizens for war crimes.

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115 Maogoto, above n.40, 99.
116 Schabas, above n.91, 7.
117 Maogoto, above n.40, 100.
118 Schiff, above n.111, 25.
119 Ratner and Abrams, above n.109, 259.
Although the Charter of the Tokyo Tribunal was patterned on the Charter of the Nuremberg Tribunal, there were several differences.\textsuperscript{120} For example, article 5(c) of the Tokyo Charter provided that persecution conducted on the basis of political and racial grounds constituted a crime against humanity\textsuperscript{121}, whereas article 6(c) of the Nuremberg Charter included religious grounds\textsuperscript{122}, as a consequence of the Holocaust. Also, with respect to crimes against humanity, the Nuremberg Charter provided that ‘inhuman acts committed against any civilian population’ were subject to prosecution. This was slightly different in the Tokyo Charter; its article 5(c) took out the phrase ‘against any civilian population’, thus expanding the scope of persons to be tried by the Tribunal beyond civilians only.

Like the Nuremberg Tribunal, the Tokyo Tribunal was in great part a US initiative. For example, the execution of sentences was inconsistent and depended heavily on the political whims of General MacArthur, who was empowered to give clemency, reduce sentences and release convicted war criminals on parole.\textsuperscript{123} Maogoto points to the conviction of General Tomoyoki Yamashita in the Philippines as an example of the ‘domineering influence of MacArthur over the judicial process in the Far East’.\textsuperscript{124} General Yamashita probably had no role in Japanese wartime atrocities, but he had a personal conflict with General MacArthur relating to the latter's forced retreat when Japanese forces occupied the Philippines.\textsuperscript{125}

**Conclusion**

Despite the United States’ contributions to the development of international criminal law during the period of 1907 and 1919 by the introduction of the

\textsuperscript{120} Maogoto, above n.40, 102.
\textsuperscript{123} ibid., 103.
\textsuperscript{124} ibid. Another example of the influence of politics on the selection of defendants was the decision not to prosecute Emperor Hirohito, who had agreed to Japan’s unconditional surrender. It is also assumed that this decision was intended to ensure better political cooperation with Japan after the war.
\textsuperscript{125} ibid.
Lieber Code and the use of Hague Conventions on Humanitarian Act and Limitation of the Rights of War between States, the United States rejected proposal to establish a permanent criminal court as well as introduction of crimes against humanity, calling the idea uncommon to the practice of nations.

Nonetheless, as this brief history demonstrates, the policy of the United States’ towards the notion of international criminal court varied over time to reflect its changing geopolitical interests. By 1945, the United States had changed its position to now support the inclusion of crimes against humanity in Nuremberg Tribunal’s jurisdiction and played a significant role in the final iteration of both the Nuremberg Tribunal and the Tokyo Tribunal that followed soon after.

While the Nuremberg Tribunal has been criticized as an emanation of victor’s justice, its legacy in the field of international criminal law has been significant. The same core crimes addressed by that Tribunal continue to be the basis of the Rome Statute’s substantive jurisdiction, albeit the Rome Statute crimes are codified in a way that has not been seen before at an international criminal court or tribunal.

The function of this chapter has been to track the development of international criminal law from its early origins to the Nuremberg and Tokyo tribunals. The following chapter, will now address the impact of great power politics and policy, and particularly the approach taken by the United States, upon the development of the so-called “second generation” tribunals: the ad hoc tribunals established to deal with international crimes committed in the territory of the former Yugoslavia and in Rwanda, and the eventual establishment of the ICC.
Chapter 3

Politics and the Development of Ad Hoc Tribunals and the Rome Statute

This chapter addresses the extent to which the creation of Ad Hoc tribunals was not only a legal but also a political event. This evaluation is useful, as it will assist to understand the reluctance of Indonesia to engage with the ICC. Such concerns are not regarded as exceptional; they may be seen as forming part of a longer history of the relationship between politics and international criminal law. This longer history continues to influence the skepticism of some states in engaging with international criminal institutions that will impact upon their sovereignty.

To provide such broader historical context, this chapter offers a history of the growth of Nuremberg and Tokyo tribunals and the establishment of the ICC, which places political developments at the center of its narrative. Particular attention is paid to the attitude adopted by the United States during the drafting of the Rome Statute of the ICC, and the impact it had upon the final design of the ICC.

The chapter concludes that the United States government has not maintained a consistent policy towards the ICC. Under President Clinton, the United States adopted a measured approach to the ICC, as resistance from the Senate was high. This policy position changed dramatically under the Bush presidency, with the enactment of several domestic policies and US conduct within international affairs that was often ‘hostile’ to the ICC. Under the Obama administration, this position shifted, becoming more amendable again to the implications of the ICC. While the Trump administration is relatively new, its initial gesture in early 2017 may serve to make other state alarmed again regarding the prospects of genuine and positive US engagement with the ICC.
**Politics in International Tribunals**

One of the greatest legacies of the Nuremberg and Tokyo Tribunals was the shift from state sovereignty to individual criminal responsibility. Simpson argued that these trials marked the *rebirth* of international criminal law, where the conception of individual criminal responsibility was taking center stage under the system of international law.\(^{126}\) However, at this time, international criminal justice\(^ {127}\) became something that was utopic, with war crimes trials mostly held in municipal courts under domestic legislation between 1945 and 1993.\(^ {128}\) This suggests that after a century of struggle to create a permanent forum to try perpetrators of heinous crimes, states still regarded international criminal law only as moral guidebook rather than a binding instrument on states and individuals.\(^ {129}\)

Simpson states that war crimes' history is suffused with irony.\(^ {130}\) For example, the signing of London Charter on August 8, 1945 to create the Nuremberg Tribunal seemed 'to presage a new era in which the requirement of justice and the concerns of universal human rights were to guide the conduct of international relations'. However, *on the same day* the United States dropped an atomic bomb on Japan, shattered the city of Nagasaki and taking approximately 70,000 lives\(^ {131}\). Even as the Allies were campaigning to subordinate force to the rule of law, they were silent when by their own conduct they were perpetrating an unacceptable act of violence that contradicted the laws of war.\(^ {132}\)

It is widely argued that war-crimes trials are compromised by politics.\(^ {133}\) Gideon Boas summarises the intrusion of politics into war-crimes trials as

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\(^{126}\) Simpson, above n.33, 34.

\(^{127}\) In essence, the meaning of international criminal justice is any kind of response of the international community to atrocity. However, it could be argued that 'the obvious embodiment of international criminal justice comes in the form of international war crimes trials'. See Gideon Boas, 'What is International Criminal Justice?' in Gideon Boas, William A. Schabas and Michael P. Scharf (eds), *International Criminal Justice: Legitimacy and Coherence* (Edward Elgar Publishing Limited, 2012), 1.

\(^{128}\) Simpson, above n.37, 29.

\(^{129}\) Maogoto, above n.40, 6.

\(^{130}\) Simpson, above n.37, 4.

\(^{131}\) Ibid.

\(^{132}\) Ibid.

\(^{133}\) For detailed arguments on how scholars perceive war-crimes trials see Simpson, above n.33 and
occurring ‘in a practical sense, from their creation, implementation and ongoing support; in a conceptual sense, from the fact that all law is an expression of politics; and finally, in the sense that war crimes trials invariably mean different things to different people’. Simpson contends that war crimes trials are political trials:

They are political not because they lack a foundation of law or because they are crude product of political forces but because war crimes law is saturated with conversation about what is means to engage in politics or law, as well as a series of projects that seek to employ these terms in the service of various ideological preferences. War crimes trials are political trials because concepts of the political remain perpetually in play.

Similarly, Bassiouni states:

Politicians and diplomats responsible for setting up bodies mandated to investigate and prosecute violations of international humanitarian law often favour political expediency. And trials occur only when and in the manner dictated by prevailing political currents. Justice is compromised through a series of mechanisms, both legal and political. Often, timely investigations can lead to politically undesired results. Indeed, the investigations of the alleged criminal conduct by military and political leaders who are essential to achieving peaceful settlements are favoured over justice. This is why so many international and non-international conflicts have resulted in de jure or de facto immunity for leaders, as well as most of the perpetrators of international humanitarian law and international human rights violations.

Sometimes, political elites deeply engage themselves in political concessions that result in immunity for those who allegedly committed serious crimes under the international criminal law regime. According to Maogoto, this situation may reignite the debate on whether international law was ‘simply a convenience leading to free rein in diplomacy’. He went further, arguing:

The law is in many ways part of the political process; law is made and agreements are given meaning by the total political process—when governments react, when courts (national and international) decide cases, when political bodies debate and pass resolutions and nations act in their light. International law, then, is in many aspects an ‘architecture of political compromises’.

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134 Maogoto, above n.40.
135 Boas, above n.127, 17.
136 Simpson, above n.33, 11.
138 ibid, 10.
139 Maogoto even questioned whether international humanitarian law was a useful mechanism in the international system or just another weapon in the game of diplomacy. See Maogoto, above n.40, 5.
140 ibid, 10.
In relation to this, an interesting question posed by Simpson that is of relevance to the discussion of ‘political intrusion’ of this thesis is: ‘do powerful interests within the international system...have any intention of permitting the application of international criminal law to their own citizens or military personnel?’\textsuperscript{140} Or might they simply overcome this concern by ensuring that their interests are securely protected and that they can control the behaviour of the tribunals, including the ICC?

Four of the subjects that were interviewed for this project – Hikmahanto Juwana\textsuperscript{141}, Diajeng Wulan Christianity\textsuperscript{142}, Rizal Yasma\textsuperscript{143} and Ahmad Shaleh Bawazier\textsuperscript{144}, indicated a view that Indonesia should wait for all permanent members of the Security Council before joining the ICC (see further Chapter Four). For example, One interviewee, Fadhillah Agus\textsuperscript{145}, indicated that, having been successful in securing several safeguards protective of US interests under the Rome Statute, in particular the special role of the Security Council under the Statute, the US will consider the Security Council as a playing field to protect its interest and to influence the performance of the ICC\textsuperscript{146}. This is consistent with the point noted in chapter one that identified safeguards that the United States delegation had successfully built into the Rome Statute as a potential site for state contestation and cynicism towards the ICC.

In order to understand the US policy towards international tribunals and the drafting of the Rome Statute, the following sections highlight some of the political aspects of both ad hoc tribunals and of the ICC in terms of the impact of influential states upon the operation of those tribunals, as well as by identifying more broadly US policy towards those tribunals, the drafting of the

\textsuperscript{140} Simpson, above n.33 , 10.
\textsuperscript{141} In 2014, Hikmahanto was one of the strong candidates for the position of Indonesia’s Minister for Foreign Affairs. See chapter 4 on the outcome of the interview.
\textsuperscript{142} Researcher and lecturer at Padjajaran University, Indonesia. See chapter 4 on the outcome of the interview.
\textsuperscript{143} Current Head of Law and Human Rights Department of the Legal Development Agency of the Indonesian Military. See chapter 4 on the outcome of the interview.
\textsuperscript{144} Section Head for Extradition and International Law of the Directorate of Political, Security and Territorial Treaties of the Indonesian Ministry of Foreign Affairs. See chapter 4 on the outcome of the interview.
\textsuperscript{145} Founder and Partner at FRR Law Office, Indonesia. See chapter 4 on the outcome of the interview
\textsuperscript{146} See chapter 4 of this thesis.
Rome Statute draft and the ICC. This is done so as to make the point that the United States has not maintained a consistent policy towards the ICC.

I. The United States and the Ad Hoc Tribunals

Crime of Aggression

In attempts to address post-war trauma after the World War II, the International Law Commission (the ILC) drafted a code of offenses against the peace and security. The first draft of this Code of Offenses Against the Peace and Security of Mankind in 1954. Upon receipt of the draft code, the General Assembly adopted Resolution No. 897 (IX), which articulated that the work of the ILC might raise problems related to the definition of aggression. It thus asked the ILC to suspend its work until a Special Committee mandated to define aggression had submitted its report. The Special Committee's definition of aggression was later adopted in Resolution No. 3314 (XXIX) in 1974.

The work of the ILC on the question of a Code of Crimes was further suspended following growing tension in the political arena at that time and until 1981, when the General Assembly adopted Resolution No. 36/106 asking the ILC to recommence its work on the draft Code. In 1991, the ILC adopted a revised version of the draft Code; it was then sent to the member states for their response. The development of the Code then slowed down until its final version was adopted in 1996.

151 ibid., 10.
152 Timothy L. H. McCormack and Gerry J. Simpson, ‘The International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind: An appraisal of the Substantive Provisions’ (1994) 5(1) *Criminal Law Forum*. Please also note that the final draft of the Code replaced the use of the wording ‘Offenses Against...’, which was used on the first draft of 1954, with ‘Crimes Against...’.
Momentum for the International Criminal Court

Several years before, in 1989, Trinidad and Tobago had appealed for the world’s attention to combat narcotics and transnational crimes, which had been affecting the country. The General Assembly responded with the adoption of Resolution 44/89 on 11 December 1989, which requested the ILC to consider the creation of a specialised international court for such crimes ‘within the context of its works and the draft Code’. Special Rapporteur James Crawford, who had been tasked with preparing the draft statute of such a tribunal, completed this work in 1993. The Commission’s first draft was submitted to the General Assembly for examination in the same year; its final draft was submitted a year later. This draft statute was later negotiated at Zutphen and provided the basis for the Rome Statute of the ICC.

At almost the same time, the Yugoslav wars began in 1991. This series of conflicts contributed to a push in the discourse debating the formation of an international criminal court, in which the international community demanded that the major powers take action to stop the conflicts. As a result, in 1993 the UN Security Council established an ad hoc tribunal to address the situation in the former Yugoslavia. Comparably, in a geographically separate event, the international community had also witnessed a theatre of archetypal genocide where an attempt to exterminate an entire ethnic group within Rwanda took place in 1994. The UN responded in this case also, and a similar ad hoc tribunal was created.

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153 Schabas, above n.91, 10.
154 ibid.
155 ibid.
156 ibid.
157 In brief, after the demise of Josip Broz Tito on 4 May 1980, the country was ruled by a hopelessly inefficient collective presidency comprising representatives from each of the six republics and the two autonomous regions. At this time, the Serb nationalists began grumbling forcefully that Tito’s national policy was designed to fragment Yugoslavia, dilute Serb dominance and make it easier for Tito to rule unchallenged. Slobodan Milosevic rose to power in 1987 and introduced the policy of ‘Greater Serbia’. Acts of secessions by Slovenia, Croatia and Bosnia triggered Milosevic to crush any bid for independence and embrace his policy of Greater Serbia. For a more detailed history and background of the Yugoslav wars, see Maogoto, above n.40, 143-78.
158 The International Criminal Tribunal for the former Yugoslavia (‘ICTY’) was established by UN Security Council Resolution No. 827, May 25th 1993.
159 For the history, background and details of the Rwanda conflict, see Maogoto, above n.40, 179-200.
160 The International Criminal Tribunal for Rwanda (‘ICTR’) was established by UN Security Council Resolution No. 995, November 8th 1994.
The end of the Cold War had made the formation of a permanent international criminal tribunal feasible. Political commitment to create such a tribunal now gained support and momentum. The Yugoslav wars and Rwanda’s genocide generated a sense of urgency for states to do ‘something to mask the disorder and moral collapse’. The world was, in a sense, united in response to reports that indicated systematic and widespread violations of international humanitarian law and mass killings, as well as the continuation of ethnic-cleansing practices in both the former Yugoslavia and Rwanda.

**The Politics of Nations amongst the Ad Hoc Tribunals**

However, both ad hoc tribunals had been criticised for being highly politicised. In the context of the former Yugoslavia, the international community, represented by the UN and the European Community, at first hesitated to interfere, as both the UN and the European Community were trapped under the notion of maintaining the territorial unity and integrity of the former Yugoslavia. The creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) has been criticised as less a genuine response in the pursuit of justice but rather a response to ‘international humanitarian concerns and to the extensive media coverage of the atrocities’.

Indeed, the creation of the tribunal was one of the attempts of the UN and EC to deter and pressure the Serbian government. The choice was political. According to Maogoto, this was the reason why the Commission of Experts had not

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161 Schiff, above n.111, 38. It had previously been impossible, as states feared it could be used as a political tool by one ideological bloc against the other.
162 Maogoto, above n.40, 164.
163 Interestingly, it was argued that both tribunals were adopted not because of the intrinsic value of punishing war criminals or upholding the rule of law. Instead, they were established because of mobilisation of shame by NGOs. Once the political will of the major powers was mobilised by public shame and outrage, Security Council resolutions provided the legal basis for speedy action. See Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia* (Transnational Press, 1995); David P. Forsythe, ‘Politics and the International Tribunal for the Former Yugoslavia’ (1994) 5 *Criminal Law Forum*, 401; and UN Security Council Resolutions No. 808 of 22 February 1993 and No. 955 of 8 November 1994.
164 Maogoto, above n.40, 148.
165 ibid., 153.
166 The Commission of Experts was comprised of five members and constituted on the basis of UN Security Council Resolution No. 780 dated 6 October 1992, which requested the Secretary General to establish such a commission to examine and analyse information on possible war crimes and serious violations of
been fully supported  by the UN. As the work of the Commission of Experts grew, it was considered to threaten the political process that continued to take place in the background under the ICTY. As a result, the Commission of Experts was arbitrarily terminated on 30 April 1993 by the decision of the UN Office of Legal Affairs.  The Chairperson of the Commission, M.C. Bassiouni, commented:

The premature termination of the Commission cannot be explained. Could it have been a purposeful political action to prevent the further discovery of the truth? Or was it simply an unwise administration decision. Or perhaps it is the nature of the UN beast – part political, part bureaucratic – that accounts for what I believe to be an unconscionable outcome, no matter what the reason.

The situation in Rwanda was similar. With a UN peacekeeping force on the ground in Rwanda and wide coverage of the killings there, the UN peacekeeping office rejected the request of the United Nations Assistance Mission in Rwanda (UNAMIR)’s commander, General Romeo Dallaire, to seize large arms; this allowed the massacres in Rwanda to continue.  Even more shamefully, on 21 April 1994, two weeks after approximately 100,000 civilian casualties had been recorded, the UN Security Council slashed the UN? peacekeeping force to 450 troops with the adoption of Resolution 912.  This was despite African countries’ pleas to have the peacekeeping forces bolstered. The Council also avoided the use of the term genocide until 17 May 1994.  Six weeks after the genocide had begun, when the Security Council finally acknowledged that genocide had occurred in Rwanda with the adoption of Resolution 918, 800,000 civilians had been reported dead.

humanitarian law in the former Yugoslavia. The Commission collected information from various sources, carried out investigations and submitted three reports to the Secretary General referring to widespread patterns of willful killing, ethnic cleansing, mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. See UN Doc. S/25274, 9 February 1993.

The UN provided only the minimum administration cost for a short period. The Commission of Experts had thus resorted to external funding, aid from volunteers and gratis personnel contributions from certain governments. See Maogoto, above n.40 , 153.

ibid., 154.


Maogoto, above n.40 , 182.

ibid., 183.

ibid.

ibid., 184.
With the recent creation of the ICTY, it has been argued that it would have been 'patently discriminatory for the Security Council not to have considered creating a similar institution in Rwanda'. 174 Thus, the International Criminal Tribunal for Rwanda (ICTR) was created. The ICTR has been considered by some as a symbol of the international community's neglect of historical lessons about the need to maintain peace, and especially to react when a case of genocide occurred. 175 Arguably, the ICTR was simply an afterthought. 176

Interestingly, both the ICTY and ICTR shared the same Prosecutor and Appeal Chamber. 177 Article 15 (3) of the ICTR statute provided that both tribunals have a common Prosecutor, who would be assisted by additional deputy prosecutors. Likewise, article 12 (2) mandated that the five members of the Appeal Chamber of the ICTY also serve as the members of the same chamber in the ICTR. 178 The decision to link the two bodies with a common Prosecutor and Appeal Chamber was not based on any valid and acceptable legal arguments. Instead, it was highly political, proposed and insisted on by the United States to avoid delays in selecting the prosecutor, as had been the case for the ICTY. 179 On this decision, M.C. Bassiouni commented: 180

The choice of single Prosecutor was particularly ill advised because no person, no matter how talented, can oversee two major sets of prosecutions separated by 10,000 miles. The idea that one can shuttle between the Hague, Netherlands and Arusha, Tanzania as part of a normal work schedule is nothing short of absurd.

**Legacies of Ad Hoc Tribunals**

Nevertheless, despite all the criticisms of these ad hoc tribunals, both benefited significantly from the works of the ILC, particularly the draft Statute of 1994 and the draft Code of 1996. These two drafts played an influential role in

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174 Maogoto, above n.40, 185.
175 ibid., 193.
177 Schabas, above n.91, 12.
179 The Russian Federation had vetoed five of the previous eight nominees for the post of Chief Prosecutor in the ICTY. It was uncertain whether Russia wanted to stall the tribunal or was simply objecting to nominees from countries belonging to NATO. See Maogoto, above n.39, 197-8.
establishing two foundations: a definition of core crimes prohibited under international law and the creation of an institutional and procedural framework that served as a forum to prosecute those responsible for crimes under the Code. Schabas commented, ‘the Statute[s] [of both Tribunals] clearly borrowed from the work then underway within the International Law Commission on the statute and the code of crimes, in effect combining the two into an instrument that both defined the crimes and established the procedure before the court’. 181

This may have been one of the phases where international criminal law was given another rebirth after having idled for so long. If, as Simpson argued, the Nuremberg and Tokyo trials marked the rebirth of an international criminal-law regime 182 by means of giving the role of individual criminal responsibility an essence, then the creation of ICTY and ICTR can be assumed similar by giving the international criminal-law regime forums to try individuals responsible for atrocities.

Moreover, the work of both tribunals developed many of the principles that contributed to the development of an international criminal law regime 183 and shaped how the future of the ICC should look and operate. 184 Beyond providing legal precedent through the development of detailed international criminal jurisprudence, which is available to inform the work of the ICC: these ad hoc tribunals developed model of rules of evidence and procedure, which could also serve as examples for the future ICC.

The ICTY was the first of the two to adopt rules of evidence and procedure for its proceedings. There were more than 100 amendments between 1994 and 2001 to complete, if not to perfect, the rules. 185 These amendments achieved an

181 Schabas, above n.91 , 12.
182 Simpson, above n.33 , 34.
183 Examples include the separation of commander and civilian responsibility (see Daryl A. Mundis, ‘Crimes of Commander: Superior Responsibility under Article 7(3) of the ICTY Statute’ in Gideon Boas and William A. Schabas (eds), International Criminal Law Development in the Case Law of the ICTY (International Humanitarian Law Series, 2003), the rights of the accused (see Gabrielle McIntyre, ‘Defining Human Rights in the ‘Renaissance of the ICTY’ in Gideon Boas and William A. Schabas (eds), International Criminal Law Developments in the Case Law of the ICTY (International Humanitarian Law Series, 2003) among others.
184 Schabas, above n.91 , 13.
internationally recognized and accepted code of evidence and procedure that contributed considerably to the development of the future ICC. Gideon Boas stated that:186

...the ICTY has developed a body of Rules, based inherently upon the adversarial model of criminal procedure, with a considerable overlay of concepts from the civil law system... It has focused its Rule amendment process on resolving the problem of expediting trials whilst respecting the right of an accused to a fair trial under international law. This has taken it into a new field of inquiry and closer to the development of a truly international code of evidence and procedure. This is a legacy which will benefit the [ICC] in its development.

In another example, at the end of the 20th century, another conflict took place in Sierra Leone. In 2000, the Security Council asked the UN Secretary General to create a tribunal to address the conflict.187 Thus, a Special Court for Sierra Leone was established on 16 January 2002.188

**Summary**

At this point, although the demand for international tribunals was apparent by the creation of the three tribunals noted above, the international community’s attention was shifting from ad hoc tribunals to the need for a permanent one. This can be seen from the process of creating the Special Court of Sierra Leone, where the international community voiced concerns about the problems that perpetually exist with ad hoc tribunals: lack of expeditiousness and the high cost of operation and prosecution. The international community was more inclined toward the creation of a permanent tribunal.189 The Special Court of Sierra Leone itself was different to the ad hoc tribunals, as it was primary funded by voluntary contributions, and its structure and applicable law was a hybrid of both international and national elements.190

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186 Boas above n. 185., 27.
187 Schabas, above n.91 , 14.
In 2005, the United States proposed the creation of another ad hoc tribunal to address the situation in Darfur, Sudan. But many states considered that the new ICC that had been established in 2002 and thus should have jurisdiction in the case of Sudan. In response, the United States backed down and the UN Security Council referred Darfur situation to the ICC. This is an illustration of how the United States tried to continue exerting its political influence on the ICC as they had in 1907 and 1919.

II. The United States and the Rome Statute

Preparation of the Draft Statute

Soon after the ILC submitted its draft Statute for a permanent international criminal court in 1994, the UNGA set up an Ad Hoc Committee. Under the draft Statute, the ILC had envisioned the future ICC to work precisely like the ad hoc tribunals: to have primacy over national courts. Between meetings of the Ad Hoc Committee, a new proposal developed: the future ICC should only exercise jurisdiction if domestic courts were found unable and unwilling to do so. This was what later became known as the principle of complementarity as enshrined in the Rome Statute.

Another issue during the meetings of the Ad Hoc Committee was the need to elaborate the scope of core crimes within the jurisdiction of the ICC in more detail. Under the 1994 draft Statute, the ILC had only listed crimes within the scope of the ICC; the fuller definition of each crime itself was instead elaborated in the draft Code of 1996. This development mandated the merging of the draft Statute with the draft Code. Henceforth, it was agreed during the Ad Hoc Committee’s meetings that the Rome Statute should incorporate a detailed

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191 Schabas, above n.91, 14.
192 More about this will be discussed in chapter 4.
193 Schabas above n.91, 16.
194 ibid.
195 See article 17 of the Rome Statute.
definition of crimes together with general principles derived from the Nuremberg Principles and other substantive matters.

Many delegations to the Ad Hoc Committee affirmed their position that the ICC should be of the highest standard of justice, and that all subject matters be incorporated in the Rome Statute rather than subject to the interpretation of the judges. It was expected that the work of the Ad Hoc Committee would lead to the convening of a diplomatic conference to adopt the Rome Statute. Ultimately, the General Assembly first established a Preparatory Committee to continue the work of the Ad Hoc Committee.

The Zutphen Draft

The Preparatory Committee held two three-week sessions in 1996 that resulted in the submission of a proposal for substantial amendments to the draft Statute of 1994. They met again in 1997, for three sessions that were punctuated by informal inter-sessional meetings held in Zutphen, the Netherlands, in January 1998. These inter-sessional meetings were important, as they produced a consolidated draft of the proposals, known as the Zutphen draft, which was later submitted for consideration at the Diplomatic Conference.

The Zutphen draft maintained only few provisions from the original ILC draft Statute. It now contained 500 additional proposals and amendments.

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196 Along with the task to draft a statute of criminal court, in the late 1940s UNGA also instructed the International Law Commission to formulate what became known as the Nuremberg Principles; this task was completed in 1950. The principles began with a declaration that ‘any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment’. See United Nations Website, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf> (5 May 2014).

197 Schabas, above n.91, 16.


199 Schabas, above n.91, 17.

200 ibid.

201 ibid. The Zutphen draft used the draft Statute of 1994 as its basis, and it was reworked at the final session of the Preparatory Committee.

covering 116 articles in 173 pages, with 1,300 bracketed optional words, sentences and clauses. However, at this stage, issue of the complementarity principle under the system of the future ICC had been resolved during meetings of the Preparatory Committee. The challenge was for the Rome Conference to keep this issue from being renegotiated.

**The Rome Conference**

On 28 January 1998, the General Assembly adopted Resolution No. 52/160 calling for the convening of the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (‘Rome Conference’) in Italy from 15 June-17 July 1998. One hundred and sixty states participated – the highest number for all UN codification conferences, which reflected the gravity of the subject matter. The resolution also created a trust fund to provide financial assistance to 35 delegates from 33 of the least-developed countries and 19 delegates from developing countries to attend the negotiations.

During the Rome Conference, a number of caucuses of states were formalised, including the 'like-minded caucus', the non-aligned movement (NAM), Southern African Development Community (SADC) and Arab Islamic States (AIS) caucuses. Each took a specific position during the Rome Conference: The NAM caucus was very active in arguing for the inclusion of crimes of aggression within the core crimes of the ICC; the SADC caucus was very well-positioned for human rights issues as a logical consequence of the post-apartheid era in Africa; and the AIS caucus insisted on the prohibition of nuclear weapons and the inclusion of the death penalty.

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204 Schabas, above n.91, 17.
205 UN Doc. A/RES/52/160.
206 Lee, above n.12, 9.
207 ibid.
However, the like-minded caucus was the largest grouping, with more than 60 states. It took several positions that were ‘substantively at odds with the draft Statute of 1994 and in conflict with the conception of the [ICC] held by the permanent members of the UN Security Council’: the inherent jurisdiction of the ICC over the core crimes of genocide, war crimes and crimes against humanity; the elimination of the UN Security Council veto on prosecutions; the establishment of an independent prosecutor with the power to initiate proceeding proprio motu; and the prohibition of reservations to the Statute.

During the Rome Conference, there were two most important bodies: the Committee of the Whole, chaired by Canadian Ambassador Philippe Kirsch, which was responsible for the adoption of the draft Statute; and the Drafting Committee, chaired by M. Cherif Bassiouni, which was responsible for ensuring ‘consistency of the drafting and all the language throughout the Statute, without altering the substance emerging from the Committee of the Whole’.

As the task to examine the Zutphen draft was overwhelming, the Committee of the Whole allowed several ‘informal working groups’ and ‘informal-informal working groups’ to meet at different times and places throughout the Food and Agriculture Organization (FAO) building to discuss specified tasks, such as general principles, procedures, penalties and final clauses.

Since the nature of the groups’ work was to seek consensus and proposals that could not meet this objective were dropped. After a week, the working groups began to provide reports to the Committee of the Whole about provisions that had already met with agreement. These were then scrutinised by the Drafting Committee for ‘terminological and linguistic coherence in various official language versions of the Statute’. However, the Drafting Committee had received a wide range of incomplete articles from the

212 Kirsch, above n. 19, 451.
213 Ibid.
214 Schabas, above n 91, 19; Bassiouni above n.203.
215 Bassiouni, above n 203. As a consequence to this approach, provisions were discussed by working groups in ‘bits and pieces with varying degrees of specificity as to content and consistency’.
216 Schabas, above n. 91 , 20.
Committee of the Whole at different times, making its work very daunting. Bassiouni stated:

...the Drafting Committee would receive paragraph 2 of article x and paragraph 3 of article y, while the remaining paragraphs of these articles arrived a week or two [weeks] later. Never during that process did anyone have a comprehensive view of the whole, except perhaps for the Drafting Committee in the last week of the conference.

On the final day of the conference, delegates finally agreed to support ‘packaged deals’ and resisted any attempt to stall or alter this achievement. When the Committee of the Whole presented the final proposal for adoption, India and the United States attempted to call for amendments. India proposed the removal of provisions allowing the UN Security Council to refer situations to the ICC, as well as the power of the Council to defer investigation of the ICC, and the inclusion in the list of war crimes of the use of nuclear and other weapons of mass destruction.

On the other hand, the United States attempted to limit the ICC’s jurisdiction to cases where the States already accepted the ICC’s jurisdiction, excluding those that had not accepted it. Addressing these developments, Norway made a procedural motion under rule 25 of the conference’s Rules of Procedures calling for no action to be taken to address these situations in order to preserve the ‘delicate balance and of avoiding a vote on the substance of the subject matters’. On India’s proposal, a motion of no action was supported by Malawi and Chile and eventually adopted by a vote of 114 to 16 with 20 abstentions; as for the United States’ proposal, a motion of no action was adopted by a vote of 113 to 17 with 25 abstentions.

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217 Bassiouni, above n 203, xxv-xxvi. Bassiouni also explained that ‘the Drafting Committee did not receive Part 2 of the Statute and some of the final clauses before these provisions were being negotiated until the very last day of the Rome Conference. Political consultations were still going on concerning these articles until late on Thursday, 16 July 1998…[t]he delegations had scant opportunity to review the entire text or to access the interrelationship between its various parts and between provisions of connected subject-matter…. only those who had worked on specific provisions of the statute knew what was intended and only those who worked on the Drafting Committee and the Bureau of the Committee of the Whole had a comprehensive understanding of the statute’.

218 Schabas, above n 91, 20.
219 Lee, above n 12, 24-5.
220 ibid.
221 ibid.
222 ibid.
High hopes that the Rome Statute could be adopted by consensus on the final day diminished as the delegation from the United States was still trying to influence the conference, demanding a non-recorded vote to be taken. The Statute was adopted by a vote of 120 to 7 with 21 abstentions on 17 July 1998. The United States, Israel and China were amongst those against adoption, and several Arab and Islamic states as well as delegates from the Commonwealth Caribbean were amongst the abstainers. However, the text of the adopted Rome Statute contained a number of minor errors especially of a technical nature. Two attempts to rectify the English version of the Statute were made in 1998 and 1999.

Although it had opposed the adoption of the Statute, the United States remained involved with the preparation of the ICC as a member of the Preparatory Commission. Ambassador David Scheffer, former US Ambassador at Large for War Crimes Issues (1997-2000), who led the US delegation in Rome, wrote: 'we worked very hard...in 1999 and 2000 to address our remaining concerns about the Rome Statute, and the US voted in favour of the Rules of Procedure and Evidence and the Elements of Crimes'.

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223 Schabas, above n 91, 20.
224 The Conference also adopted a Final Act to establish a Preparatory Commission charged with the establishment and coming into operation of the ICC, including preparing draft texts in eight areas: i) rules of procedures and evidence; ii) elements of crimes; iii) a relationship agreement between the ICC and the UN; iv) basic principles of the headquarters agreement with the Netherlands; v) an agreement on privileges and immunities; vi) financial regulation; vii) the first budget of the ICC; and viii) the rules and procedures of the Assembly of State Parties. The Commission was also charged with preparing a proposal for the definition and elements of crimes of aggression. It was to report to the Assembly of States Parties of the ICC, after which it would be disbanded. During its work, the Commission held ten sessions and concluded in July 2002, as the Rome Statute entered into force. However, the Commission did not actually dissolve itself until September 2002. See S. Rama Rao, 'Financing of the Court, Assembly of States Parties and the Preparatory Commission' in Roy S. Lee (ed), The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results (Kluwer Law International, 1999) , 417.

States Addressing the Rome Conference

In addressing the Conference, proponents of the ICC claimed it had achieved the greatest progress in the history of international criminal justice.229 Another scholar, Lee,230 highlighted that the main task of the Rome Conference to adopt the Rome Statute was nearly impossible, as the conference was given only five weeks to negotiate the whole 128 articles containing more than a thousand brackets that were 'diametrically opposed'. Lee congratulated all delegations that finally agreed to adopt the Statute and considered the adoption as a big achievement.

In contrast, some delegations professed dissatisfaction and declared the Statute to be imperfect.231 Critics232 elaborated that the Rome Statute performed only on paper, and many obstacles were obvious in the Statute itself, such as requiring ratification by 60 states, the role of the UN Security Council in assigning situations and suspending the ICC's activities, the limited enforcement powers given to the ICC, the heavy reliance on states' cooperation, the failure to include weapons of mass destruction in its definition of core crimes and the failure to adopt a jurisdictional power reflective of universal jurisdiction. Moreover, some asserted, that the Statute only reflected 'current political forces in the international community'.233

In addressing the Rome Conference, an Indonesian representative made the following statement:234

Indonesia had from the outset attached great importance to the establishment of an international criminal court and had participated actively in the achievement of that goal in the meetings of the Preparatory Committee and at the Rome Conference. Its delegation had always considered that the Statute should fully comply with the principle of international law governing relations between States. It was also of the view that the Statute should be a product of mutual cooperation among all nations, irrespective differences in political, legal

230 Lee, above n 12, 13-5.
231 Ibid., 26.
233 Ibid.
234 Lee, above n.12, 600. Also see A/C.6/53/SR.12 for Indonesia’s position toward the Rome Statute.
or social systems, and that it should scrupulously respect the principles of States sovereignty, territorial integrity and non-interference in the internal affairs of States. Its delegation had also emphasized how important it was for the Court to be impartial and devoid of political influence of any kind, including by the Security Council.

It was not the occasion for a detailed analysis of the Statute. Its delegation, for its part, would carefully examine all provisions in accordance with those basic precepts, in particular the elements within the Statute relating to the jurisdiction of the Court. It must be remembered in that regard that the Court was complementary to national courts.

At every stage of the deliberations, Indonesia had attached great importance to achieving consensus and guaranteeing the universal character of the Court. For that reason, it deplored the fact that it had been necessary to resort to voting. It was its fervent hope that a spirit of cooperation would prevail in the work of the Preparatory Commission, whose deliberations were all the more important in that it had been entrusted with heavy responsibilities.

For the purpose of this thesis, several key words mentioned in the above statement resonate; constituting continued concerns identified by Indonesian stakeholders regarding the Court: state sovereignty, political influence and role of the UN Security Council. These themes are picked up further in Chapter Four in the context of stakeholder interviews.

**The Functioning of the ICC**

Russia and China, two members of the permanent five of the Security Council, expressed interesting position as follows. These countries' position are relevant with this thesis, as it will illustrate resistance from two other permanent countries of the Security Council outside the United States.

Russia\(^{235}\) signed the Rome Statute in September 2000. By 2003, the discussion on whether the Statute was inconsistent with the Russian Constitution had escalated to its Cabinet. In 2004, Russian President Vladimir Putin hinted at his plan to move the Rome Statute's ratification bill to the Parliament in 2004. However, in November 2016, Russia formally withdrawing its signature as a response to the ICC's report that suggest Russia's annexation to Crimea may classify as occupation.\(^{236}\)

\(^{235}\) Schiff, above n 111, 169.

On the other hand, China\textsuperscript{237} adopted ‘an open attitude ...[to] the actual performance of the [ICC]...[China would also] continue to adopt a serious and responsible attitude to follow carefully the progress and operation of the [ICC]’. The Chinese government argued\textsuperscript{238} that some provisions in the Rome Statute did not reflect the interest of many countries in the world. It emphasised that not all countries were involved in the negotiations over key articles, as some articles were negotiated behind closed doors and were circulated only at the last minute before the vote. It argued that the final text of the Rome Statute ‘was riddled with deficiencies that should have been remedied’.\textsuperscript{239} More importantly, China asserted that several articles defining the ICC system posed serious problems; specifically, article 12 and its potential conflict with articles 11, 15, 17 and 124.\textsuperscript{240} Conflict between article 12 and article 124 of the Rome Statute had been discussed earlier in Chapter 1.

**The United States and the Security Council**

Schabas argues that ‘even prior to entry into force, it became increasingly clear that a showdown was looming between the United States and the ICC’.\textsuperscript{241} At first, the United States showed willingness to join the Rome Statute as long as the prerequisite for the ICC to work under the auspices of the UN Security Council was guaranteed. Tracing back to 1994, when the ILC submitted its draft Statute, the United States was well inclined to the draft. According to Schabas, this was because that the draft Statute of 1994 envisaged the ICC working within the Charter of the United Nations and put the ICC as subordinate to the UN Security Council.\textsuperscript{242} Ambassador Scheffer affirmed this perception. He considered that the 1994 draft Statute accommodated more US objectives than the adopted Statute. He also stressed the importance of the UN Security Council’s role in peace

\textsuperscript{237} Lee above n.12, 582-6. Also see A/C.6/53/SR.9 for China’s position on the Rome Statute.
\textsuperscript{238} Ibid.
\textsuperscript{239} Ibid.
\textsuperscript{240} At this point, the Chinese government’s position is one of the supporting arguments that helped the author formulate this study’s research questions later on.
\textsuperscript{241} Schabas above n. 91, 24.
\textsuperscript{242} ibid., 25.
maintenance, especially on the need to identify aggression under chapter VII of the UN Charter. During the Rome Conference, with increasing resistance by a majority of states to this conception, the United States became aggressive and put so many safeguards within the Rome Statute that one may consider it as a political intrusion into the system of the Rome Statute. At the end of the Rome Conference, the United States resisted the Rome Statute on pragmatic, principled and constitutional grounds.

The United States signed the Rome Statute on the last day of the signing deadline. Despite its resistance towards the Rome Statute, the United States opted to sign with several considerations: to ensure the ongoing influence of the United States during negotiations, to allow national judges and prosecutors to make positive assessment towards the Rome Statute, and to progress the role of the United States in the international justice arena.

**Domestic Pressure in the United States**

President Clinton's administration was divided on the issue of the Rome Statute. Some members, including Ambassador Scheffer and President Clinton himself, felt that it was still workable to fix the Rome Statute to the point that it could eventually be supported by the United States. However, the political situation at the domestic level was not very conducive to such a process at that time. The Senate Foreign Affairs Committee harshly criticised the ICC. Republican Senator from North Carolina Jesse Helms, Jr., who served as the

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244 Schiff, above n 111, 170.
245 ibid.
246 Schabas, above n 91, 26-7.
248 Schiff, above n 111, 173. It was cited that President Clinton was actually a supporter of the ICC, and wanted to continue US participation in the preparatory process in the hopes that a workable solution could be achieved to ease US entry to the Rome Statute.
249 Schabas, above n 91, 27. From various statements, it can be inferred that Ambassador Scheffer had a forward-looking approach to US engagement with the ICC. He had maintained a positive attitude during his involvement in many events, such as the US participation in the Preparatory Committee, which resulted in support from the US government towards the ICC’s Rules of Procedure and Evidence and Elements of Crimes. However, at the Rome Conference, with deep regret, he was ‘positioned’ to veto the Rome Statute. With the change of administration in 2001, Ambassador Scheffer left the State Department and took a public position of encouraging the government to ratify the Rome Statute.
Chairman of the Senate Foreign Affairs Committee, declared that ‘should the [Rome Statute] be submitted to his committee, it would be dead on arrival’. 250

The Congress occupied Clinton’s administration in countering internal attacks. In fact, domestic insurgence actually prevented Clinton’s administration from taking the Rome Statute to the Senate for ratification. 251 On 29 June 1999, the Protection of United States Troops from Foreign Prosecution Act was circulated at the House of the Representatives but failed to pass, as the Clinton administration strongly challenged it. 252 Similarly, in June 2000, the American Servicemembers Protection Act (ASPA), which was intended to prevent cooperation with the ICC and authorise the President of the United States to use all means necessary to release US nationals from ICC custody, was introduced; but this, too, failed to pass. 253

**Shifting Courses in the United States’ Policy towards the ICC**

In January 2001, the Bush administration took office and the relationship between the United States and the ICC became more overtly antagonistic than ever. In May 2001, another version of the ASPA came before both the House and the Senate; but as the United States had by this stage signed the Rome Statute, it was bound by the Vienna Convention on the Law of Treaties (VCLT) to refrain from any actions adverse to the purpose of the Rome Statute. Consequently, this version of the ASPA also failed to pass. 254

The Bush administration then approached the UN Secretariat to determine the feasibility of revoking the US signatory status on the Rome Statute. 255 The administration invoked article 18 (a) of VCLT as the basis to do so, 256

250 Schiff, above n 111, 172.
251 ibid.
252 ibid.
253 ibid.
254 ibid., 173.
255 Schabas, above n 91, 27.
256 Article 18 (a) of VCLT reads: ‘A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a
sending a letter dated 6 May 2002 to the UN Secretary General, as the depositary for the Rome Statute, that read:257

this is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, that the United States does not intend to become party to the treaty. Accordingly, the United States has no legal obligation arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to the treaty.

The act of un-signing the Rome Statute was only the beginning of further aggressive attempts by the US to undermine the ICC.258 A month later, in June 2002, there was another attempt to adopt the ASPA. This time, it gained strong support and passed in August.259 This version of the ASPA had been expanded in coverage, and it now allowed the President to waive and implement certain measures on the basis of national interest and security. Each version of the ASPA had been designed to influence US cooperation with the ICC in the Hague; thus it was also colloquially known as the ‘Invade the Hague Act’.260

The Bush administration further believed that some flaws existed in the Rome Statute that would adversely affect the Rome Statute system and the functioning of the ICC in delivering justice. This notion was apparent in a statement by then-Secretary of State Colin Powell, ‘Demarche on the US Government Policy on the International Criminal Court from Secretary of State to Ambassadors, 2002’:261

The U.S. position is that the Rome Statute is ill conceived and that it contains many significant defects. The ICC threatens principles of national sovereignty, is very likely to be susceptible to political pressures and creates potential for conflict with the UN Charter... The United States cannot accept an unaccountable international prosecutor empowered to investigate individuals with minimal oversight... This lack of positive political control over the ICC will ultimately erode confidence in the rule of law and detract from the international community's ability to deal with war crimes effectively.... The U.S. government supports justice, but not the seriously flawed ICC. We believe our policy on the ICC is consistent with the history of our policies on human rights, the rule of law and the validity of democratic institutions.

257 Schabas, above n 91, 27. This act of un-signing the Statute was then taken by Israel.
258 ibid.
259 Schiff, above n 111, 173-4.
260 ibid., 174.
Obama’s Administration

Under Obama’s administration, the United States shifted its position towards the ICC. In fact, during his presidential campaign, Obama already hinted that he would seek a more cooperative relationship towards the ICC.\(^{262}\) In April 2008, three organizations: the Enough Action Fund, the Save Darfur Coalition and the Genocide Intervention Network conducted a questionnaire to presidential candidates on Darfur crisis. When asked about the ICC, Senator Obama responded that ‘the [ICC]’s actions are a credit to the cause of justice and deserve full American support and cooperation’.\(^{263}\) However, he also commented that the ICC is a young institution and it would be premature to consider that the United States to join.\(^{264}\)

Throughout Obama’s terms, support for international justice was increased. Financial support was donated through UN member contributions and voluntary donations. Under its May 2010 National Security Strategy, US policy towards the ICC was follows: ‘...although the United States is not a party to the ICC’s Statute, the Obama administration has been prepared to support [the ICC’s] prosecutions and provide assistance in response to specific request from the ICC prosecutor and other court officials...’\(^{265}\)

Harold Koh, Legal Adviser to the United States Department of State on the occasion of Annual Meeting of the American Society of International Law in Washington DC, March 25\(^{th}\) 2010, conveyed the message that the United States, under Obama’s administration will act as a ‘valuable partner and ally’\(^{266}\) to the ICC in promoting international justice. He also mentioned that the Obama’s administration ‘has been actively looking at ways that the U.S can, consistent with U.S law, assist the ICC in fulfilling its historic charge of providing


\(^{263}\) Ibid., 451.

\(^{264}\) Ibid.

\(^{265}\) US Department of State, Office of Global Criminal Justice <https://www.state.gov/j/gcj/icc/> (15 December 2015)

justice’.\(^{267}\) Under Obama’s administration, the United States, for the first time since the establishment of the ICC, conducted positive engagement with the ICC.\(^ {268}\) Indeed the United States attended the Resumed 8\(^{th}\) Session of ICC Assembly of States Parties in New York in 2010 and participated in Kampala Review Conference 31 May-11 June 2010 as an observer.\(^{269}\)

At the Kampala Review Conference, the United States made two commitments.\(^ {270}\) First, the United States pledged to help non-member countries to the ICC to improve their legal infrastructure so that they are able to prosecute war crimes, crimes against humanity and genocide domestically.\(^{271}\) Additionally, the United States also pledged to cooperate with the ICC to bring the Lord’s Resistance Army leaders to justice.\(^ {272}\)

The United States’ support for the ICC continued in 2013 when Congress passed legislation\(^ {273}\) to expand the State Department’s longstanding ‘rewards for justice’ program. This program allows the Department of State to permit the payment of reward for information leading to the arrest or conviction of individuals who have been indicted by certain international criminal tribunals.\(^ {274}\) On April 2013, following the call to arrest and transfer Joseph Kony of Uganda to the ICC, the Obamas administration offered a reward of total $5 million for information that help the arrest, transfer and conviction of Kony, who has been charged by the ICC with war crimes and crimes against humanity.\(^ {275}\)

\(^{267}\) Koh above n. 266.


\(^{269}\) ibid.


\(^{272}\) Ibid.


\(^{274}\) Ibid.

Despite the growing positive trend that the Obama administration showed to the ICC, the Obama administration did not present the Rome Statute for ratification, though this failure might be attributed to domestic restrictions created under the previous administration. Accordingly, another note that this thesis needs to highlight is that during Obama’s administration, the United States still continues the practice of retaining exclusive jurisdiction towards its personnel. This policy is apparent when President Obama issued certification to U.S personnel that participate in UN Multidimensional Integrated Stabilization Mission in Mali (UNMISMM) in September 26, 2014, which reads as follows:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and consistent with section 2005 of the American Servicemember’s Protection Act of 2002 (22 U.S.C. 7424), concerning the participation of members of the Armed Forces of the United States in certain United Nations peacekeeping and peace enforcement operations, I hereby certify that members of the US. Armed Forces participating in [UNMISMM] are without risk of criminal prosecution or other assertion of jurisdiction by [the ICC] because the Republic of Mali has entered into an agreement in accordance with article 98 of the Rome Statute preventing the ICC from proceeding against members of the Armed Forces of the United States present in that country.

The Trump Administration

The promising trends reflected by the United States' re-engagement policy towards the ICC under the Obama Administration may be set to change yet again under the Trump administration. In January 2017, the new elected President Trump held a press conference stating that his administration is preparing an executive order that will significantly reduced the United States' participation in the United Nations. Basically, the United States has expressed the intent to reduce financial support to international organizations, including the United Nations and the ICC.


Under the draft executive order, President Trump instructs the establishment of International Funding Accountability Committee (the Committee) to prepare a comprehensive report of all-current and expected United States’ funding designated for support of the United Nations, its related agencies and any other international organization. This is to include a recommendation of at least a 40% overall decrease in the amount of annual funding of voluntary contributions. The executive order also tasks the Committee to examine the ICC for the purpose stipulated therein.

President Trump's approach towards the ICC might raise concern for Indonesia and the implications of this policy to the power of the Security Council to refer situation to the ICC. Article 115(b) of the Rome Statute states that one of the sources of the ICC funding is from the United Nations as a consequence of the Security Council’s referral. Although no exact wording is provided to oblige the United Nations to pay for expenses coming out of the Security Council’s referral, this was exactly what the drafter of the Rome Statute intended. Reisman also states that, during the Preparatory Committee negotiation on the Rome Conference, general sentiment among the delegations was that the United Nations to bear expenses should the Security Council refer a situation to the ICC.

Given the budgetary and financial limitation that the ICC has been facing, with increasing numbers and demands for investigations and prosecutions, President Trump’s policy is a serious concern for the ICC, or at least for Indonesia. Two UN Security Council resolutions, Resolution 1593 (Darfur) and Resolution 1970 (Libya), have been made in the past and both resolutions prohibit funding to the ICC despite referral of situations to the ICC. This precedence coupled with President Trump’s policy will certainly generate further distrust for Indonesia and may continue to influence its willingness to

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280 Ibid.
join the ICC in the near future. These themes are taken up further in the following Chapter.

Indonesia has expressed apprehension with article 13(b) and 16 of the Rome Statute on the power of the Security Council to refer and to defer a situation to and from the ICC. At the Rome Conference, the Indonesian delegation stressed the need to assess the operation of the Rome Statute before joining. Should in the future the United States choose to influence the Security Council to exercise its power to refer a situation to the ICC, how could Trump's new policy impact the work of the ICC? One must not forget that the ICC's funding mechanism only attributed from state parties, voluntary and the United Nations' contribution.\(^\text{281}\) This chapter will not elaborate more on this issue but more about allocating UN funds for an ICC referral will be discussed later in chapter 4.

**Conclusion**

The ICC is now established. The United States, which once was an antagonist, as shown in this brief history of efforts towards international criminal institutions, has not maintained a consistent policy in that regard. From its embryo in 1919 through to the current administration under President Trump, the United States has sent a mixed signal to the international community, especially to non-member states to the Rome Statute. It is yet clear what will be the policy of the United States towards the ICC under the new administration.

Initial gestures from Trump's administration is threatening. Beside the establishment of an International Funding Accountability Committee, the nomination of John Bolton in early 2017, previously a great opponent to the ICC, as a potential National Security Adviser was alarming. We cannot predict how the United States will use the Security Council for its advantage.

Accordingly, even though Obama’s re-engagement to the ICC during his term of 2009-2017 gave hope to supporters and non-member states to the ICC, Collin Powell’s demarche document in 2002 is a bad sign. It is a living document that

\(^{281}\) Article 115 & 116 of the Rome Statute.
may still be used as reference by the current administration of the United States to act against the ICC. This is an aspect that may also give influence to Indonesia’s decision to join the ICC. On this note, exploring Indonesia’s perspective is timely, as shall be made on the next chapter.
Chapter 4

Obstacles to Ratification: Indonesia as a Case Study

Indonesia adopted its first National Plan of Action on Human Rights ("National Plan") in 1998. However, the plan to ratify the Rome Statute was only raised within the second (2004-2009) and third (2011-2014) National Plans. Notably, the current National Plan (2015-2019) adopts a new approach. The fourth National Plan identifies a need for national consensus between ministries and relevant stakeholders, as well as calling for the preparation of an academic paper on each international instrument recognized in the National Plan as warranting consideration for ratification, including the Rome Statute.

It has been more than ten years since the first mention of the Rome Statute within the second National Plan, yet Indonesia still remains a non-member state to the ICC. Indonesia may still need time to measure the consequences before deciding to join the ICC. In chapter 1, we examined the argument made by Valerie Toon that some Southeast Asia countries are adopting a wait-and-see approach before deciding to join the ICC. This makes it relevant to examine as a case study the reasons why Indonesia, among other Southeast Asia countries, is still reluctant to join the ICC.

Using a structured interview method, I was able to conduct interview with several senior decision-makers in Indonesian government circles who had

286 In Indonesia, the sponsoring institutions in a treaty ratification process are obliged to prepare several documents, one of which is an academic paper to be presented and discussed during inter-ministerial meetings. See article 12 of Regulation No. 24/2000 on Treaties.
either worked in the past on or are currently engaged in preparations for Indonesia to join the ICC. I conducted interviews with practitioners, academics and representatives of civil society whose work concerns international criminal law. These interviews gave me insight into their attitude towards the ICC and matters that remain as obstacles for Indonesia, and maybe for other Southeast Asia countries, to become parties to the Rome Statute.

For this reason, this chapter will address the following. First, it outlines research approach adopted for the purpose of identifying obstacles that still prevent Indonesia joining the ICC. Second, it will summarize the outcomes of the interviews in terms of the questions posed, and note spontaneous points raised by the interviewees. Third, it will analyze the outcome of the interviews and fourth, reflect on key findings of the interview – being the importance of article 13(b), 16 and 98(2) of the Rome Statute as implied by most interviewees. Finally, this chapter will conclude that a joint committee between the ICC’s Assembly of States Parties and the UN General Assembly that chapter 1 proposes is relevant for mitigation of Indonesia’s concern and perhaps those of other Southeast Asian countries too.

I. Research Approach

I work at the Indonesian Ministry of Foreign Affairs (“MoFa”) and prior to this thesis, dealt with ratification of treaties by Indonesia. In my observation, academic literature on the ICC and Indonesia is virtually non-existent. The relevant literature in Indonesia consists mostly of general introductions to international criminal law/humanitarian law, the ICC and the Rome Statute, or the Indonesian Human Rights Court. It does not include an assessment as to why Indonesia has been reluctant to join the ICC.

There are several articles that discuss Asian countries and the ICC, such as Valerie Toon’s article as discussed in Chapter 1 and articles by Steven Freeland\textsuperscript{287} and Mooto

Noguchi. 288 However, a specific literature on the relationship between Indonesia and the ICC is lacking. Thus, this thesis will try to fill the gap by taking advantage of my background as government official who has dealt with treaties ratification in Indonesia.

More importantly, to better understand factors that may serve as obstacles for Indonesia in joining the ICC, I will elaborate insights arising from my prior interactions with many Indonesian government officials. From this interactions, some obstacles are pre-identified. First, one issue that often rose in many inter-ministerial discussions in Indonesia was that the United States is a non-state party to the Rome Statute. Some worry that the United States might abuse its membership status at the Security Council and use the ICC as an extension of its power. Second, some officials consider that several articles in the Rome Statute were drafted to protect the United States' interest in a manner that may influence the work of the ICC – a phenomenon this thesis terms political intrusion. Third, the linkage between the ICC and the Security Council is often seen as a threat to state sovereignty.

This is in line with the Indonesian delegation's statement in addressing the Rome Conference discussed in chapter 3. This highlighted the three key aspects that are so important for Indonesia in deciding whether to join the Rome Statute, namely: state sovereignty, political influence and role of the UN Security Council. 289

These insights reflected the Indonesian government's position toward the ICC five to ten years ago. In order to see whether they are still relevant, I needed to investigate further. For this purpose, a qualitative research method was used. This was to ensure that “all respondents are replying to the same questions...[that] leads to comparability...”. 290 My intention is to compare responses of the interview participants whose insights are derived from different areas of expertise.

289 Lee, above n.12.
**Question Design**

In order to test the hypothesis mentioned in chapter 1, four major interview questions were formulated as follows:

a. Do you think current relationship between the ICC and the Security Council is ideal for the ICC to fulfill its mandates?

b. Do you think Indonesia is ready to accept the Rome Statute?

c. Do you agree with argument that some Asian countries are in a status of wait-and-see towards the ICC?

d. What do you think about the Kampala Review Conference?

During the interviews, these four questions were then elaborated upon as needed. The full list of the interview questions are set out in Annex I. Note that question on Kampala Review Conference was to obtain insight on how interviewees perceive crimes of aggression under the Rome Statute. It relates to discussion of article 13(b) and 16 of the Rome Statute, as the Security Council shall have the authority to refer and defer a situation of crimes of aggression to the ICC once it is activated later in 2017. However, for reasons of space, this thesis will not address the crime of aggression.

**The Interviews**

Prior to interview, the author presented a paper on issue of Indonesia and the ICC to an audience led by former Vice Minister of Foreign Affairs of Indonesia, Dino Patti Djalal. The intention was to gain insight directly from the Vice Minister on how he perceived the Indonesia-ICC relationship.

One interesting insight arose when an audience member observed that not all permanent members of the Security Council, especially the United States had joined the ICC. The former Vice Minister also asked whether the ICC could touch upon past crimes in Indonesia. These questions are important to this chapter as they add insight as to how stakeholders in Indonesia perceive the ICC. These
questions are also relevant to some responses of the interviewees outlined below.

The interviews were conducted between 5 September to 4 December 2014 in Indonesia. Interviewees included people from the Indonesian Ministry of Foreign Affairs, Ministry of Legal Affairs and Human Rights, the Indonesian Military, Academics and Non-Governmental Organization.

Interviews were recorded and participants were given permission letters and consent forms to sign. All interviews were conducted at relevant participant’s office, except in one instance where the interview was conducted at the lobby of a hotel in Jakarta, Indonesia. Some interviewees asked for certain comments to remain confidential and not to be quoted in certain circumstances, such as in conjunction with naming a person or institution or event in Indonesia. These confidentiality requests have been adhered to in the reportage of the interview outcomes set out below.

To conduct interviews, I distributed around forty invitations to potential interview subjects. These included invitations to foreign embassies in Jakarta - Indonesia, Members of Parliament, the Indonesian Ministry of Defense, the Indonesian Ministry of Legal Affairs and Human Rights, the Indonesian Military, Police Force, Indonesian academics and Non-Governmental Organizations.

At the end of the fieldwork, I was able to conduct interviews with nine people as follows:

a. Professor Hikmahanto Juwana – former Dean of Law School of the University of Indonesia and expert in International Law. Formerly, in 2014, Hikmahanto was one of the candidates for the position of Minister for Foreign Affairs of the Republic of Indonesia. He often participates, and provides legal opinions, within inter-ministerial meetings in Indonesia, including on the subject of the ICC;
b. Muhammad Anshor – current Director General for America and European Affairs of the MoFA. In 2014, he was Director for Human Rights and Humanitarian Affairs, Directorate General of Multilateral Affairs of the MoFA;

c. DR. Iur. Damos Dumoli Agusman – current Secretary to the Director General of Law and International Treaties of the MoFA. In 2013, he was former Director for Economic, Socio and Cultural Treaties that dealt with treaties ratification;


e. Rizal Yasma – Colonel in the Navy, current Head of Law and Human Rights Department of the Legal Development Agency of the Indonesian Military;

f. Dahana Putera – current Division Head for Public Legal Administration and Human Rights on Regional Office of Special Administration of Jakarta of the Indonesian Ministry of Legal Affairs and Human Rights. He has been the focal point for the National Plan since 2012;

g. Fadillah Agus – Founder and Partner at FRR Law Office, a private legal firm acting in areas of humanitarian and international criminal law. FRR law office is also member to the Indonesian Coalition Civil Society for the ICC;

h. Diajeng Wulan Christianty – Researcher and Lecturer at Padjajaran University. Christianty often participates and provides legal opinion to inter-ministerial meetings on issue of humanitarian law;
II. Key Findings

This section will highlight points that were raised by interview subjects. These points will then be discussed in the following section of this chapter. The grouping of key findings is based on four major questions prepared for the interviewees as mentioned above. A full report of the interview is available as annex to this thesis.

Highlights from the Interviews

a. Relationship between the Security Council and the International Criminal Court

One interviewee considered the Security Council might complement the work of the ICC in certain ways, whilst the majority considered the link between two organizations is less than ideal. Most interviewees were concerned that the United States has not yet joined the ICC. However, one interviewee suggested that there could be ways in which the ICC could benefit from the link with the Security Council. Highlights from the interview are as follows:

Jaelani argued that every country should able to make best use of the Security Council. He also argued that there is no guarantee that an ICC fully detached from the Security Council would make the ICC free from politicization.

Agus commented that the ICC should be fully independent. He considered the link between the ICC and the Security Council as obstacle for countries in joining. He also considered necessary for the Security Council not be given power to
refer or defer a situation to and from the ICC. He questioned the fact that the United States seems immune from the ICC.

*Hikmahanto* contended the link between two institutions is not yet ideal as not all permanent members of the Security Council have joined. He took this position in many inter-ministerial meetings that he attended. He mentioned that the United States is not a party to the Rome Statute and mentioned the need to assess the implication of article 98 agreements concluded between the United States with so many countries.

*Dahana* stated that the Security Council could influence the work of the ICC. He added that the Security Council could hand pick cases. He also mentioned the need to limit the power of the Security Council in the work of the ICC. Further, he added that the United States is not yet a party to the Rome Statute.

*Anshor* considered the link between the ICC and the Security Council as necessary but not ideal. He added that it might be ideal if the Security Council could be reformed.

*Diajeng* commented that the ICC should be fully independent from the Security Council. She added that Indonesia should wait for all permanent members of the Security Council join the ICC before deciding to join. She stressed the need to review the Security Council referral mechanism.

*Yasma* contended that many articles in the Rome Statute are subject to multiple interpretations. According to him, Indonesia has not yet joined because not all permanent members of the Security Council have joined the ICC, especially the United States. He added that the power of the Security Council to defer a case from the ICC is an act of intervention in the ICC.

*Bawazier* stated that he could accept the role of the Security Council to refer, but not to defer a situation from the ICC. He stated that Indonesia needed to wait until all permanent members join the ICC. He also stressed the importance to monitor the approach taken by the United States to the ICC.
Agusman commented that the relationship is not ideal. He would regret it if Indonesia joined the ICC without the United States being member as well. He added that the United States influence in the Security Council is still strong. He considered the power of the Security Council to refer and defer a situation to/from the ICC needs further assessment. He mentioned the need to have a watchdog body that monitors the Security Council.

b. Universal Status of the International Criminal Court

Indonesia mentioned the importance of the ICC being an institution with universal membership at the Rome Conference 1998 and restated this position again at the Kampala Review Conference in 2010. For the purpose of this chapter, the universal status of the ICC means a situation in which the Rome Statute is widely ratified by countries, including by the permanent members of the Security Council. All interviewees considered that the universality of the ICC is very important.

c. Crime of Aggression

The majority of the interviewees expected that there should be an alternate forum involved in determining the crime of aggression (not the Security Council). Highlights from the interview are as follows:

Jaelani stated that crime of aggression would be an obstacle for the ICC because it overlaps with chapter VII of the UN Charter.

Agus commented that he regretted it if the Security Council have a significant role in determining the crime of aggression.

Hikmahanto stated his wish for an alternative institution other than the Security Council to determine the crime of aggression.
Dahana avoided answering but implied that it was important to consider the interest of peacekeeping operations personnel abroad in addressing the crime of aggression.

Anshor stated his hope for the next conference in 2017 to be able to produce a mechanism that would create confidence in determining crime of aggression. By confidence Anshor meant an alternative institution beside the Security Council should determine the crime of aggression.

Diajeng expected that in the future the international community would have supplementary institution to be given a role in determining crime of aggression. According to her, the ICC, a committee, or other UN organ like the General Assembly could do it.

Yasma also expected that the international community would soon have an alternate forum that is more independent and democratic in determining the crime of aggression.

Bawazier commented that crime of aggression might create constitutional issues for Indonesia.

Agusman argued that it should be for the ICC alone to determine the crime of aggression.

d. Indonesia’s readiness to join the International Criminal Court

Although the majority of the interviewees considered Indonesia is ready to join the ICC, I received the impression that interviewees want to make sure Indonesia would be able to try ICC crimes in its own domestic proceeding. Highlights from the interview are as follows:
Jaelani argued that even though Indonesia is legally ready to accede the Rome Statute, Indonesia still not ready politically. He stated that many people in Indonesia are still cautious with regard to the Rome Statute.

Agus commented on a need to socialize policy makers as to the different nature of the ICC and the Indonesian Court of Human Rights in Indonesia. According to him, people in Indonesia perceive that both institutions are retroactive. He also commented that Indonesia is ready to accede the Rome Statute. He added that ICC crimes have been accommodated in the new draft of the Indonesian criminal code.

Hikmahanto argued that Indonesia should prioritize the independence of member states to prosecute ICC crimes domestically. He stressed the importance for Indonesia to continue legal reform before joining the ICC.

Dahana stated that some people in Indonesia still consider, incorrectly, that the ICC is a court of retroactive jurisdiction. He added that, because of this perception, some people still believe the ICC is able to try past crimes.

Anshor underlined the importance of observing the practice of the ICC before Indonesia joined; in order to see whether there is any politicization or abuse of whole decision making process of the ICC.

Diajeng commented that Indonesia is ready but needs to continue study the Rome Statute.

Yasma commented that Indonesia is ready but needs to improve domestic legislation.

Bawazier noted that Indonesia is ready but needs to reach national consensus on the matter and continue legal reform.

Agusman commented that Indonesia is ready to accede the Rome Statute.
III. Discussion on Key Findings

This section will discuss key findings of the interviews. The discussion on each grouping is as follows:

a. **Relationship between the International Criminal Court and the Security Council**

All interviewees considered the relationship between the ICC and the Security Council is not yet ideal. One notable response came from Jaelani who suggested making the best use of the Security Council. This suggestion is irrelevant in the present context, as there is no means to allow other countries, like Indonesia, any permanent influence over the decisions of the Security Council.

States may only able to influence the decision of the Security Council when they hold a seat as non-permanent members, which is a rotating seat. Additionally, non-permanent members do not hold veto rights. Jaelani's suggestion to make the best use of the Security Council is simply suggesting that countries need to actively engage and lobby the permanent members to influence the decision of the Security Council, which will not guarantee any control over the behavior of the Security Council towards the ICC.

On this note, Anshor suggested to reform the Security Council. This is a long running debate. Countries have raised this issue and attempted reform before but the permanent members will always try to maintain the status quo. This thesis will not attempt to further elaborate this issue.

Interestingly, Bawazier and Yasma consider the deferral role of the Security Council an obstacle for Indonesia in joining the ICC. Yasma contended that this role could be deemed an act of intervention in the ICC. There is a merit in his argument. In order to assess this view, an analysis of Security Council Resolution
No. 1422 will be made later on this chapter\textsuperscript{291}. Quiet similarly, Agus, Diajeng and Hikmahanto also commented that linkage between the ICC and the Security Council is an obstacle for countries to join the ICC. They added that it is better for Indonesia to wait for all permanent members of the Security Council to join the ICC first. Moreover, Hikmahanto, Dhahana, Yasma specifically mentioned that the United States is not a party to the Rome Statute.

\textbf{b. Universal Status of the International Criminal Court}

All interviewees agree that it is important for the ICC to have universal status. It may be too long to wait until this objective is achieved. However, if there was an indication that the ICC was opening its investigations to bigger and more powerful states (even the United States), it might send the signal that the ICC is working impartially; or alternatively, we will need to build confidence building mechanism that will increase the level of trust of the international community towards the ICC. Chapter 5 will discuss a mechanism that might build confidence for countries, especially non-member countries like Indonesia.

\textbf{c. The Crime of Aggression}

Six interviewees, Agus, Hikmahanto, Anshor, Diajeng, Yasma and Agusman raised the need to have alternative institution to determine crime of aggression. This thesis however, will not attempt to answer that question, because Kampala Review Conference in 2010 already bestowed the Security Council’s authority to determine whether an act of aggression has taken place. This thesis will focus more on assessing Diajeng’s suggestion regarding a supplementary institution to determine acts of aggression. Such a supplementary institution will be discussed later in chapter 5.

d. Indonesia's Readiness to join the ICC

All interviewee considered that Indonesia is legally ready to accept the Rome Statute. One interviewee, Agus, suggested that the legal aspect of Indonesia's preparation to join the Rome Statute is not an issue as ICC crimes and elements of crimes under the Rome Statute have already been accommodated in Indonesia's domestic legislation.

However, whether Indonesia is politically ready to join the Rome Statute is still debatable. On this matter, Agus, Anshor and Bawazier stressed the importance of achieving national consensus; which is currently underway under President Joko Widodo's administration. Additionally, Agus stated the need to socialize the ICC in Indonesia; so that people would not get confused between the nature of the ICC and the Indonesian Court of Human Rights. The latter is retroactive and people tend to believe that the ICC is also retroactive. Dahana and another interviewee also shared this opinion, however, the other interviewee asked not to be recorded and be treated anonymously. Interestingly, former Vice Minister for Foreign Affairs, Dino Patti Djalal, at a question and answer session after my paper presentation, asked me about the ICC's retroactivity. It shows that beside the need to achieve national consensus, many people in Indonesia are still cautious as to whether the ICC can operate retroactively or not.

Indonesia might be legally ready to accede the Rome Statute, however, it is still politically cautious as to the implications of joining the ICC. Indonesia achieved its independence through a struggle against the colonial power for 350 years. This makes most Indonesians value national sovereignty very highly. However, as Hikmahanto suggested, Indonesia should continue its capacity building program to prepare for joining to the ICC. It is unfortunate that the United States under the new administration might no longer continue Obama's policy to assist countries in establishing the infrastructure necessary to prosecute ICC crimes. ICC non-member countries that are still considering on improving their legal capacity might now need to find other donors that might support this objective.

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292 See chapter 3.
Interview Conclusions

It seems that Indonesia, and maybe other Southeast Asia countries, may be more inclined to withhold its participation in the ICC. One colonel, one practitioner, one academic, one government official and one influential scholar, who was once a candidate for the position of the Foreign Affairs Minister, all shared the perception that it is better for Indonesia to wait for all permanent members of the Security Council to join the ICC before joining.

This section will conclude that the linkage between the Security Council and the ICC still dominates discussions in deciding whether Indonesia should join the ICC or not. Indeed, this factor might be the most influential factor in the discussion.

More openly, Yasma and Agusman mentioned the status of the United States, as a non-member to the ICC is an influential factor for Indonesia. This confirms the hypothesis laid out in chapter 1, that Southeast Asia countries’ reluctance, especially Indonesia’s, might be driven by suspicion of the privileges accorded to permanent members of the Security Council, particularly the United States, under the current ICC system. This perception coupled with the key finding of chapter 2 and 3 - that the United States has not able to maintain a consistent policy towards the ICC might justify Valerie Toon’s argument that Southeast Asian countries are adapting wait-and-see approach towards the ICC293.

On this note, to further assess the outcome of the interviews, the following section will address three articles that are relevant to the power of the Security Council under the Rome Statute, namely article 13(b), 98(2) and 16.

293 Toon above n. 2.
IV. Analysis of Key Findings

**Article 13 of the Rome Statute**

Article 13 represents the result of a “profound compromise and intense bargaining” made by countries during the Rome Conference between those which wished to see an independent judicial institution, and those which argued such judicial institution should be subordinate to some sort of political control. As a result, not every state was satisfied with the final text of article 13, especially article 13(b) that allows the Security Council to refer a situation to the ICC. Indonesia, in this regard, deplored that the ICC is not fully independent from the Security Council. Similarly, Cherif Bassiouni, Chairman of the Drafting Committee of the Rome Diplomatic Conference to Establish an International Criminal Court, commented “better not to have an ICC than to have it in the service of a political body that has hardly distinguished itself by adherence to the rule of law”.

One of the key issues in article 13 negotiations was determining the role of the Security Council in “the initiation, development and enforcement of ICC investigations, including the type of political, social and financial support the [Security Council] would provide to the ICC”. Initially, as outlined in chapter 3, the International Law Commission envisioned the ICC as subordinate to the Security Council. This was when the United States showed its full support for the concept of an ICC.

In relation to article 13's negotiation, permanent members of the Security Council argued for a strong role for the Security Council and ‘a considerably

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295 ibid.
296 When referring to article 13, *this section means article 13(b)* of the Rome Statute.
297 See Indonesian delegate’s statement in addressing the Rome Conference, in chapter 2.
299 Aloisi, above n. 294.
300 See chapter 3.
circumscribed jurisdiction of [the ICC] whilst opponents of this vision ‘were extremely suspicious of the intention of the [Security Council], whose record of being an impartial and fair institution was ... questionable’. States finally accepted the compromises made under article 13 considering that the Security Council’s referral might fill a gap in the ICC’s jurisdiction. Article 13 was seen to extend the ICC’s jurisdiction over states that are not yet party to the Rome Statute. It can also impose obligations surpassing those derived from the Rome Statute upon both members and non-members of the ICC. One may thus argue that article 13 is important as it creates jurisdiction for the ICC. However, in reality ‘the [Security Council] referral[s] have been less than adequate in supporting the investigations of the ICC ... the technical and financial support to the [ICC] has been non-existent; and ... the [Security Council] has been accused of dispensing referrals selectively’. It has been noted that the Security Council has been very passive in supporting the ICC following referral of a situation. The Security Council has referred two situations, Sudan and Libya, to the ICC. From the date of each referral, the ICC Prosecutor has presented reports to the Security Council on the developments of investigations. However, despite the challenges faced by the ICC in ‘accessing the countries under investigations, the lack of arrest of major criminals indicted, and the lengthy proceedings through which cases are built’, the Security Council has provided no material support.

On 8 June 2017, the ICC Prosecutor made her 25th report on the development of Darfur situation. In her statement, the Prosecutor publicly asked the Security Council to provide tangible support to the ICC. Similarly, on 9 May 2017, the ICC Prosecutor also made her 13th report on situation of Libya and asked for

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301 Aloisi, above n. 294.
302 ibid.
303 ibid., 149.
305 Aloisi, above n. 294, 149.
307 Ibid., 152.
support from the Security Council as well as from UN countries, to arrest and surrender those issued with arrest warrant.\textsuperscript{309} The relationship between the ICC and the Security Council seems to be limited to periodic reports by the Prosecutor to the Security Council. There has been little acknowledgement by the Security Council of the availability of enforcement mechanisms under Charter VII of the UN Charter following non-cooperation by states with the ICC. This lack of enforcement following a Security Council referral coupled with the perception that the ICC is a biased institution not only ‘weakens the ability to improve the application of universal justice, but [also] creates disincentives for other states to ratify the [Rome Statute] or implement legislation that could favour the apprehension and prosecution of [ICC criminals]’.\textsuperscript{310}

The Security Council has referred two situations to the ICC through resolution 1593 (Darfur)\textsuperscript{311} and 1970 (Libya).\textsuperscript{312} Two fundamental concerns regarding both resolutions are the language of both resolutions whereas ‘(1) the Security Council disallowed, or at least purported to disallow, allocation of U.N. funds to the ICC to pursue investigation and prosecution of the referred situations, and (2) the Security Council excepted from jurisdiction certain nationals of non-ICC State Parties from referral of the situation’.\textsuperscript{313}

\textbf{a. Non Allocation of UN Funds}

Given the daunting tasks and budgetary limitation of the ICC, with expanding number of investigations and demands for more prosecutions and investigations\textsuperscript{314}, it has been the concern of ICC officials and member states that

\textsuperscript{309} The International Criminal Court website, \textit{Statement of ICC Prosecutor to the UNSC on the situation in Libya} <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib> (accessed 26 June 2017).

\textsuperscript{310} Aloisi, above n. 294, 154.


\textsuperscript{313} Trahan, above n.304, 449.

\textsuperscript{314} Above n. 308, para 10 and 11 of the ICC Prosecutor statement before the UN Security Council on Situation in Darfur, 8 June 2017 reads as follows: ‘Despite budget constraints, I took the decision to add additional investigators and analysts to the Darfur team. This increase in the size of the team is yielding results. Existing cases are being strengthened through the collection of additional evidence. Extensive analytical work is also advancing these cases. My Office is also intensifying its investigations into new crimes allegedly committed in Darfur’.
neither resolution 1593 nor 1970 contained wording making comment to support the ICC financially.\textsuperscript{315} On 9 May 2017, in reporting on Libya to the Security Council, the ICC Prosecutor stated that her office would welcome any funding support from U.N. states.\textsuperscript{316} She added that ‘without adequate resources, the crucial work of the [ICC] is hampered and its ability to impact on the current climate of impunity in Libya is diminished’.\textsuperscript{317}

Hypothetically, if in the future, the Security Council produced consecutive referrals to the ICC without any funding mechanism accompanying the resolutions, the ICC would be in a serious predicament of not having enough resources to support its investigation and/or prosecutions.\textsuperscript{318} The ICC might then be in a position where it had to reduce funding for currently ongoing investigations so that it can proceed with another ‘unfunded Security Council referral’.\textsuperscript{319}

It is unclear however, whether the General Assembly must abide by the Security Council resolutions that dismiss funding to the ICC. Para 7 of Resolution 1593 and para 8 of Resolution 1970 only recognize that there is no allocation of UN funds to pay for the referrals. Nothing in either of the resolutions specifically precludes the General Assembly from allocating funds to support the ICC. Besides, the Security Council’s resolutions are binding only to member states and not binding to the General Assembly, as it is an independent body under the UN system.\textsuperscript{320} More specifically, article 17 of the UN Charter regulates that budgetary provisions of the United Nations shall be the exclusive domains of the General Assembly.\textsuperscript{321}

Article 115 of the Rome Statute suggests that ICC funding shall come from, among others, the UN subject to the approval of the General Assembly should the Security Council made referral to the ICC.\textsuperscript{322} Article 13 para 1 of the Negotiated

\begin{footnotes}
315 Trahan, above n.304, 450.
316 Above n.309 para 40.
317 ibid. para 41.
318 Trahan, above n. 304, 450.
319 ibid.
320 Trahan, above n.304, 451.
322 See article 115 of the Rome Statute.
\end{footnotes}
Relationship Agreement between the ICC and the UN also mandates any funds provided to the ICC shall be by the decision of the General Assembly. Yet, very unfortunately, the Negotiated Relationship Agreement requires a conclusion of a separate agreement between the ICC and the UN for dispersion of such funds. This may be one aspect that the Joint Committee, that this thesis proposes, needs to address later on chapter 5.

In chapter 3, we have seen that President Trump made an executive order to reduce allocation of U.S. funds to the UN as well as to the ICC. It is more likely that should in the future, the Security Council make referral to the ICC, President Trump will continue this behaviour and ask American diplomats at the Security Council to prohibit funding to the ICC despite referrals being made to the ICC.

This argument is based on current U.S. legislative that bans funding to the ICC. Under section 705(b) of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act 1999 the United States is not allowed to provide funding to the ICC unless the United States has become a party to the ICC pursuant to a treaty made under article II, section 2, clause 2 of the Constitution of the United States. On this note, a logical argument to support the above assumption is that the United States may not permit UN funds to be allocated to support any ICC activities because by doing so it might violate U.S. law.

b. Exclusion of Nationals of Non-State Parties

Both resolution 1593 and 1970 shared similar language that exclude nationals of non-State Parties from the ICC’s jurisdiction. The United States was the key

324 Article 13 para 1 of the Negotiated Relationship Agreement.
326 Trahan, above n.304, 453.
327 See para 6 of each resolution.
actor behind the inclusion of such wordings. On resolution 1593 negotiation, the United States insisted on three things:

the first being that no funding would be forthcoming from the UN for the costs of investigations in Darfur... The second demand made by the United States was that the resolution make reference to the bilateral immunity agreement that it had made with a number of countries... [the third was] the inclusion of operative paragraph 6 [the carve-out of jurisdiction] as to peacekeepers who are nationals of non ICC-States Parties.

Under Obama’s administration, the United States adopted a similar approach, that the investigation or prosecution of nationals of non-States Parties to the ICC should fall within the exclusive jurisdiction of the relevant state. Libya’s referral, which was negotiated under Obama administration, confirms this and so does the adoption of crime of aggression at Kampala Review Conference in 2010 that also exclude nationals of non-States Parties.

One may argue that exclusion of nationals of non-state parties is a direct attempt to amend the Rome Statute. The Security Council however, has no such power. According to Robert Cryer, ‘the Security Council does not have the authority to alter the Rome Statute. The ICC is a separate international person to its members and is not party to the UN Charter, therefore it is not bound by the trumping provisions contained in article 103 of the Charter’, Exclusion of nationals on non-state parties can also be seen in conflict with jurisdictional regime of the ICC under article 12(2) of the Rome Statute. This will be discussed later on this chapter on section that assess article 16 of the Rome Statute.

c. Non-Existence of Enforcement Mechanism

Both resolutions impose obligations to cooperate only upon the states subject to referral. The execution of referrals by the ICC would be ineffective if countries subject to referral were the only one to bear cooperation obligations. Taking the example of Sudan, President Bashir was honoured the main seat on the Arabic League Summit on March 2009 right after the ICC issued an arrest

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329 ibid.
330 Trahan, above n.304, 460.
331 Cryer, above n. 328, 213.
332 See para 2 Resolution 1593 and para 5 resolution 1970.
333 Trahan, above n.304, 462.
warrant.334 Not much later, during the meeting of the African Union in Sirte, Libya, president Bashir was given a seat on the same table as the UN Secretary General, Ban Ki Moon.335 Additionally, in 2011, on an official visit to Peking, President Bashir reviewed a military parade after arrival. 336 This non-compliance by states with the ICC’s arrest warrant was a slap in the face to the international community as well as to the ICC.

As consequence, the ICC has started to make declaration of non-compliance by states. The first such decision was that of the Pre-Trial Chamber I regarding Republic of Malawi for not arresting President Bashir during his visit on 14 October 2011.337 The same chamber also issued a decision against the Republic of Chad, which is a party to the Rome Statute, for failing to arrest and surrender President Bashir during his visit to Chad on 7 and 8 August 2011.338 Chad has also been found in violation to the Rome Statute on 26 March 2013 when Pre Trial Chamber II issued a new decision related to Chad’s repeated breach of its obligations for not arresting President Bashir when he visited Chad 16-17 February 2013.339 A similar decision of Pre Trial chamber II has also been issued on 9 April 2014 regarding Republic of Congo340, a Rome Statute member state, and Sudan on 9 March 2015341, a country subject to referral, for not cooperating with the ICC to arrest and surrender its President.

335 ibid.
336 ibid.
338 The International Criminal Court website, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Al Bashir <https://www.icc-cpi.int/pages/record.aspx?uri=1384955> (accessed 28 June 2017).
Without cooperation from wider states, the ICC is losing its credibility.\textsuperscript{342} One solution regarding execution of the Security Council referrals might be to attempt to create ‘effective political isolation, which could reduce the political playing field significantly for the actor wanted by the ICC or his/her political supporters’.\textsuperscript{343}

The development of Sudan's situation is, however, different from Libya’s.\textsuperscript{344} The ICC’s process to execute the referral on Saif Islam Gaddafi was stopped because the capturing rebel group refused to extradite the accused to the ICC and wanting to bring him to justice within domestic jurisdiction.\textsuperscript{345} On 1 May 2012, the Libyan government challenged the admissibility of Saif Gaddafi’s case based on the principle of complementarity\textsuperscript{346}, stating that the ICC should not automatically replace domestic criminal justice. On 31 May 2013 Pre Trial Chamber I rejected the challenge\textsuperscript{347}, arguing that the state of Libya was unable genuinely to carry out prosecution on Saif Gaddafi. The Appeals Chamber reaffirmed this decision on 21 May 2014 declaring the case against Saif Gaddafi is admissible before the ICC.\textsuperscript{348}

Both situations in Sudan and Libya show that without an enforcement mechanism, execution of referrals by the ICC will be ineffective. Hypothetically, learning from Saif Gaddafi’s case, the Security Council may, in the future, explicitly state in a referral resolution that ‘for the purposes of criminal justice, the principle of complementarity is waived’ in order to avoid the possibility that a state subject to referral may challenge the admissibility of a case (or a situation) before the ICC by invoking the principle of complementarity. Considering that the Security Council is a political institution, this scenario is

\textsuperscript{342} Lattman, above n. 334, 72.
\textsuperscript{343} ibid., 71.
\textsuperscript{344} This chapter will not address case against Abdullah Al Senusi and Moammar Gaddafi.
\textsuperscript{345} ibid., 73.
\textsuperscript{346} The International Criminal Court website, Case Information Sheet on Situation in Libya <https://www.icc-cpi.int/libya/gaddafi/Documents/GaddafiEng.pdf> (accessed 29 June 2017).
\textsuperscript{348} The International Criminal court website, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the Admissibility of the case against Saif Al-Islam Gaddafi” <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-01/11-547-Red&ln=fr> (accessed 29 June 2017).
possible. However, if this happened, this might be seen as another example of amendment to the Rome Statute.349

In recent years, the international community has paid attention to the situation in Syria and to the activities of the Daesh organisation in Iraq.350 The continuous deterioration of both situations opens the possibility of new Security Council referral to the ICC.351 An ideal outcome would be for future Security Council resolutions to impose ‘cooperation obligations on all U.N. Member States’352 by adoption of wordings to the effect that the council ‘decides that all U.N. Member States shall cooperate fully with and provide any necessary assistance to the [ICC] and the Prosecutor pursuant to this resolution’.353

As a matter of fact, the need for the Security Council to support the ICC following its referrals was addressed by the ICC’s Pre-Trial Chamber II in 2012:354

[U]nlike domestic courts, the ICC has no direct enforcement mechanism in the sense that it lacks a police force. As such, the ICC relies mainly on States’ cooperation, without which it cannot fulfil its mandate. When the Security Council...refers a situation to the [ICC]...it is expected that the [Security Council] would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of the relevant State Party to the [Rome Statute] to cooperate in fulfilling the [ICC]’s mandate entrusted to it by the [Security Council]. Otherwise, if there is no follow up action on the part of the Security Council, any referral by the [Security Council] to the ICC under chapter VII would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile (emphasis added).

Moreover, other technical matters support by the Security Council that are also of importance are measures such as travel bans and asset freezes to enforce cooperation. It is noteworthy that the practice of the Security Council when imposing sanctions was to create a ‘sanction committee’ to monitor the implementation of sanctions.355 In relation to this, a Chatham House discussion in 2012 considered the need to create some kind of ‘Security Council working group for ICC referral’ to help the Security Council to remain fully updated on the

349  Lattman, above n. 334, 74.
350  ibid., 70.
351  ibid.
352  ibid., 304, 449.
353  ibid., 463.
354  The International Criminal Court website, Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir <https://www.icc-cpi.int/CourtRecords/CR2013_02245.PDF> (accessed 29 June 2017).
355  Trahan, above n. 304, 466.
development of situations referred to the ICC and to assist the ICC should requests or assistances be made.356

There is no automatic system of asset freezes and travel ban once the ICC issued an arrest warrant. These measures require the voting of the Security Council committee.357 Observing that through these years the Security Council remained inactive despite repeated public requests by the ICC prosecutor in her periodical reports358, an additional possibility is for the ICC to consider engaging the General Assembly. This might be relevant in regards to Anshor, Diajeng and Yasma’s arguments proposing that there needs to be an alternative forum to determine act of aggression (as well as to refer and defer situation involving crime of aggression to the ICC). On chapter 5, we will see that the Joint Committee that this thesis proposes should be a similar character of the General Assembly. Therefore, the above argument is noteworthy.

d. Conclusion on article 13(b)

Article 13(b) of the Rome Statute creates additional jurisdiction for the ICC. The Security Council can refer a situation to the ICC without the consent of the territorial state and regardless of whether that state had ratified the Rome Statute or not. However, the price of extending the ICC’s jurisdiction by means of article 13(b) is not comforting.

From the examples of the two referrals that this section has presented, we can see that without financial and technical support from the Security Council, it might be difficult for the ICC to fulfil its mandate. It even may compromise the work of the ICC. The ICC’s Prosecutor has publicly and repeatedly requested support from the Security Council, yet the Security Council has remained

356 Para 10 of Chatham House’s report on International Law Meeting Summary, with Parliamentarians for Global Action on the UN Security Council and the ICC dated 16 March 2012 read as follows:’ drawing upon the practice of establishing Sanctions Committees to monitor the implementation, enforcement and consequences of the sanctions regimes…it was suggested that similar subsidiary bodies could be established to focus upon referrals to the ICC. This, it was suggested, might stimulate better follow-up by the [Security Council].’ Full report is available at Catham House website, The UN Security Council and the International Criminal Court <http://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf> (accessed 29 June 2017).

357 Trahan, above n.304, 467.

358 See earlier section of this chapter.
unresponsive. We cannot forget that these referrals have set precedent and create disincentives for countries to ratify the Rome Statute. In chapter 5, the Joint Committee that this thesis proposes is hoped to be able to mitigate these concerns.

**Article 98 (2)**

Article 98(2) is relevant given the outcomes of the interviews, as the Security Council has made reference to this article. For the purpose of this section, the article 98(2) reads as follows:359

The [ICC] may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that state to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

In order to avoid United States personnel being prosecuted by the ICC, President Bush had made a wide campaign of entering “article 98(2)” bilateral agreements with many countries in the world so that any United States’ personnel would not be surrendered or transferred to the ICC for any purposes.360 The United States argued that such agreements are not contrary to the Rome Statute and are in conformity of international law.361 However, the language of article 98 agreements is problematic for at least two reasons. First, article 98(2) of the Rome Statute does not explicitly mention blanket immunity and second, there is ambiguity whether article 98(2) is meant to cover existing international agreements or also applicable for future agreements.

**a. Article 98(2) for existing and future agreements?**

Ambassador David Scheffer, the lead U.S negotiator on the drafting of the Rome Statute has sent mixed signals on this issue. In the Wall Street Journal Europe he

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359 Rome Statute article 98(2).
360 This wording is usually stipulated under article 98 agreements concluded between the United States with so many countries in the world. Exact example of this agreement will be mentioned later on.
stated that article 98(2) was ‘to ensure that Status of Forces Agreements (SOFAs) between the United States and scores of countries would not be compromised and that Americans on official duty could be specially covered by agreements that fit Article 98’s terms. I first put that requirement on the table in early 1995 in Madrid’. However, two years later in a separate article, he contended that ‘it would be equally incorrect to argue that article 98(2) only covers SOFAs and SOMAs [Status of Mission Agreements] that existed prior to when the Rome Statute entered into force...the original US negotiating intent was to provide for a means within the Rome Statute to negotiate future international agreements for non surrender of US personnel”.

Most commentators on the Rome Statute consider that article 98(2) should be construed applicable only to SOFAs and to ‘agreements establishing diplomatic immunity for certain discrete classes of people’. Moreover, a number of Rome Statute negotiators argued that it should be interpreted more narrowly, and that article 98(2) covers only existing agreements. Hans Peter Kaul stated:

The idea behind...[article 98(2)] was to solve legal conflicts, which might arise because of Status of Forces Agreements, which are already in place. On the contrary, article 98(2) was not designed to create incentive for (future) States Parties to conclude Status of Forces Agreements which amount to an obstacle to the execution of requests for cooperation issued by the [ICC].

Accordingly, members of other delegations have also confirmed that this was the true interpretation of the scope of article 98(2).

**b. Article 98(2) for Blanket Immunity**

to David Scheffer, the key limitation on article 98(2) is the term ‘sending state’. It means that article 98(2) agreements cover personnel in official capacity of a sending state. He elaborated that the term ‘derives from the original American effort, very early in the ICC negotiations, to preserve the rights accorded to its official personnel covered by...SOFAs’. Article 98(2) however, does not cover all nationals of a country. Schefer explained that ‘it was not the intention of the United States to shield individuals acting in private capacity. We are not aiming, I confirmed, to seek immunity from surrender to the ICC of US citizens who act as mercenaries or in other strictly [private] capacities...overseas’.

The above statement by Schefer was a response to Bush administration policy that interpreted article 98(2) very broadly. Under the Bush administration, persons to be covered by article 98(2) agreements include ‘current or former government officials, employees (including contractors), or military personnel or nationals of one Party’ (emphasis added). Schefer added that under the Bush administration, article 98(2) agreements purported to cover ‘all US citizens of whatever character...it includes US citizens acting in their private capacity’.

Schefer defended that when reading the Security Council resolutions 1422 (2003) and 1487 (2003) none contain any language intended to protect all US nationals. He added that ‘if article 98(2) had been meant to cover all nationals of a ‘sending state’...[it] would have been reflected in the Security Council resolutions [1422 and 1487]’. This argument is appealing, however, although he may have forgotten that on separate resolution, that is resolution 1593, the Security Council made reference to article 98(2) agreements that were concluded between the United States and many countries. By this, basically the Security Council resolution 1593 covers all nationals of the United States. One must not also ignore that resolution 1593 was adopted in 2005, when Bush was still President and the campaign to enter article 98(2) agreements was in effect.

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368 Scheffer, above n. 362, 338.
369 ibid.
370 ibid., 339.
371 ibid., 345
372 ibid.
373 Will be discussed later on this chapter.
374 Scheffer, above n.362, 351.
375 See earlier section of this chapter.
Up to the writing of this thesis, the United States had signed approximately 95 article 98(2) agreements with foreign governments, of which 68 are States Parties to the Rome Statute. In chapter 3, we saw the inconsistency of the United States' policy towards the ICC. President Bush may have intended article 98(2) agreements to cover all US personnel; however, late in chapter 3, Obama while making reference to article 98 of the Rome Statute, specifically mentioned that only ‘members of the US Armed Forces participating in UNMISMM are without risk of criminal prosecution...by the ICC’.  

**c. Conclusion on article 98(2)**

This chapter is not going to attempt to predict the policy of President Trump on this matter. It is interesting to compare the text between resolution 1593 and 1970. Different attitudes between President Bush and Obama towards the ICC are apparent. If resolution 1593 (2005 - Bush) explicitly mentions article 98(2) agreements in the preamble, resolution 1970 (2011 - Obama) was more positive to the ICC by avoiding the mention of article 98(2) agreements in its text.

Despite inconsistency in the United States' policy towards the ICC, one important aspect is that ambiguity as to whether article 98(2) of the Rome Statute would allow blanket immunity and covers future agreements still persists. This is relevant given the outcome of the interviews, as resolution 1593 has set precedent in making reference to article 98(2) in its text. Chapter 5 will link this discussion to the proposed Joint Committee and will provide an alternative perspective on how to mitigate this problem.

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377 Scheffer, above n. 362, 344.

378 See chapter 3.
**Article 16**

One may argue that article 16 ‘may be considered [as] one of the most dangerous and sensitive provisions in the [Rome Statute]’. Bawazier and Yasma considered that the deferral power of the Security Council is an obstacle for Indonesia in joining the ICC. More explicitly, Yasma contended that this function could be deemed as an act of intervention to the ICC.

Under article 16, the Security Council may request the ICC not to proceed with investigation or prosecution should the *majority* of the Security Council’s members determined that such activities pose threat to peace and security pursuant to the UN Charter. Two views might arise in defining the scope of article 16. First, the Security Council is able to prevent the commencement of investigation or prosecution by the ICC, and second, the Security Council is authorized to ask the ICC to stop any ongoing activities of investigation or prosecution.

To better understand the aspects of article 16 that this chapter concerns, this section will first address the drafting history of article 16 and then it will discuss the structure of article 16, followed by the controversies surrounding Security Council resolution 1422 and current references to article 16; and lastly, the African Union’s frustration with the Security Council.

**a. Drafting History: Single Veto vs. Affirmative Votes**

The drafting history of article 16 indicates that some of the drafters of the Rome Statute wanted to limit the power of the Security Council. Under the International Law Commission’s draft Statute, the original article 16, which was then article 23(3) reads as follows ‘no prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council’.

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380 ibid., 1512.
381 ibid., 1514.
382 More about this discussion is available on above n. 379, 1509.
Council as a threat to or a breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides’.383

Article 23(3) of the draft Statute blocked the ICC from initiating investigation or prosecution if the situation ‘is being dealt’ by the Security Council, unless it decides otherwise. Many delegations were concerned that this article may disrupt the ICC in performing its duties. Accordingly, ‘one veto by a permanent Council member can sufficiently thwart or block the ICC from actions, which makes the ICC vulnerable to the Council’s political motivations’.384 Later on, Singapore came up with a proposal that became the current article 16 under the Rome Statute.

Under Singapore’s proposal the opposite of article 23(3) of the draft Statute was proposed so that ‘ICC proceedings may continue unless the Security Council formally decides to stop the process. Since the adoption of a Security Council decision requires a minimum of nine affirmative votes ... the ICC’s proceedings may only be blocked by a ‘concerted effort’ of the Council members’.385 In short, the drafters of the Rome Statute considered the requirement of nine affirmative votes of the Security Council’s members, instead of single vote as required under article 23(3) of the draft Statute, would be enough to prevent interference by the Security Council in the work of the ICC.

However, article 16 has proved to have the same negative effect as article 23(3) of the draft Statute.386 One may argue that the Security Council would have difficult time in passing resolution on deferral under article 16 of the Rome Statute as it requires a majority vote, consisting of nine affirmative votes and including those of permanent members.387 However the adoption of Security Council resolution 1422 ‘evinces the [United States]’ overwhelming political influence upon international law’.388

384 Al Zeidy, above n. 379, 1510.
385 ibid.
386 ibid., 1517.
387 ibid., 1518.
388 ibid.
The United States manoeuvred to reach the affirmative vote of the Security Council regarding Resolution 1422 by threatening to veto the UN Mission in Bosnia and Herzegovina (UNMIBH) and the International Police Task Force (IPTF)’s renewal unless members of the Security Council adopted resolution 1422. In other word, the United States ‘indirectly attained the intended goal – namely, the same powers provided in former article 23(3) of the [draft Statute], however, it did so through article 16’.390

b. Structure of article 16

Article 16 reads ‘no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions’.391 (emphasis added)

For the purpose of this chapter, three aspects from article 16 are noteworthy. First, the most important is when making deferral, the Security Council must be certain that it acts in conformity of chapter VII of the UN Charter. Second, when it makes a deferral, no investigation or prosecution may be commenced or proceeded, and lastly, the Security Council is allowed to renew the deferral with the same considerations and conditions that legally prompted the Security Council to defer a situation. On this note, the wording ‘adopted under chapter VII’ of article 16 requires the Security Council to satisfy the requirement of article 39 of the UN Charter - that is to prevent threat or breach to peace or act of aggression392, in making any deferrals request to the ICC.393

One question that arises is: who should trigger the interpretation of ‘threat to the peace’394, and can it be a person, a state, a regional or international organisation or only the Security Council as the sole organ able to do so? This

389 Al Zeidy, above n. 379, 1518.
390 ibid.
391 Article 16 of the Rome Statute.
392 See article 39 of the UN Charter.
393 Trahan, above n. 304, 435.
394 ibid., 436.
question is relevant as later on this chapter, one regional organisation has repeatedly requested a deferral from the Security Council as investigation or prosecution by the ICC is considered to be 'endangering peace process' of a state.

Another question arises regarding the element of 'no investigation or prosecution may be commenced or proceeded' under article 16. Does it mean an ongoing investigation or prosecution as Human Rights Watch have argued or it 'can be made pre-emptively to cover potential investigations or prosecutions not yet commenced at the time of the deferral'?\textsuperscript{395} This question is important because neither the Rome Statute nor the Negotiated Draft Agreement between the ICC and the UN nor the UN Charter provides much specific guidance. The practice of the Security Council under resolution 1422, however, appears to favour the latter.

Before assessing resolution 1422 as mentioned above, one additional note is important. According to Human Rights Watch:\textsuperscript{396}

The phrase, "no investigation or prosecution may be commenced or proceeded with," presupposes the existence of a particular "investigation" or "prosecution" that relates to a specific incident or the potential culpability of an individual regarding specific conduct. Article 15 of the Rome Statute spells this out. The Pre-Trial Chamber must authorize the commencement of a specific "investigation." All prosecutor inquiries up to this point are not "investigations," but only "preliminary examinations" - see Article 15(6). Only after Pre-Trial Chamber authorization of an "investigation" is the Security Council entitled to request a deferral under Article 16.

\textbf{c. Controversies regarding Resolution 1422}

To date, the Security Council has only utilised article 16 in one resolution, that is resolution 1422 on peacekeeping operations in Bosnia Herzegovina\textsuperscript{397} and its renewal: resolution 1487.\textsuperscript{398}

\textsuperscript{395} Trahan, above n. 304, 436-7.

\textsuperscript{396} ibid., 436. Also available at Campaign for the International Criminal Court website, \textit{the ICC and the Security Council: Resolution 1422} <http://pantheon.hrw.org/legacy/campaigns/icc/docs/1422legal.htm> (accessed 8 August 2015).


As mentioned earlier, the United States had successfully, on these two occasions, achieved the same effect as article 23(3) of the draft Statute through utilisation of article 16. Originally, the Security Council draft resolution 1422 was intended only to protect United States military personnel.\textsuperscript{399} However, as resistance from the international community grew, the United States compromised so that the resolution 1422 protected not only US military personnel, but the personnel of all non-member countries to the ICC.\textsuperscript{400} The other members of the Security Council argued that the deal reached on resolution 1422 was necessary in order to ‘counter the US threats to block the collective security system of the [UN] Charter’.\textsuperscript{401}

This leads us to question resolution 1422 on several grounds:

a. since resolution 1422 was a compromise to prevent veto of the United States on peacekeeping operation in Bosnia Herzegovina, one could ask what was the actual threat to peace required to meet the criterion of ‘adopted under chapter VII of the UN Charter’ that article 16 envisages;

b. At time resolution 1422 was adopted, the ICC had not made any investigation or commenced any prosecution in any situation in Bosnia Herzegovina, thus, which ICC investigation or prosecution resolution 1422 seeks to defer is unclear. Rather, resolution 1422 ‘acted pre-emptively so that no … investigation or prosecution could arise’\textsuperscript{402};

c. Both resolution 1422 and 1487 contain wording which ‘expresses the intention to renew the request … each 1 July for further 12 month period for as long as may be necessary’. This ‘intent clause’ does not meet and even conflicts with criteria set out under article 16.\textsuperscript{403} Even though ‘article 16 does not limit the number of times a deferral request may be renewed’,\textsuperscript{404} a literal reading of article 16 suggest that a renewal of a deferral request is not automatic and is not to be interpreted to cover future deferral of a certain situation.\textsuperscript{405}

\textsuperscript{399} Al Zeidy, above n. 379, 1505.
\textsuperscript{400} ibid.
\textsuperscript{402} Trahan, above n. 304, 440.
\textsuperscript{403} Stahn, above n.401, 91.
\textsuperscript{404} Al Zeidy, above n. 379, 1515.
\textsuperscript{405} The wordings ‘expresses the intention to renew’ shows the Security Council’s intention to impose an indefinite blockage through the repeated renewal every 1 of July.
From the standpoint of three criteria available under article 16, both resolutions 1422 and 1487 act beyond the scope of article 16. More concerning is that both resolutions, if legally effective, ‘represent an unauthorized amendment to the Rome Statute’. Many scholars and representatives of states, such as Canada, France, Syrian Arab Republic, Islamic Republic of Iran, argued in support of this analysis. According to Al-Zeidy:

Resolution 1422 has also been argued to be in conflict with several articles of the Rome Statute. First, resolution 1422 is inconsistent with article 27 as it gives a person or certain nationalities immunity. Accordingly, by granting immunity to certain individuals, one may argue that resolution 1422 is restraining the ICC State Parties from fulfilling their international obligations under the Rome Statute. First, resolution 1422 is inconsistent with article 27 as it gives a person or certain nationalities immunity. Accordingly, by granting immunity to certain individuals, one may argue that resolution 1422 is restraining the ICC State Parties from fulfilling their international obligations under the Rome Statute.

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406 Resolution 1487 was not renewed when it expired after twelve months.
407 Trahan, above n. 304, 444.
408 Al Zeidy, above n. 379, 1504 (one dominant theory posits that the adoption of Resolution 1422 delineates the Council’s intent to augment its power by amending the International Criminal Court treaty). See also: N. Jain, ‘A Separate Law for Peacekeepers: the Clash between the Security Council and the International Criminal Court’, E.J.I.L. 16 (2005), 250 (the cumulative effect of these resolutions [1422 and 1487] is to carve out an exception from the Rome Statute for members of non-party states in UN peace-keeping operations. This exclusion would amount to an amendment to the Rome Statute and violate the law of treaties under which treaties may be amended only in the manner provided for their constitutive instruments) and A. Mokhtar, ‘The Fine Art of Arm Twisting: The US, Resolution 1422 and Security Council Deferral Power Under the Rome Statute’, Int’l Crim. L. Rev 3 (2003), 331 (to adopt a resolution that turns a provision of a treaty on its head and gives rise to an effect that was never intended by the drafters is, in effect, to amend the negotiated terms of that treaty).
409 Paul Heinbecker of Canada stated ‘…first the issue at stake is larger than the International Criminal Court; fundamental principles of international law are in question. Secondly, the Council has not been empowered to rewrite treaties; the draft resolutions that are circulating contain elements that exceed the Council’s mandate, and passage of them would undermine the credibility of the Council’. Al Zeidy, above n.379, 1519.
410 Mr. Levitte of France said ‘France has made a specific proposal regarding article 16 and is ready to discuss that within the limits of authorized by law – I repeat, within the limits authorized by law. However, it cannot accept modification, by means of a Security Council resolution, of a provision of the treaty’. Ibid., 1520.
411 Mr. Wehbe of Syria said ‘… the Security Council does not have the right to take decisions under Chapter VII to amend an international treaty that has been entered into force, because this would constitute a precedent that would destabilize and undermine the international legal regime’. Ibid., 1521.
412 Mr. Fadaifard of Iran said ‘we expect that all members of the Security Council take note of and accept the fact that the Council is not authorized to interpret or amend treaties’. Ibid., 1522.
413 ibid., 1523.
414 Trahan, above n. 304, 443. Human Rights Watch also explains why peacekeepers immunity is inconsistent with the Rome Statute: ‘article 27 of the Rome Statute expressly prohibits making distinction on the basis of official capacity. It is a crucial provision that encompasses the fundamental object and purpose of the treaty to ensure that no person is above the law. This includes peacekeepers, as well as politicians and heads of states. Without strict adherence to this principle, the door of impunity will remain open. In contrast, resolution 1422 allows an entire class of individuals to escape judgement of the ICC, opening the door to impunity if national courts of non-state parties fail to carry out good faith investigations and prosecutions. It is a clear violation of article 27’. See here http://pantheon.hrw.org/legacy/campaigns/icc/docs/1422legal.htm (accessed 8 August 2015).
Statute.\textsuperscript{415} Second, it conflicts with jurisdictional regime of article 12(2) by establishing distinction between individuals from non-and State Parties to the Rome Statute.\textsuperscript{416} Thus, resolution 1422 introduces ‘a discriminatory element into international law, and insinuates a dangerous double standard by sending the message that some people [or nationalities] are above the law’.\textsuperscript{417} Third, many scholars\textsuperscript{418} argued that prohibition against acts of aggression, genocide and crimes against humanity ‘constitute uncontested peremptory norms … [and] example for jus cogens … one can infer that crimes under the Rome Statute could be recognized as jus cogens [and it] creates obligation erga omnes’.\textsuperscript{419} Accordingly, granting immunity to those responsible for crimes under the Rome Statute is considered as violation of jus cogens norms.\textsuperscript{420} More on this, resolution 1422 has also been considered in violation of article 86 of the Rome Statute, the preamble as well as article 1(1) and article 2(1) of the UN Charter, customary law and Geneva Convention and Genocide Convention obligations.\textsuperscript{421}

Resolutions 1422 and 1487 were passed more than ten years ago. However, these resolutions have set precedent that the Security Council can and may attempt to limit the authority of the ICC. This is one point that many countries, including Indonesia, have feared that the Security Council can intervene the work of the ICC on the basis of political consideration of permanent members of the Security Council. The United States, borrowing Aly Mokhtar’s words, ‘has become an enemy of the ICC’\textsuperscript{422} by introducing these resolutions.

\textsuperscript{415} Mokhtar, above n. 408, 324.
\textsuperscript{416} Trahan, above n. 304, 443.
\textsuperscript{417} Mokhtar, above n. 408, 319.
\textsuperscript{418} Ibid., 337.
\textsuperscript{419} Ibid.
\textsuperscript{420} Ibid., 338. This chapter acknowledges that many court decisions have upheld findings of immunity even where violation of jus cogens norms have been alleged. Indeed, the International Court of Justice in the arrest warrant case upheld the ability of a state to plead immunity even in the face of an allegation of torture which would normally be considered a possible violation of a peremptory norm. The usual theory involved is that immunity is only a question of procedural law, and does not deny the substantive liability involved.
\textsuperscript{421} Trahan, above n. 304, 443-4.
\textsuperscript{422} Mokhtar, above n. 408, 344.


d. Current Debates over Article 16

There have been additional requests by regional organization and an individual state for the Security Council to resort to article 16 again. One is request by the African Union (AU) to defer case against President Bashir of Sudan and the other one is from Kenya (with support from the African Union) regarding the situation in Kenya. These requests for invocation of article 16 received particular urgency after the AU proposed an amendment to article 16 of the Rome Statute to the 8th session of the Assembly of States Parties of the ICC (ASP) in November 2009. Under the proposal, the AU proposed that should the Security Council failed to resolve the issue of the deferral request, then the General Assembly shall be empowered to make decision on that matter.

This section will not discuss in great length the development of the situations in both Sudan and Kenya. However, this section will show that the AU’s proposal is relevant for the discussion in chapter 5.

e. The African Union’s Frustration with the Security Council

The Sudanese government argued that the Security Council and the ICC have violated its sovereignty since the referral in 2005. The AU, which has for years been engaging the Sudanese authorities to find a political solution to the Darfur conflict called upon the Security Council to invoke article 16 in July 2009. Ever since, the AU’s Peace and Security Council has also repeatedly called upon the Security Council to invoke article 16. However, the repeated request was only considered and discussed once by the Security Council.

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423 Trahan, above n. 304, 433-4.
426 ibid., 8. The Assembly of Heads of States of the AU in 2009 also directed all AU member states to withhold cooperation with the ICC in respect of request of arrest and surrender of President Bashir.
427 ibid., 22.
428 ibid. Even that instance was within the context of discussions on the extension of the mandate of UNAMID, the AU-UN hybrid operation in Darfur established by resolution 1769, July 2009.
effort was when the Ministers of the African countries adopted seven recommendations to guide their position at the 8th ASP meeting in 2009 and the Kampala Review Conference in June 2010. The relevant recommendation for the purpose of this thesis reads as follows:

Recommendation 3: Deferral of Cases: Article 16 of the Rome Statute
Article 16 of the Rome Statute granting power to the [Security Council] to defer cases for one (1) year should be amended to allow the General Assembly...to exercise such power in cases where the Security Council has failed to take a decision within a specified time frame, in conformity with the UN General Assembly resolution 377 (V)/1950 known as ‘Uniting for Peace Resolution’

At the 8th ASP meeting in 2009, the Ambassador of the Republic of South Africa to the Kingdom of the Netherlands, Peter Goosen, presented this proposal on behalf of the continent. Although the general response of other ICC State Parties was non-committal, the proposal was raised again on March and December 2010 sessions of the ASP.

On a separate note, Kenya requested the same deferral request to the Security Council on 21 October 2013. Backed up by the AU, in 2013 Rwanda proposed a draft resolution to defer cases against President and Deputy President Uhuru Kenyatta and William Ruto. However, on 15 November 2013, the Security Council did not adopt the draft. This section will not discuss further the development of the AU’s proposal. However, it will address the validity of the proposal to grant the General Assembly a power to address matters that fall under chapter VII of the UN Charter.

The Security Council holds primary responsibility for the maintenance of peace and security. However, it does not mean that the General Assembly is lacking authority in such matters. Article 10 to 14 of the UN Charter lists the competence

429 Jacob et al above 425, 26.
430 ibid., 26. The AU proposal adopts that the specified time frame before the General Assembly can decide the matter is six months after receipt of deferral request by the Security Council.
431 ibid., 27.
432 ibid.
434 ibid.
435 ibid.
436 Derived from articles 24, 26, 33-4, 37, 39 and 42 of the UN Charter.
of the General Assembly in area of peace and security. More specifically, article 12 of the UN Charter implies that the General Assembly has a subsidiary role on peace and security matters. The International Court of Justice confirmed this in the Certain Expense case.

UN practice in interpreting article 12 of the UN Charter suggests that when one particular situation is on the agenda of the Security Council, it does not prevent the General Assembly from acting regarding that situation. The very early UN practice in the interpretation of article 12 was that the General Assembly should refrain from making recommendation should such a situation be on the agenda of the Security Council. This practice changed. However, the reason being that matters often remained on the Security Council agenda for an indefinite period even though the Security Council did nothing with respect to them.

In 1964, the UN Legal Counsel gave a legal opinion, commenting that the practice of the General Assembly in making recommendations on a matter being considered by the Security Council reflected ‘a changed understanding of the meaning or article 12’. In further consideration of the same matter in 1968, the Legal Counsel stated, ‘the Assembly had interpreted the words ‘is exercising’ as meaning ‘is exercising at this moment’.

Following this development, the General Assembly had made recommendations on matters which the Security Council was also considering.

This practice of the General Assembly was then reviewed by the International Court of Justice; in its Israeli Wall advisory opinion, it stated that it “considers that the accepted practice of the General Assembly, as it has evolved, is consistent with article 12, paragraph 1, of the Charter”. Thus AU’s proposal to grant the General Assembly power to address matters that fall under chapter VII

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437 Jacob et al, above n.425, 31.
438 ibid.
440 Jacob et al, above n. 425, 32.
441 ibid.
442 ibid.
443 ibid.
444 ibid.
445 ibid.
446 ibid., 33. See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, International Court of Justice, 2004, 150.
of the UN Charter is valid. The general rule is that the General Assembly should not make any recommendation only when the Security Council is actively considering the matter.\textsuperscript{447}

Another point is that the AU’s proposal made reference to the Uniting Peace resolution\textsuperscript{448} where its paragraph 1 reads:

...if the Security Council because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session with twenty-four hours of the request therefore. Such emergency special session shall be called if requested by the Security Council on the vote of any seven [now nine] members, or by a majority of the Members of the United Nations. (emphasis added)

From the wording 'lack of unanimity' in the text of the Uniting Peace resolution, one may infer that when permanent members use their veto then the Security Council is not exercising its function in peace and security maintenance as there will be no resolution able to pass.\textsuperscript{449} One single veto then means that the General Assembly may assume its subsidiary role for the matter.

Apparently, in Israeli Wall Advisory Opinion, the International Court of Justice has approved the practice of the General Assembly in utilizing the Uniting Peace resolution to become seized of matters when the Security Council failed to exercise its primary duty.\textsuperscript{450} Moreover, the International Court of Justice ‘did not cast doubt on the validity of the Uniting for Peace Resolution and held that the General Assembly was duly convened and seized of the matter at issue two months after a veto by a permanent member had terminated discussion in the [Security Council]’.\textsuperscript{451}

\textsuperscript{447} Jacob et al above n.425, 33
\textsuperscript{449} Jacob et al, above n.425, 34.
\textsuperscript{450} Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo, Advisory Opinion, International Court of Justice, 2010, para 42.
\textsuperscript{451} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, International Court of Justice, para 31.
f. Conclusion on Article 16

The practice of the Security Council regarding article 16 has generated much discussion. The first utilization of article 16 under a Security Council resolution, which is resolution 1422, showed that the Security Council can act beyond the scope of article 16 as the drafters intended. Many even argued that resolution 1422 is a direct amendment to the Rome Statute which is beyond the scope and authority of the Security Council.

At the present time, developments in the African continent has brought us to a proposal to amend article 16 of the Rome Statute so that the General Assembly may consider the matter of peace and security if the Security Council fails to do so. This might be relevant as regards some interviewees’ desire to see a bigger role for the General Assembly, but more importantly, this section underlines the practice and approval of the validity of the Uniting Peace resolution by the International Court of Justice.

General Conclusion

Several interviewees’ objection to the linkage between the Security Council and the ICC is warranted. Yasma and Agusman’s concern regarding the privileges of the United States, as one of the permanent members of the Security Council, is also apparent regarding articles 13(b), 98(2) and 16 of the Rome Statute as earlier sections have demonstrated. We have seen that the United States can weaken the ICC by exercise of those three articles under the practice of the Security Council.

Even though the use of article 98(2) was detrimental only in the case of resolution 1593, and not in resolution 1970, we cannot predict what will be the approach adopted under President Trump’s administration. Differences between resolution 1593 and 1970 also confirms that the United States has not maintained a consistent policy towards the ICC. Its policy may change from one presidency to another.
We must not also forget that continuous deterioration in Syria and Iraq might open the possibility of new Security Council referrals to the ICC. However, without technical and financial support as well as an enforcement mechanism following referral to the ICC, such resolutions will just weaken the ICC and create disincentives for countries, including Indonesia to join the Rome Statute.

Under current conditions, and without alternative solutions, it may seem that countries will just withhold their participation in the Rome Statute, and some may even choose to withdrawal from it. The AU’s proposal is noteworthy. However, chapter 5 will propose a different approach and elaborate further the proposal for a new Joint Committee between the Assembly of States Parties and the General Assembly to mitigate the concerns which this chapter has discussed.
Previous chapters of this thesis have identified a number of reasons for lack of institutional trust in the ICC among the Southeast Asian countries such as Indonesia. Among others are the linkage between the ICC and the Security Council and, most importantly, the United States’ inconsistent policies towards the ICC. One possible way forward toward wider ratification of the Rome Statute is the introduction of a procedural mechanism that could serve as forum for both ICC States Parties and non-state parties for exploration of perceived obstacles to ratification. By its design, the ICC’s Assembly of States Parties is not the ideal forum for such discussion as it excludes non-state parties to the Rome Statute except as possible observer states.

Thus, given the importance of universality of the ICC, the Assembly of States Parties would not be the correct forum for such a discussion by virtue of its being under-inclusive. On the other hand, while the General Assembly can debate matter related to international criminal justice and despite its subsidiary role on matters of peace and security and also despite its near-universal membership, it is over-inclusive in terms of its mandate and the number of other issues upon its agenda. What is needed is an independent and focused mechanism, open to all states and not restricted simply to the Assembly of State Parties. The Joint Committee between the Assembly of States Parties and the General Assembly (Joint Committee) proposed in this chapter, might thus provide a way forward.
Introduction

This Joint Committee will be a forum for all states, parties and non parties to the Rome Statute, to discuss the Rome Statute, to assess the practice of the ICC for the last decade and to identify issues that are of importance for each individual state relating to any aspects of their participation or potential participation in the ICC. This thesis contends that until now, the ICC has gained only partial legitimacy from the international community; one reason is that it has not yet fully achieved universality.

Steven C. Roach suggests, “[i]nternational legal institutions … require strong forms of legitimacy to function effectively and efficiently”452. He argues that even though the ICC enjoys significant political legitimacy independent of the Security Council453, the ideal relationship between the two governing institutions is not yet attained. This might be attributed to the absence of support from China, Russia, and, most importantly, the United States among the permanent seats of the Security Council.

The relationship between the ICC and the Security Council is not without controversy. During the Rome Conference ‘many developing states’ delegations believed that any integral role for the Security Council’s powers would politicize the [ICC], since it would allow the permanent members to use their veto to block the investigation and prosecution of certain perpetrators, namely, their own’.454

Roach’s Proposal

This chapter will discuss the work of Steven C. Roach. He argues that, for the purpose of strengthening the ICC, an accommodative approach is necessary to “induce…other major non-state parties to reconsider the need for a strong and independent juridical authority”.455 This accommodative approach, according to Roach, requires “amendment of the Rome Statute and should be supported by

452 Roach, above n. 14, xvii.
453 Ibid, 145. Chapter 4 also demonstrates that the Security Council can also create jurisdiction for the ICC.
454 Ibid. 18.
455 Ibid., 111.
broad consensus of all stakeholders in the Assembly of States Parties”.

Although this chapter takes a slightly different position, it supports the need for involvement of wider countries to strengthen the ICC.

One interesting point in Roach’s approach is the proposal to create a special working committee in the Assembly of States Parties to discuss, among other things, the definition and elements of the crime of aggression and the need for politically legitimate humanitarian intervention. He suggests that the Assembly of States Parties is the right forum for this purpose. According to Roach, “[such a forum] is vested with the power to … adopt the policies needed for enhancing the [ICC]’s legal and strategic character.”

It is noteworthy to understand that Roach’s proposal was made in 2006. At that time, the definition of the crimes of aggression was still taking place. Roach argues that in order to address crimes of aggression, this special working committee may be a committee of “similar character” to either the General Assembly or other UN body, most notably the Commission of Human Rights. On the latter, Roach refers to the statement by the New Zealand delegation at the ninth meeting of the Rome Conference on June 22, 1998, which suggested that such a committee “might be used to consider creating a nexus between the UN human rights machinery and the [ICC]”.  

As the definition and the element of crime of aggression were already adopted at the ICC’s Kampala Review Conference in 2010, the only issue left was for the new working committee to discuss potential humanitarian intervention. Roach elaborates, “the creation of a decision-making body within the Assembly of States Parties … would be to address a humanitarian crisis in a manner that overcomes the time restriction imposed by the principle of complementarity …

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456 Roach, above n 14, 111.
458 Ibid, 144.
459 Ibid, 112.
460 Ibid, 114.
such a novel body within the Assembly of States Parties would function much like the Security Council, albeit without the veto”.462

There are several aspects of Roach’s proposal that have merit. This chapter will not discuss the scope of a new committee to address legitimate humanitarian intervention. Instead, this chapter critically considers Roach’s proposal that this committee should be: (a) of similar character to the General Assembly, (b) involve participation of wider countries to strengthen the ICC, and (c) would function much like the Security Council, albeit without veto. Several questions that arise from Roach’s proposal are: is a committee the best form for any new body? What are the procedures to create such a committee? Is there any legal basis to create it? And, most importantly, what would be the relationship of this new committee with Indonesia?

Chapter 2 and 3 illustrate that the struggle for international justice was dominated by many political interventions. These chapters emphasize the role the United States has managed to perpetually in play in the creation and functioning of the ICC. While chapter 4 limits the discussion more narrowly, we can see that some interviewees’ concerns are valid. Examination of how articles 13(b), 98(2) and 16 of the Rome Statute work in practice appears to show that politicization of the ICC is still evident in the practice of the Security Council.

Roach’s proposal might provide an alternative solution for such a case. In order to test this proposition, the following sections will develop Roach’s proposal and discuss the 1950 Uniting for Peace Resolution, the new committee from the perspective of the UN Charter, the Relationship Agreement between the United Nations and the ICC, and the relevance for Indonesia. This chapter will also provide a draft resolution of the Assembly of States Parties that would establish the new committee.

Chapter 4 demonstrates that the African Union has made a formal proposal to effectively amend article 16 of the Rome Statute by invoking UN General Assembly Resolution No 377(V)/1950 known as Uniting for Peace Resolution.\footnote{The United Nations website, UN General Assembly Resolution No 377(V)/1950 <http://www.un.org/en/sc/reperoire/otherdocs/GAres377A(v).pdf> (accessed 15 April 2015).} The Uniting for Peace Resolution, which was adopted by the General Assembly on 3 November 1950, is an important landmark for conceptualization of the proposed Joint Committee. Chapter 4 illustrates that the General Assembly is acknowledged to have a subsidiary role on matters of peace and security. In Declaration of Independence in Respect of Kosovo Advisory Opinion, the International Court of Justice approved the practice of the General Assembly in utilizing the Uniting Peace Resolution to seize itself of the matter when the Security Council failed to exercise its primary duty.\footnote{Above n.449.}

This chapter will not elaborate further on the Uniting for Peace Resolution, as much has been written on the subject.\footnote{See Jean Krasno and Mitushi Das, The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council in Bruce Cronin and Ian Hurd (eds), The UN Security Council and the Politics of International Authority (Routledge, 2008), 173-95; Dominik Zaum, The Security Council, the General Assembly, and War: the Uniting for Peace Resolution' in Vaughan Lowe et al (eds), The United Nations Security Council and War: The Evolution of Thought and Practice since 1945 (Oxford University Press, 2008), 154-74; Keith S. Petersen, 'The Uses of the Uniting for Peace Resolution since 1950' (1959) 13(2) International Organization, 219-232; Mike Billington, 'UN “Uniting for Peace” Resolution Could Demand End to U.S. War on Iraq' (2003) (11 April 2003) Executive Intelligence Review, 42-4; Andrew J. Carswell, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) Journal of Conflict & Security Law, 453-80.} However, a brief historical perspective of the resolution recalls situation in early 1950s when the Soviet Union used 26 vetos between 1946 and 1949.\footnote{Carswell, above n. 465, 457.} This situation, together with the Soviet Union's boycotting of the Security Council, paralyzed the function of the newly established United Nations. US Secretary of State Dean Acheson, along with delegates Benjamin Cohen and John Foster Dulles, found a creative formula to break the impasse in the Security Council, proposing that the General Assembly be empowered to act when the Security Council fails to perform.
In a note sent from the US delegation to the UN Secretary General, accompanying the request for an agenda item in the annual session of the General Assembly in 1950, the US delegation stated:\footnote{467}

> The Charter gives the General Assembly important functions to perform in the field of international peace and security, including the right to discuss any question relating to this field and the right to make recommendations ... in the view of the United States ... the General Assembly should be enabled to meet on very short notice, in case of any breach of international peace or act of aggression, if the Security Council, because of lack of unanimity of the permanent members, is unable to discharge its primary responsibility for the maintenance of peace and security. To this end, the United States proposes that the Assembly should make provision for emergency special session to be convoked in twenty-four hours

The note seems to have led the creation of one mechanism in the Uniting for Peace Resolution: the authorisation for the General Assembly to consider a matter immediately if the Security Council fails to perform its primary responsibility. Under section A of the Uniting for Peace Resolution, the General Assembly shall be authorised to recommend to the members of the United Nations collective measures, including the use of armed force if necessary.\footnote{468}

Since first introduced, the Uniting for Peace Resolution has been used ten times.\footnote{469} However, the General Assembly has only once recommended the use of force in implementing the resolution: the Korean case, as the conflict continued for one year into 1951.\footnote{470} Probably the most recent attempt to use Uniting for Peace Resolution was in the case of Iraq in 2003. In this Iraq case, Indonesia, along with the other 114 countries of the Non-Aligned Movement, as well as Russia and China, expressed their support for the General Assembly to convene in emergency special session under the Uniting for Peace Resolution procedure.

\footnote{467} Note from the head of the US delegation to the UN Secretary General (20 September 1950) 5 UNGAOR (279th plenary meeting) Annexes (Agenda Item 68) 2-3 UN Doc A/1377. Also see Carswell, above n. 465, 458.


\footnote{470} Carswell, above n. 465, 459.
in 2003.\textsuperscript{471} However, the emergency special session was never convened. One possible reason was that none of the five permanent members had formally made a request to call an emergency special session to the UN Secretary General; and smaller countries did not want to alienate the US in an increasingly polarised political climate.\textsuperscript{472}

The Uniting for Peace Resolution was a precedent initiated by the United States. However, as the geopolitics in the General Assembly changed, the five permanent members, especially the United States, realised that the resolution was a “double-edged sword” that could restrict the benefits they had enjoyed in the Security Council, and perhaps even threaten their sovereignty.\textsuperscript{473} The Uniting for Peace Resolution then slowly faded from mainstream world practice.\textsuperscript{474}

This thesis asserts that the Uniting for Peace Resolution is relevant to the discussion of the Joint Committee that this chapter focuses on. Not only has the African Union has already invoked this resolution,\textsuperscript{475} it is also important for the development of the ICC as it may support the Assembly of States Parties to promote the universality of the ICC - by offering a new confidence building mechanism for countries.

\textbf{I. The Joint Committee from the Perspective of the UN Charter}

Earlier section indicates that any new committee needs to be similar in character to the General Assembly. The simplest argument that may support this approach is that such a new committee needs to be established by the General Assembly.

\textsuperscript{471} Billington, above n. 465, 42.
\textsuperscript{472} Ibid
\textsuperscript{473} Carswell, above n. 465, 455-6.
\textsuperscript{474} In the Iraq case, Billington mentions that the United States disposed a demarche to its embassies instructing them to stall the attempt for an emergency special session of the General Assembly. The demarche, titled “Possible UNGA and CHR Session” (Commission on Human Rights), reads in part: “some members of the UN General Assembly have been discussing holding a[n]... Emergency Session on Iraq, should the Security Council not produce an additional Chapter VII resolution on the subject. We urge you to oppose such a session, and either to vote against or abstain if the matter is brought to a vote”. See Billington, above. 470, 42. This is an example of an attempt by the United States to suppress the use of the Uniting for Peace Resolution from current practice after realising the threat that the Resolution may hold.
\textsuperscript{475} See chapter 4.
For this purpose, it is essential to understand how the UN Charter regulates the General Assembly.

The General Assembly has one general committee and six main committees\textsuperscript{476} as “subsidiary organs” established on the Rules of Procedure of the General Assembly (“Rules of the GA”). Under Rule 102 of the Rules of the GA, each of these main committees is given further power to establish its own subsidiary organs.\textsuperscript{477}

Nevertheless, the Secretary General’s document “Summary of International Studies of Constitutional Questions relating to Agencies within the Framework of the United Nations” stated that: “A subsidiary organ is one which is established by, or under the authority of, a principal organ of the United Nations in accordance with article 7, paragraph 2, of the Charter, by resolution of the appropriate body. Such an organ is an \textit{integral part} of the Organization”.\textsuperscript{478} This definition might permit the new committee to operate as a subsidiary organ under the rule of the UN Charter.

\textbf{a. Article 7(2) UN Charter}

Article 7(2) of the UN Charter reads as follows: “such subsidiary organ as may be found necessary may be established in accordance with the present Charter”.\textsuperscript{479} The wording "as may be found necessary" shows that the framers of the UN Charter recognised that the UN may face situations that differ from those at time of the Charter’s adoption. This is a precautionary clause that anticipates future necessities, but the question that arises from this reading is how to measure what is “necessary”.

\textsuperscript{476} The six main committees are: a. Political and Security Committee; b. Economic and Financial Committee; c. Social, Humanitarian and Cultural Committee; d. Trusteeship Committee; e. Administrative and Budgetary Committee; and f. Legal Committee. See Simma, above n. 469, 383-4.

\textsuperscript{477} Ibid, 373.

\textsuperscript{478} Ibid, 196.

Rules of interpretation as laid down under article 31(1) of the Vienna Convention on the Law of the Treaties 1969 (‘VCLT’) will assist in measuring "necessary" in light of the UN Charter’s purpose. Article 1(1) of the UN Charter clearly stipulates that one purpose of the United Nations is “to maintain international peace and security, and ... to take effective collective measures”. It is logical that a threat of aggression or any other ICC crimes may suffice to trigger the “necessary” element of article 7(2) of the UN Charter to establish a subsidiary organ.

Yet, it must be acknowledged that article 7(2) of the UN Charter is somewhat vague. This article does not provide further information on the procedure of establishing a subsidiary body, or on which organ is competent to do so. Simma contends that the ambiguity of article 7(2) "may raise doubts as to whether article 7(2) can be interpreted as a directly and generally applicable authorization to create subsidiary organs wherever they may be found necessary, or whether article 7(2) must be instead regarded as a mere reference to those other articles of the Charter (articles 22, 29, and 68)".480

Articles 29 and 68 of the UN Charter govern the power of the Security Council and ECOSOC to establish subsidiary organs and commissions, respectively. For the purpose that the Joint Committee should be similar in character to the General Assembly, Security Council and ECOSOC seem to be out of context. Article 7(2) and Simma’s argument above seem to indicate that the only relevant provision is article 22 of the UN Charter.

b. Article 22 of the UN Charter

Article 22 reads ‘the General Assembly may establish such subsidiary organs as it deems necessary for the performance of its function’. It is clear that the General Assembly is empowered to establish a subsidiary organ. However, two things are now of importance: what is "the performance of its function" to which article 22 refers; and is the new body that this thesis proposes a subsidiary organ under articles 7(2) and 22 of the UN Charter?

480 Simma, above n. 469, 201.
Performance of an organisation's function usually comprises: appointment of the executive officers, establishment of meetings, discussion of agenda meetings, procedure for meetings, decision-making and many other activities. In the context of the General Assembly, “performance of its function” encompasses similar activities, which are regulated under the General Assembly's rules of procedure. One may then argue that to understand article 22 of the UN Charter one needs to read it together with the Rules of the General Assembly.481 Rule 96 of the Rules of the General Assembly provides that “the General Assembly may establish such committees as it deems necessary for the performance of its function”. The wording of this rule is almost identical with the reading of article 22 of the UN Charter, with the explicit exception that this Rule allows the General Assembly to establish a "committee" to assist its function.

According to Kelsen, a “committee in a specific sense of the term, in contradistinction to commission, may be defined as collegiate organ composed of members of the body by which it is established”.482 If this definition is acceptable, the Joint Committee might compose members of the General Assembly. This is exactly what Roach suggests. It might be safe to assume that, for the purpose of this chapter, the ICC’s new body discussed herein shall be in a form of committee, not a commission or any other type of body.

Kelsen further argues that article 22 could be interpreted such that any committee established by the General Assembly may not fall within the definition of “subsidiary organ”, but rather be considered an “auxiliary organ” because it was established for the purpose of assisting the General Assembly (auxiliary organ)483 and not to administer UN-related functions (subsidiary organ). This notion is acceptable, however, one may also argue that establishment of any organ on the basis of article 22 is merely establishing a "subsidiary organ" as envisioned by article 7(2) of the UN Charter. This may be attributable to the fact that both article 7(2) and 22 literally use the words

481 In this matter, Simma argues, “the GA’s Rules of Procedure…provide an initial impression of the organizational practice based on art. 22”. See Simma above 469, 382.
483 Ibid, 137-8.
“subsidiary organ”. The note from the Secretary General is also problematic in light of the latter interpretation, as the Secretary General suggests that a “[subsidiary] organ is an integral part of the Organization”.484

If the ICC’s new committee is being acknowledged as an integral part of the UN, the implication is that this new committee will have direct “rights and responsibilities” with respect to the General Assembly. This issue is difficult in two respects: the ICC is not an organ of the UN; and the permanent members of the Security Council, most likely including the United States, might resist this idea.

There are two possible solutions. First, the new committee should not be treated as a “subsidiary organ” but rather as a sessional committee of the General Assembly that can act as an “integral part of [the General Assembly’s] decision making machinery”.485 If this is the case, the legal basis is then to be found in Rule 69 of the Rules of the GA. Second, another possible scenario is to trigger other functions of the General Assembly; specifically, to initiate studies for the purpose of promoting international cooperation. This function is provided under article 13 of the UN Charter. The General Assembly can establish a committee to initiate studies on issues relevant to the ICC. A precedent was in 1947 when the General Assembly, acting under article 13 of the UN Charter, established an Interim Committee. The purpose of the Interim Committee was to study and assist the General Assembly on the situation of world peace at that particular time.486

If these two scenarios are acceptable, the new ICC’s committee shall not be treated as a “subsidiary organ” of the UN, but rather as an “auxiliary organ” of the General Assembly. If it was a subsidiary organ then it could be treated as an integral part of the UN with rights and responsibilities. At this point, another issue arises: should this new committee be a joint committee between the General Assembly and the ICC? What is the legal basis for such a proposal?

484 Simma, above n. 469, 196.
485 Ibid, 197.
486 Ibid.
There are some cases where committees have been established between the General Assembly and specialised agencies of the UN, but this is not the case for the ICC, as it is not an integral part of the UN. According to Simma, establishment of a joint committee between the General Assembly and another international organisation falls outside of the context of article 22 of the UN Charter. Simma argues that if article 22 is strictly interpreted, the article covers only UN-related functions. The only possible situation for the General Assembly and other international organisations setting up a joint committee is when prior agreement between the two bodies has been established. On this matter, earlier studies have shown that the constitutionality of this new joint committee would be subject to debate. However, this issue was resolved in 1963 by a letter from the UN Secretariat to the Intergovernmental Committee on the World Food Programme. The letter acknowledged that there is no particular reference in the UN Charter that governs the establishment of joint bodies between the General Assembly and other international organisations, yet “setting up of committees jointly with other international organizations would be considered as permissible in appropriate circumstances by application of the provision of the United Charter.”

In this light, a joint committee between the General Assembly and the ICC is conceivable, as long it refers to either article 13 or article 21 of the UN Charter and a prior agreement has been established between the General Assembly and the ICC.

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487 There are few examples on this matter. The first case of this sort was an agreement between GA and IDA, which was approved by GA Res. 1594 (XV) of March 27, 1961, whereby a Liaison Committee composed of the SG and the President of IDA or their representatives was created to assure the coordination of technical assistance and other development activities of both organisations. Another case was the establishment of the UN/FAO Intergovernmental Committee, composed of an equal number of member states of the UN and the FAO, for policy guidance in the administration of the World Food Programme, and of a joint UN/FAO Unit for administrative coordination. The establishment of such bodies was approved by concurrent resolutions of the GA (1714 (XVI), Dec 19, 1961 and 2095 (XX) Dec 20, 1965) and of the FAO Conference (Res 1/61, 4/65). The Committee has been restructured and enlarged and is now called the Committee on Food Aid Policies and Programmes (GA Res. 3404(XXX). See ibid, 204-5.

488 This confirms this chapter’s previous analysis.

489 Simma, above n. 469, 205.

490 Ibid.
c. **Relationship Agreement between the United Nations and the ICC**

The relationship agreement was a mandate given in article 2 of the Rome Statute. Under this article, the ICC was brought into relationship with the UN through an agreement to be approved by the Assembly of States Parties. On December 2003 the General Assembly adopted Res 58/79, which invited the Secretary General to take steps to conclude a relationship agreement between the United Nations and the ICC. Such a negotiated agreement needs to be submitted to the General Assembly for approval. The text of the negotiated draft agreement was finalised with the initials of representatives of both the Secretary General and the ICC on 7 June 2004. Following this, on 13 September 2004, the General Assembly adopted Res A/58/318, which approved the Relationship Agreement between the United Nations and the ICC. This agreement entered into force on 4 October 2004.

The article within this agreement that is relevant to this chapter is article 7, which reads:

> The [ICC] may propose items for consideration by the United Nations. In such cases, the [ICC] shall notify the Secretary General of its proposal and provide any relevant information. The Secretary General shall, in accordance with his/her authority, bring such item or items to the attention of the General Assembly or the Security Council, and also to any other United Nations organ concerned, including organs of United Nations programmes and funds.

According to article 7 of the Relationship Agreement, it is the ICC that should initiate the proposal. Here, as indicated by article 2 of the Relationship Agreement, the definition of "the ICC" also includes the secretariat of the Assembly of States Parties. This is in line with Roach's proposal that the Assembly of States Parties is the right forum to initiate the establishment of the new committee. This may also support the Plan of Action of the Assembly of

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493 ibid.
States Parties that has been established ten times to promote the universality of the ICC.

The Rome Statute stipulates in article 112(4) that the Assembly of States Parties can initiate the proposal for the new joint committee: “The Assembly may establish such subsidiary bodies as may be necessary”. The wording of this article is almost identical to that of article 22 of the UN Charter. Thus further examination of this article might be deemed unnecessary. Legal bases to establish a joint committee between the General Assembly and the Assembly of States Parties can thus be found.

II. Relevance to Indonesia

The potential of a new Joint Committee is tremendous. From Indonesia’s perspective, the Joint Committee could be used to discuss several issues that may be hindering the Indonesian government from joining the ICC. The Joint Committee could discuss issues such as complementarity, the ICC’s funding and legitimacy. Other countries could also use this Joint Committee to discuss issues of their own interests, particularly in light of the next Review Conference, during which the Joint Committee can be a useful mechanism to discuss the exercise of jurisdiction by the ICC on crimes of aggression.

For the purpose of mitigating issues that are raised in Chapter 4, this chapter will only illustrate the Joint Committee to address aspects that relate to article 13(b), 98(2) and 16 of the Rome Statute.

III. Scope of the New Joint Committee

Chapter 4 has identified several aspects from the practice of the United States and the Security Council on the implementation of articles 13(b), 98(2) and 16 of the Rome Statute. From the discussion in chapter 4, the following aspects are of importance for Indonesia:
a. a consideration of Chatham House’s proposal in 2012 to create a Security Council working group on ICC referral to help the Security Council remain updated on matters referred to the ICC and to assist the ICC in achieving the goal of the referral;

b. a precedent set by the Uniting Peace Resolution allowing the General Assembly to take up matters of peace and security if the Security Council has failed to act;

c. article 13 para 1 of the Negotiated Relationship Agreement and article 115 of the Rome Statute both allow the General Assembly to provide funds to the ICC following the Security Council’s referrals. However, a separate agreement that regulate the conditions under which any funds may be provided to the ICC should be separately concluded between the ICC and the UN;

d. a need to determine whether the Security Council has acted *ultra vires* on resolution 1593, 1970, 1422 and 1487;

e. the Prosecutor of the ICC has presented the 25th and 13th reports on situations in Sudan and Libya in 2017 and has publicly asked the Security Council to provide tangible supports to the ICC as consequence of referral; yet the Security Council has not done so. This thesis considers it important to address technical, financial and enforcement mechanisms supports from the Security Council (or other UN body) to achieve the goals of each referral;

f. A need for affirmation that both the ICC and the Security Council are separate entities bound by different treaty regimes. This thesis emphasis the importance for the ICC to be able to interpret each article of the Rome Statute. More specifically, to determine the scope of article 13(b), 98(2) and 16 of the Rome Statute; and

g. A need to seek advisory opinion of the International Court of Justice on
several aspects that have been identified in chapter 4.

Hence, this thesis recommends a creation of a Joint Committee to address the seven questions identified above. These seven questions need to be addressed by the Joint Committee by two-track method. First, the Joint Committee should convene meetings and address concerns from each states with the purpose to strengthen the ICC and to invite the wider participation of states in becoming states parties to the Rome Statute.

For Indonesia, the Joint Committee should address articles 13(b), 98(2) and 16 of the Rome Statute. The ideal outcome of the meetings of the Joint Committee should be recommendation by the Joint Committee to the Pre-Trial Chamber of the ICC to provide interpretive guidance on articles 13(b), 98(2) and 16 of the Rome Statute. Such recommendation should also address whether Security Council’s resolutions No. 1593, 1970, 1422 and 1487 conflict with several articles of the Rome Statute, among others: articles 12 on ‘Preconditions to the Exercise of Jurisdiction’ and article 27 on ‘Irrelevance of Official Capacity’.

The Joint Committee may also provide recommendations to the Prosecutor to interpret article 15 of the Rome Statute and part 5 of the Rome Statute to determine whether the Security Council has acted ultra vires in resolution 1422 and 1487. For example, in chapter 4, we have seen the importance of determining whether ‘investigation’ under article 16 of the Rome Statute means literal investigation or whether it should include preliminary examination by the Prosecutor as governed by article 15 of the Rome Statute. Another example is pursuant to article 53 (1)(a)-(c) where the Prosecutor may evaluate ‘whether there is a reasonable basis to proceed with an investigation’ by considering jurisdiction, admissibility and the interests of justice. If these criteria are not met, the Prosecutor may determine that there is ‘no reasonable basis to proceed’ or in other words, refuse to take actions on the Security Council’s referrals.

\[494\] Article 15 of the Rome Statute.
\[495\] Article 53(1) of the Rome Statute.
\[496\] ibid.
Second, after decision by the Pre Trial Chamber or the Prosecutor of the ICC, the Joint Committee should consider making recommendations to the General Assembly. Here, the General Assembly can: (a) adopt resolutions that bind UN member states; (b) conclude agreements pursuant to article 13 para 1 of the Negotiated Relationship Agreement that may allow UN funding to the ICC; (c) mandate the Joint Committee to act as a Committee on Security Council referral; (d) invoke the Uniting for Peace Resolution procedure to take actions regarding matters of peace and security if necessary; and (e) seek an advisory opinion from the International Court of Justice.

A request for an advisory opinion by the General Assembly is governed by article 65 of the Statute of the International Court of Justice that reads ‘the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request’.\(^497\)

The General Assembly is obviously able to request. The General Assembly should request that the International Court of Justice address (a) whether the Security Council has authority to de facto amend or substantially vary the application of the Rome Statute;\(^498\) (b) whether the General Assembly is allowed to ignore Security Council resolutions which are in conflict with the Rome Statute (for example: on UN funding to the ICC); (c) whether the Security Council has acted ultra vires in resolutions 1593, 1970, 1422 and 1487; (d) seek confirmation that the ICC and the Security Council are different institutions and that the judges and the Prosecutor may interpret the Rome Statute independently and more importantly, may refuse to execute a referral and/or deferral should they consider the resolutions are not in adherence to the Rome Statute and the UN Charter; (e) if necessary, to seek interpretation of article 98(2) of the Rome Statute whether it covers existing agreement only and whether ‘personnel’ under the article should be limited to official personnel or cover all personnel of a state; and (f) the General Assembly may also request the International Court of Justice to determine the status of article 98 agreements concluded by the United

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\(^{497}\) Article 65 of the Statute of the International Court of Justice.

\(^{498}\) See discussion in chapter 4.
States with approximately 95 countries (prior and after the establishment of the ICC) that exempt US nationals from the ICC jurisdiction.

Another note is that after recommendation by the Joint Committee or after decision of the International Court of Justice, the General Assembly may: (a) adopt resolutions requesting UN member states to provide cooperation to the ICC for arrest and surrender of individuals wanted by the ICC; (b) adopt resolutions as mechanisms that impose travel bans and asset freezes on individuals wanted by the ICC; and (c) provide funding to the ICC to support investigation and prosecution on referred situations.

In short, the scheme of work of the Joint Committee would make recommendations first to the ICC and second, to the General Assembly. For clarity, the Joint Committee needs to run on two tracks as follows:

**Joint Committee’s recommendations to the ICC**

The Joint Committee should recommend the ICC to issue guidelines or interpretations regarding several articles of the Rome Statute as follows:

a. On article 13 (b), **the Pre Trial Chamber** should address:
   - reference to article 98 agreements in resolution 1593 that exempt US nationals and consider the extent to which this conflicts with article 12 (preconditions to the exercise of jurisdiction) and article 27 (irrelevance of official capacity) of the Rome Statute;

b. On article 98(2), **the Pre Trial Chamber** should address:
   - whether ‘article 98 agreements’ are agreements concluded prior to the establishment of the ICC or include subsequent agreements;
   - whether ‘personnel’ under this article covers all individuals of a state or only personnel acting in official capacity.

c. On article 16, **the Pre Trial Chamber and/or Prosecutor** should address:
   - whether pre-emption as envisaged by resolution 1422 and 1467 is
allowed;

- whether granting immunity to certain individuals is in conflict with article 27 (irrelevance of official capacity) of the Rome Statute;

- whether exemption of certain nationals is in conflict with article 12 (preconditions to the exercise of jurisdiction) of the Rome Statute;

- whether 'investigation' under article 16 means literal investigation or includes preliminary investigation by the Prosecutor.

Joint Committee’s recommendations the General Assembly

After a decision by the Pre-Trial Chamber and/or Prosecutor of the ICC on the issues raised above, the Joint Committee should make recommendations to the General Assembly on matters as follows:

a. to invoke the Uniting for Peace Resolution if necessary (to allow the General Assembly adopt recommendations on this section);

b. in response to the decisions made by the Pre-Trial Chamber and/or the Prosecutor of the ICC on articles 13(b), 98(2) and 16 of the Rome Statute: to reaffirm that such decisions are made by the competent authorities that are authorized to interpret the Rome Statute;

c. Security Council referrals (article 13(b) of the Rome Statute):
   - to conclude an agreement between the ICC and the United Nations on the funding of the United Nations to the ICC as mandated by article 13 para 1 of the Negotiated Relationship Agreement between the ICC and the United Nations;

   - to mandate the Joint Committee to act as a committee for Security Council referrals as recommended by Chatham House in 2012;¹⁹⁹

¹⁹⁹ See chapter 4.
• to adopt a General Assembly resolution on funding and technical support (for example: travel bans and asset freezing) to the ICC;

• to adopt a General Assembly resolution that obliges UN member states to cooperate with the ICC. Proposed wording for this purpose is: ‘decides that all UN Member States shall cooperate fully with and provide any necessary assistance to the [ICC] and the Prosecutor pursuant to this resolution’ (enforcement mechanism).

d. to seek an advisory opinion from the International Court of Justice on:

• questions regarding the limits of the power of the Security Council to de facto amend or substantially vary the application of the Rome Statute;\textsuperscript{500}

• the question whether the ICC is allowed to refuse execution of the Security Council’s referrals and/or deferrals that are not adopted in adherence to the Rome Statute and the UN Charter;

• the question whether the General Assembly is allowed to ignore Security Council resolutions considered in conflict with the Rome Statute (for example: on UN funding to the ICC after referral is made);

• the question as to the role of the ICC’s judges and the Prosecutor as the only competent authorities to interpret the Rome Statute;

• the question as to the interpretation of article 98(2) of the Rome Statute: whether agreements under article 98(2) of the Rome Statute means existing agreements that were already in place when the ICC was established or also cover future agreements

• the question as to the definition of personnel under article 98(2);

\textsuperscript{500} See chapter 4.
• the question as to the status of ‘article 98 agreements’ concluded between the United States and approximately 95 countries.

These are brief illustrations as to what the Joint Committee can do to mitigate issues that prevent Indonesia from joining the Rome Statute. They are chosen only to address articles 13(b), 98(2) and 16 of the Rome Statute. However, a broader program of work could be elaborated. This thesis proposed that this Joint Committee is an alternative mechanism that the ICC might need. The Joint Committee can also empower the work of the Assembly of the States Parties to achieve universality of the ICC.

Conclusion

Roach's proposal is important for the purpose of strengthening the ICC. What is lacking from such a proposal is that it does not provide a mechanism or format for how the new committee will operate or what it will look like. This chapter is an attempt to reintroduce Roach’s proposal with a more creative approach.

The principle of establishing a new Joint Committee between the Assembly of States Parties and the General Assembly is sound. First, the Assembly of States Parties should realise this potential by making use of article 7 of the Relationship Agreement. The Assembly of States Parties can initiate a proposal on this matter to the Secretary General for discussion at the General Assembly. The main committees of the General Assembly that might be relevant to this proposal are the Third Committee on Social, Humanitarian and Social Issues and the Sixth Committee on Legal Issues.

Secondly, although article 22 of the UN Charter might provide a suitable vehicle, this chapter suggests it is better to rely for the legal basis of this new Joint Committee on Rule 69 of the Rules of the General Assembly and/or article 13 of the UN Charter, as well as article 7 of the Relationship Agreement and article 112 (4) of the Rome Statute.
From earlier section, a sketch of the new Joint Committee is introduced. We can see that the Joint Committee is a path to confidence building to increase the level of trust of the international community towards the ICC. More importantly, it may address the hypothesis that this thesis: the Joint Committee can mitigate 'political intrusions' that the United States may have incorporated into articles 13(b), 98(2) and 16 of the Rome Statute.

By the establishment of the Joint Committee, countries, especially Indonesia, could become more confident that the ICC is an independent institution that is equipped with judges and Prosecutor to provide interpretative guideline on the Rome Statute. The linkage between the Joint Committee and the General Assembly is also a reassuring solution to concerns raised by several interviewees in chapter 4.

Without changes being made, further Security Council referrals to the ICC may simply exacerbate current problems and may not able to achieve the goal of such referrals: to end impunity and bring persons responsible for such situations to justice. This thesis emphasizes that without alternative solutions, the ICC may be further weakened by a number of problems. Among which is the politics of the United States in the Security Council. This thesis proposes that the Joint Committee is alternative solution. Thus, a proposal (a draft resolution of the Assembly of States Parties) to develop this new Joint Committee is attached.
A study conducted by Valerie Toon has shown that five South Asia countries, Vietnam, Malaysia, Philippines, Laos and Indonesia are cautious in joining the Rome Statute. In fact, Toon emphasized that these countries are waiting and seeing the experience of other countries before deciding to join the ICC. Obstacles that prevent these countries joining the ICC might be different. However, from my prior interaction as government official working at the Indonesian Ministry of Foreign Affairs, I have been able to pre-identify two aspects that hinder Indonesia's participation to the ICC. These two aspects are: (a) the United States is a non State Party to the Rome Statute and (b) suspicion that the United States’ position as permanent member of the Security Council might influence the work of the ICC in a manner that would only benefit the United States and unfavourable to other countries.

This thesis argues that a number of safeguards that were embedded in the Rome Statute were intended to protect the United State’s interests, namely article 13(b), 98(2) and 16 of the Rome Statute. These safeguards are often seen as political intrusions by some Indonesian officials. Prof. Hikmahanto and Damos Agusman commented that it would be a disappointment if Indonesia joined the ICC while the United States remained a non-state party.501

The creation of the ICC has shown that the United States has not maintained a consistent policy towards the ICC. The United States has changed its position a number of times: from rejecting a proposal to establish a permanent criminal court in early 1900 to the positive engagement of the ICC by President Barrack Obama. Countries cannot predict what will be the policy of the United States under the new administration.

501 See chapter 4 of this thesis.
This situation coupled with findings of chapter 4 - that the United States is able to manoeuvre politically to achieve its goals, might confirm Valerie Toon’s conclusion that Indonesia might prefer to withhold participation until convinced that the ICC is impartial, or at least, until a new capacity building mechanism is adopted to increase level of trust of the international community towards the ICC.

Chapter 4 illustrates a detrimental effect that the United States had achieved by the adoption of Security Council’s resolutions No. 1593, 1970, 1422 and 1487. Rosa Aloisi even commented that lack of enforcement mechanism following Security Council’s referral combined with perception that the ICC is a biased institution not only ‘weakens the ability to improve the application of universal justice [by the ICC], but [also] creates disincentives for other states to ratify the [Rome Statute] or implement legislation that could favour the apprehension and prosecution of [ICC criminals].’

One example on the practice of the Security Council on article 16 of the Rome Statute (by the adoption of resolution 1422) has demonstrated that the Security Council can act beyond the scope of article 16 as the drafters intended. Many have even argued that resolution 1422 might substantially vary the application of the Rome Statute, of which is beyond the scope and authority of the Security Council. On this note, the attempt to amend article 16 of the Rome Statute by the African states to allow the General Assembly to defer a situation from commencement of investigation and/or prosecution by the ICC is noteworthy. It brings us to the Uniting for Peace Resolution that may be relevant to some of the concerns of the interviewees - that is, to allow the General Assembly to act upon a matter of peace and security if the Security Council failed to do so.

From the outcome of the interviews, we can see that one colonel, one practitioner, one academic, one government official and one influential scholar, who was once a candidate for the position of the Foreign Affairs Minister, share a perception that it is better for Indonesia to wait for all permanent member of the

502 Aloisi, above n. 294, 154.
Security Council to join the ICC. It is thus logical that this thesis seek an alternative solution to mitigate concerns that chapter 4 has already raised.

Embarking from Steven C. Roach’s proposal to create a committee to address humanitarian intervention and the crime aggression, this thesis briefly illustrating how such a committee might work and the key issues it would need to address.

An overview of the committee is introduced in chapter 5. This thesis argues that the committee is a path to confidence building that may increase level of trust of the international community towards the ICC. By the establishment of this committee, countries may be more confident that the ICC is an independent institution that is equipped with judges and Prosecutor that are authorized to interpret the Rome Statute and supported by a committee that has link to the General Assembly. This is a way to mitigate concerns that were raised by interviewees. This committee has at least two important functions. First, to serve as a committee of stocktaking; and, second, a watchdog committee that is able to provide recommendation to Pre-Trial Chamber and the Prosecutor of the ICC as well as to the General Assembly.

This thesis set out to understand why Indonesia has not ratified the Rome Statute despite the public announcement of its intention to do so made by the government in 2004. The thesis has done this through a literature review on the history of the ICC, examining the Indonesian position during Rome Conference; and analysis of the United States’ policies towards the ICC. This thesis also involved interviews with nine relevant key stakeholders in the Indonesian government who had either worked in the past or who are currently engaged in preparations for Indonesia to join the ICC. While this work has been conducted as a country specific case study, the broader implications of this thesis lie in its recommendation of the establishment of the Joint Committee. The Joint Committee, it is argued, constituted a mechanism through which countries could become more confident that the ICC is an independent institution that is equipped with judges and a Prosecutor with the clear authority to provide interpretative guideline on the Rome Statute. This will, in the end, help stimulate
greater acceptance of the Rome Statute by non-member States, including Indonesia.
Annex 1

Draft Resolution

ASSEMBLY OF STATES PARTIES

Draft Resolution

Joint Committee between the General Assembly and the Assembly of States Parties of the International Criminal Court

The Assembly of States Parties,

Bearing in mind that the Preamble of the Charter of the United Nations recognises the meaning for the international community to unite their strength to maintain international peace and security,

Recalling that the Rome Statute of the International Criminal Court reaffirms the necessity of international cooperation for peace, security and international justice,

Recalling also that General Assembly Resolution 377 (V) of 3 November 1950 re-emphasises that among the Purposes of the United Nations is “to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”,

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Underscoring the important role assigned to the International Criminal Court in
dealing with the most serious crimes of concern to the international community
as a whole, including genocide, crimes against humanity, war crimes and crimes
of aggression, as referred to in the Rome Statute, and which threaten the peace,
security, and well being of the world,

Mindful that Rule 69 of Rules and Procedure of the General Assembly as
regulated by Article 21 of the UN Charter provides that “the General Assembly
may establish such committees as it deems necessary for the performance of its
function”,

Mindful also that Article 112.4 of the Rome Statute, as further reaffirmed by Rule
83 of the Rules and Procedures of the Assembly of States Parties, provides for
the Assembly of States Parties of the International Criminal Court to “establish
such subsidiary bodies as may be necessary, including an independent oversight
mechanism for inspection, evaluation and investigation of the Court, in order to
enhance its efficiency and economy”,

Bearing in mind that General Assembly Resolution A/58/318 of 13 September
2004 concluded a Relationship Agreement between the United Nations and the
International Criminal Court,

Recalling that, in accordance with Article 7 of the Relationship Agreement
between the United Nations and the International Criminal Court, “the Court
may propose items for consideration by the United Nations”,

Deeming it necessary for both the United Nations and the International Criminal
Court to unite their strength to meet the challenges that the most serious crimes
of concern to the international community as a whole must not go unpunished
and that prevention of such, as well as their effective prosecution, must be
ensured by enhancing international cooperation,
Invokes Article 7 of the Relationship Agreement between the United Nations and the International Criminal Court to assist the Assembly States Parties in proposing an agenda item to the General Assembly of the United Nations,

Proposes to the General Assembly an agenda item to establish a Joint Committee between the United Nations and the International Criminal Court to discuss matters of common concerns, and

Adopts the current resolution and annex [annex should explaining the scope and functions of the Joint Committee as chapter 5 of this thesis has briefly demonstrated] thereto.
Annex 2

Human Ethics Certificate of Approval

This is to certify that the project below was considered by the Monash University Human Research Ethics Committee. The Committee was satisfied that the proposal meets the requirements of the National Statement on Ethical Conduct in Human Research and has granted approval.

**Project Number:** CF14/2307 - 2014001249

**Project Title:** Silent Political Intrusions into the Rome Statute of the International Criminal Court: Major Threats that May Impede Indonesia’s Joining

**Chief Investigator:** Assoc Prof Gideon Boas

**Approved:** From: 27 August 2014 To: 27 August 2019

**Terms of Approval**

1. The Chief Investigator is responsible for ensuring that permission letters are obtained, if relevant, before any data collection can occur at the specified organization.
2. Approval is only valid whilst you hold a position at Monash University.
3. It is the responsibility of the Chief Investigator to ensure that all investigators are aware of the terms of approval and to ensure the project is conducted as approved by MUHREC.
4. You should notify MUHREC immediately of any serious or unexpected adverse effects on participants or unforeseen events affecting the ethical acceptability of the project.
5. The Explanatory Statement must be on Monash University letterhead and the Monash University complaints clause must include your project number.
6. Amendments to the approved project (including changes in personnel): Require the submission of a Request for Amendment form to MUHREC and must not begin without written approval from MUHREC. Substantial variations may require a new application.
7. Future correspondence: Please quote the project number and project title above in any further correspondence.
8. Annual reports: Continued approval of this project is dependent on the submission of an Annual Report. This is determined by the date of your letter of approval.
9. Final report: A Final Report should be provided at the conclusion of the project. MUHREC should be notified if the project is discontinued before the expected date of completion.
10. Monitoring: Projects may be subject to an audit or any other form of monitoring by MUHREC at any time.
11. Retention and storage of data: The Chief Investigator is responsible for the storage and retention of original data pertaining to a project for a minimum period of five years.

---

Professor Nip Thomson
Chair, MUHREC

cc: Mr Ferry Junigwan Murdiansyah
Annex 3

Permission Letter and Consent Forms

Permission Letter

Dear A/Prof. Gideon Boas,

Thank you for your request to recruit participants from the Indonesian Ministry for Foreign Affairs for the above-named research.

I have read and understood the Explanatory Statement regarding the research project Silent Political Intrusions into the Rome Statute of the International Criminal Court: Major Threats that May Impede Indonesia’s Joining and hereby give permission for this research to be conducted.

Yours sincerely,

DR. Ir. Damoli Agusman
Secretary to the Directorate General of Law and Treaties
Consent Form Damos Dumoli Agusman

MONASH University

CONSENT FORM

Project: Silent Political Intrusions into the Rome Statute of the International Criminal Court: Major Threats that May Impede Indonesia's Joining

Chief Investigator: A/Prof. Gideon Boas

I have been asked to take part in the Monash University research project specified above. I have read and understood the Explanatory Statement and I hereby consent to participate in this project.

I consent to the following:

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Name of Participant  Dr. Mr. Damos Dumoli Agusman

Participant Signature  Date
Consent Form Dhahana Putra

Project: Silent Political Intrusions into the Rome Statute of the International Criminal Court: Major Threats that May Impede Indonesia’s Joining

Chief Investigator: A/Prof. Gideon Boas

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- I agree to be referred by position [ ] Yes [ ] No

Name of Participant: Dhahana Putra

Participant Signature: [Redacted]

Date: 21/11
Monash University

Consent Form

Project: Silent Political Intrusions into the Rome Statute of the International Criminal Court: Major Threats that May Impede Indonesia’s Joining

Chief Investigator: A/Prof. Gideon Boas

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- I agree to be referred by position [ ] ☑ [ ]

Name of Participant: Prof. Hikmahanto Juwana

Participant Signature: [ horse satisfactorily blacked out ]

Date: [ horse satisfactorily blacked out ]
Consent Form Fadhillah Agus

MONASH University

CONSENT FORM

Project: Silent Political Intrusions into the Rome Statute of the International Criminal Court: Major Threats that May Impede Indonesia’s Joining

Chief Investigator: A/Prof. Gideon Boas

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I agree to be named
I agree to be referred by position

Name of Participant: Bpk. Fadhillah Agus

Participant Signature: ___________________________ Date: 9/11/17

133
Consent Form Rizal Yasma

MONASH University

CONSENT FORM

Project: Silent Political Intrusions into the Rome Statute of the International Criminal Court: Major Threats that May Impede Indonesia’s Joining

Chief Investigator: A/Prof. Gideon Boas

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- I agree to be referred by position

Name of Participant: RIZA YASMA

Participant Signature: [Redacted] Date: 23-11-2014
MONASH University

CONSENT FORM

Project: Silent Political Intrusions into the Rome Statute of the International Criminal Court: Major Threats that May Impede Indonesia’s Joining

Chief Investigator: A/Prof. Gideon Boas

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I agree to be named
I agree to be referred by position

Name of Participant: Diajeng Wulan Christianity

Participant Signature

Date 19/11/14
Consent Form Ahmad Shaleh Bawazier
Consent Form Abdul Kadir Jaelani

MONASH University

CONSENT FORM

Project: Silent Political Intrusions into the Rome Statute of the International Criminal Court: Major Threats that May Impede Indonesia’s Joining

Chief Investigator: A/Prof. Gideon Boas

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I agree to be named [ ] Yes [ ] No
I agree to be referred by position [ ] Yes [ ] No

Name of Participant: [Redacted]

Participant Signature: [Redacted] Dat: [Redacted]
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  interview if so necessary ☑
- I agree to be named ☑
- I agree to be referred by position ☑

Name of Participant: M. Anshor

Participant Signature: [Redacted]

Date: 29 Oct 04
Annex 4

Interview Questions

1. How you know about the International Criminal Court? (Introductory Questions)

   a. What do you think about the ICC?
   b. Do you think the international community needs ICC?
   c. With the existence of the ICC, should we forget other mechanisms in international criminal justice, such as Ad Hoc Tribunals?

2. 2012 marked the 10th anniversary of the ICC and ever since, discussion on how to strengthen the ICC has been speeding up. One of the discussions is the work relationship between the ICC and the Security Council. Do you think the current relationship between the two is ideal for the ICC to fulfill its mandates?

   a. [If yes] What do you think need to be improved from this relationship?
   b. [If no] Do you think this relationship can be perceived as an obstacle for countries in accepting the Rome Statute?
   c. Two important roles of the Security Council as mentioned in the Statute are: i) to refer/defer a case to/from the ICC; and ii) to provide financial contribution; if the Council refer a case to the ICC. Do you think these roles are necessary?

   a. Do you think the ICC should be fully independent from the Security Council?

3. Do you think the universality of the ICC is an important issue? One of
the highlights of the Rome Statute is complementarity principle to allow national jurisdiction to exercise upon cases. In your opinion, which one is more important, complementarity principle or the universality of the ICC?

4. In 2010, at Kampala Review Conference, States agreed to amend the Rome Statute so that the ICC could exercise jurisdiction on aggression once the amendment come into force. What do you think about the Kampala Review Conference? The next review conference is to be held in 2017. What is your expectation from this upcoming conference.

5. Asian countries, including Indonesia, have shown little interest to the Rome Statute of the Court. One may argue for Asian countries to wait until all P5 countries accepted the Statute, do you agree with this argument and what is the significant for that?

a. In your opinion, why countries are so reluctant in accepting the Rome Statute? What do you think about the Rome Statute?

b. Do you think Indonesia is ready to accept the Rome Statute?

c. If, and only if, there’s an opportunity to amend the Rome Statute, which part of it will be the most concern for Indonesia?

c. [tentative question] New government will be elected, what is your prediction with the new government’s standpoint on the issue of accession to the Rome Statute of the ICC?

Thank you
Annex 5

Transcript of the Interview (unofficial translation)

Interview with Muhammad Anshor
Wednesday, 29th October 2014, (Director for Human Rights and Humanitarian Affairs, MoFA)

1. How you know about the International Criminal Court?

During my professional work, I dealt with multilateral issues, especially human rights and humanitarian issues. This was around 1997. I am very familiar with the process and discussion of the ICC as well as the interest of our stakeholders.

a. What do you think about the ICC?

The ICC is an international instrument for global justice to ensure that heinous crimes should never happened again. Those committed to such crimes shall not go unpunished. The ICC can also be seen as deterrence so that ICC crimes should never be committed again.

b. Do you think the international community needs ICC?

Yes. We can see from the votes that the international community needs the ICC.

c. With the existence of the ICC, should we forget other mechanisms in international criminal justice, such as Ad Hoc Tribunals?
I think they complement each other. We still need ad hoc tribunals for past crimes. Ad Hoc tribunals are also still needed so long the ICC has not yet attained its universal status. We still need Ad Hoc tribunals where the case is beyond the ICC’s reach.

I agree that the ICC replaces Ad Hoc Tribunals but there are some situations that we still need Ad Hoc Tribunals. The international community should benefit that we now have a permanent criminal court.

2. 2012 marked the 10th anniversary of the ICC and ever since, discussion on how to strengthen the ICC has been speeding up. One of the discussions is the work relationship between the ICC and the Security Council. Do you think the current relationship between the two is ideal for the ICC to fulfill its mandates?

I think the link between the ICC and the Security Council is necessary. However, it is yet ideal. The Security Council is not democratic and this is the root of all perceptions: that the ICC is biased, prone to politicization, etc.

It is undemocratic because it is not represent the current geopolitical power in the world. However, as current global mechanism between adjudication and management of peace and security, the link between the two institutions is necessary.

a. Do you think the current relationship between the ICC and the Security Council will be an obstacle for countries to join the ICC?

Indirectly, yes. This is a matter of trust for non-member states. The link between the ICC and the Security Council may affect this, however, indirectly. The Security Council may still reach non-member
states if it is a matter of peace and maintenance. Countries may consider it is not beneficial to become member state to the ICC; if the Security Council may still have power upon them.

b. Two important roles of the Security Council as mentioned in the Statute are: i) to refer/defer a case to/from the ICC; and ii) to provide financial contribution; if the Council refer a case to the ICC. Do you think these roles are necessary?

In my personal opinion, I think these roles are important and necessary. This may be ideal if the Security Council can be reformed. The current condition on the Security Council is not yet ideal but the link between two institutions is necessary.

c. I still need to ask you this question; do you think the ICC should be fully independent from the Security Council?

To be fully detached is not easy. Again, I think the link between two institutions is necessary. It is just the current condition in the Security Council makes it not yet ideal.

3. Do you think the universality of the ICC is an important issue?

This is a basic concept. Yes I think it is very important.

a. One of the highlights of the Rome Statute is complementarity principle to allow national jurisdiction to exercise upon cases. In your opinion, which one is more important, complementarity principle or the universality of the ICC?

I do not think it is contradicting. Universality means that every states
accept, support and become member states of the ICC. If this was achieved, I do not think it has negative effect to the complementarity principle.

4. In 2010, at Kampala Review Conference, States agreed to amend the Rome Statute so that the ICC could exercise jurisdiction on aggression once the amendment come into force. What do you think about the Kampala Review Conference?

We follow this issue very closely even though we are not state party to the ICC. Indonesia sent its delegation to the Conference. The outcome is not satisfactory to all states, but we took notes.

a. What is your expectation from the upcoming conference in 2017?

I think it is important for the next review conference to be able to produce mechanism that will create confidence in determining the existence of an act of aggression. It is very relevant and it is my hope that the next Review Conference will be able to address this matter comprehensively.

5. Asian countries, including Indonesia, have shown little interest to the Rome Statute of the Court. One may argue for Asian countries to wait until all P5 countries accepted the Statute, do you agree with this argument and what is the significant for that?

I do not see it that way. ICC crimes are new attention for ASEAN countries. Countries may cautious because every country in the region has its own historical background. Principle of Non-Interference in ASEAN region may also influence this. ASEAN countries may perceive external mechanism as something that is really intrusive to their sovereignty.
a. Do you think this lack of participation from ASEAN countries because they think there are some flaws in the Rome Statute?

I disagree. I think it is a matter of our culture in the region that countries shall not interfere with another country domestic problem. Accepting the Rome Statute will allow external mechanism to interfere ASEAN countries’ domestic problems. I think ASEAN countries still have trust-issue with the ICC.

b. Do you think Indonesia is ready to accept the Rome Statute?

I think we should really ask our stakeholders. Our stakeholders split into two. One suggests that we are ready and the other suggest completely the opposite. I think we have to achieve national consensus.

c. If, and only if, there’s an opportunity to amend the Rome Statute, which part of it will be the most concern for Indonesia?

I am not sure. The Rome Statute is process of multilateral negotiations. Many of its elements have been adopted into our domestic legislation. We need to see the practice of the ICC. We need to see whether there is politicization in the ICC or abuse to the whole decision making process of the ICC. We need to see that the practice of the ICC really reflects the spirit of global justice and to fight impunity.

d. What do you think about the standpoint for the new government towards the Rome Statute?

This is just prediction. I think the new government will continue to prepare Indonesia to join the ICC. We will continue to strengthen our
domestic legislation so we can either: join the Rome Statute or to be able to say that Indonesia can try ICC crimes in our own domestic court.

Thank you
Interview with Dhahana Putra

Friday, 21st November 2014 (Division Head for Public Legal Administration and Human Rights on Regional Office of Special Administration of Jakarta of the Indonesian Ministry of Legal Affairs and Human Rights)

1. How you know about the International Criminal Court?

I was member of the team that formulated the Presidential Decree No. 23/2011 on National Plan of Action on Human Rights. One of the agenda is to prepare Indonesia’s readiness to join several Human Rights Treaties, one of which is the Rome Statute of the ICC.

The Indonesian government had twice scheduling ratification of the Rome Statute on its national plan, the first one was national plan of 2004-2009 and the second one was of 2011-2014.

a. Is there any renewal of the said national plan?

We are now preparing the next national plan, which also stipulate the necessity for Indonesia to join the Rome Statute. We have not yet finished on the time frame for the next national plan of action but be assured, we have scheduled ratification on the Rome Statute.

b. What do you think about the ICC?

The ICC is an institution that can complement our human rights instruments. We do have Regulation No 26/2000 on Indonesian Court of Human Rights, however, this regulation needs to be further improved especially on matter of law enforcement.
The most crucial part from the ICC is about its complementarity principle. In this case, it will be beneficial if the government of the Republic of Indonesia joins the ICC.

c. *Do you think the international community needs ICC?*

I think the commitment shown by the international community is promising, especially by the European and several American countries, Canada for example. On this regard, I want to highlight that many European countries support the effort of the Indonesian government to join the ICC.

d. *With the existence of the ICC, should we forget other mechanisms in international criminal justice, such as Ad Hoc Tribunals?*

Many concerns grow in Indonesia that the ICC will exercise its jurisdiction over our past crimes, this is unreasonable as the ICC does not work retroactive.

e. *So should we forget ad hoc tribunals?*

I want to stress the important for us to improve our domestic law while at the same time joining the ICC. Regulation No. 26/2000 governs the creation of ad hoc tribunal in Indonesia for past crimes prior to year 2000. On the other side, the ICC works year 2000 onwards. If Indonesia joined the ICC, the ICC shall able to exercise its jurisdiction only from the year we joined the ICC.

2. *2012 marked the 10th anniversary of the ICC and ever since, discussion on how to strengthen the ICC has been speeding up. One of the discussions is the work relationship between the ICC and the Security Council. Do you think*
the current relationship between the two is ideal for the ICC to fulfill its mandates?

The Security Council sometimes still influence the ICC. Not to mention, domination by the United States and its allies is very strong in the Security Council. It is very unfortunate that the United States and China have not yet joined the ICC. I wish that the United States, as pioneer in many human rights instrument, will join the ICC so that the commitment as enshrined in the Rome Statute not only abide by and designated towards developing countries.

a. Do you think the current relationship between the ICC and the Security Council will be an obstacle for countries to join the ICC?

I think the Security Council can back up the ICC so that enforcement on human rights can be worldwide.

b. Two important roles of the Security Council as mentioned in the Statute are: i) to refer/defer a case to/from the ICC; and ii) to provide financial contribution; if the Council refer a case to the ICC. Do you think these roles are necessary?

Very important, especially when the Security Council provides their financial assistance in the ICC investigations, but other countries should also contribute proportionately so that the outcome of any ICC investigations or proceedings will not be influenced by the politics among the Security Council’s members.

c. Do you think the ICC should be fully independent from the Security Council?

That is the ideal but it is a bit utopic. When the ICC is conduct
investigation toward any states, I think support from the Security Council is needed by the ICC.

3. **Do you think the universality of the ICC is an important issue?**

Very important. If universality of the ICC is gained, I think there will be less discrimination in investigations or proceedings of cases.

*a. One of the highlights of the Rome Statute is complementarity principle to allow national jurisdiction to exercise upon cases. In your opinion, which one is more important, complementarity principle or the universality of the ICC?*

It is the right of every state to exercise its sovereign rights. Complementarity means that it should be complement to such exercise. When the ICC gets its universal status, the ICC still needs to respect complementarity principle.

4. **In 2010, at Kampala Review Conference, States agreed to amend the Rome Statute so that the ICC could exercise jurisdiction on aggression once the amendment come into force. What do you think about the Kampala Review Conference?**

Crime of aggression is a sensitive topic. Although the Kampala Conference had succeeded in defining act of aggression and crime of aggression, I think countries need to really agree on the definition and the limitation about crime of aggression. (Interrupted by phone call)

*a. What is your expectation from the upcoming conference in 2017?*

I wish the ICC to be more independent in the future and not to be influenced by the Security Council. If the Security Council still given the
power to influence the ICC, the Security Council can simply hand-picked which cases go to the ICC based on their own interest.

The ideal is that the ICC to be independent from the Security Council but sometimes, certain political back up from the Security Council is still needed. Maybe we need to limit the authority of the Security Council so that it cannot intervene any process that is going on.

5. **Asian countries, including Indonesia, have shown little interest to the Rome Statute of the Court. One may argue for Asian countries to wait until all P5 countries accepted the Statute, do you agree with this argument and what is the significant for that?**

At regional level, AICHR as well as ASEAN Charter are clear enough to send the message that human rights is our regional priority. Preparedness to join several international human rights instruments is also a priority for ASEAN countries, including Indonesia. I disagree with that statement.

*a. What do you think about the Rome Statute?*

Rome Statute is a good achievement. However, we need to strengthen the complementarity principle of the Rome Statute. There are provisions that state, more or less, that the ICC is complement to national jurisdiction and shall not work retroactive, but I think the Rome Statute to be more elaborative on this.

In Indonesia, some people still think that the ICC may try past crimes, so this is why I think it’s important to re-emphasize this matter.

*b. Do you think Indonesia is ready to accept the Rome Statute?*

Our political commitment as stipulated under the national plan is to
join the ICC. We will continue to strengthen our domestic legislations.

c. If, and only if, there’s an opportunity to amend the Rome Statute, which part of it will be the most concern for Indonesia?

I think we need to expand the criteria for war crimes so that it includes combatants.

d. What do you think about the standpoint for the new government towards the Rome Statute?

Under presidency of Joko Widodo it is mentioned that the state is to serve the people. I think this is a commitment that will bridge the process to develop out legal instrument with the effort to join the ICC.

Thank you
Interview with Fadillah Agus,
Monday, 24th November 2014 (Founder and Partner at FRR Law Office)

1. How you know about the International Criminal Court?

I worked for ICRC Indonesia and I regularly conducted trainings on human rights and humanitarian law to our military personnel throughout Indonesia. In 2004, me and the late Rudi M. Rizki (former judges at the Indonesian Human Rights Court) decided to establish this law firm. With support from Norway, Canada and Australia, we continue to conduct human rights and humanitarian training to the Indonesian military.

I was also member of a team established by the Indonesian National Commission on Human Rights on Forced Disappearance in 1998.

Our law firm has participated in providing legal opinion to the Indonesian government in many cases, such as: on the issue of possible human rights violation in Aceh – Indonesia, Lapindo and so many more.

We are also active in increasing awareness to the public, military and police on ICC-related issues. We tried to help the government to join the ICC.

Our law firm also joined the Indonesian Coalition Civil Society for the International Criminal Court. In this coalition, we have produced many position papers as well as presenting seminar both locally and overseas.

a. What do you think about the ICC?

I support the ICC. Even though it has trigger mechanism that involves
the Security Council, I believe that political influence to the ICC is much lesser compared to the ICTY and ICTR which were established by the Security Council resolution.

Public has mixed perception towards the ICC. At first, I have a strong feeling towards the ICC, but now that feeling is slowly diminished. There are many situations that involve the United States but why the United States seemed to be immune from the ICC. It is a challenge for the ICC to show to the world that it is independent and should serve the purpose of global justice. I notice that the United States, China and Russia have yet to be a party to the Rome Statute.

b. *Do you think the international community needs ICC?*

One goal of the ICC is to end impunity. If the ICC cannot do this in all regions, I think it might be better for every region to strengthen their regional capacity.

In Indonesia, I know that two institutions that support the Indonesian government to join the ICC are the Ministry of Foreign Affairs and the Ministry of Legal Affairs and Human Rights. I do not think the Ministry of Defense, the Indonesian Military, our National Police and our Parliament share the same standpoint.

I think it is really important to achieve consensus at national level. We have the need to end impunity and to achieve global justice.

I think it is better for Asian countries to find its own way, if within the next ten years participation of Asian countries in the ICC is still low.

c. *What do you mean? Do you think we should establish a court similar to European Courts of Human Rights?*
Indeed.

d. Do you think it is possible?

I think so.

e. In this context, what is your expectation for the organization in dealing with ICC related matters in the region? Should we have a regional mechanism to try ICC crimes?

Principle of complementarity of the ICC is a very good principle. I think we can adopt this principle for regional arrangement, so that it will not put away national sovereignty but instead, it complements national sovereignty.

f. With the existence of the ICC, should we forget other mechanisms in international criminal justice, such as Ad Hoc Tribunals?

Yes we should. Ad Hoc Tribunals are highly politicized.

g. In Indonesia, the ICC is often connoted as human right court. We may forget that it is not only human rights issues that are being dealt by the ICC. Associating the ICC with only human rights issues seems to be a bit of putting the spirit away. What do you think?

I do. We have encountered many situations that require us to explain that the ICC is not a court of human rights. By putting the ICC into the context of human rights, it mislead public perception. We have to explain that the ICC is a criminal court with jurisdiction upon four serious crimes: crimes against humanity, war crimes, genocide, crimes of aggression.
In Indonesia, our Court of Human Rights is retroactive. We need to explain that the ICC is different from our Court of Human Rights and that the ICC is not retroactive.

2. 2012 marked the 10th anniversary of the ICC and ever since, discussion on how to strengthen the ICC has been speeding up. One of the discussions is the work relationship between the ICC and the Security Council. Do you think the current relationship between the two is ideal for the ICC to fulfill its mandates?

Not yet.

a. Do you think the current relationship between the ICC and the Security Council will be an obstacle for countries to join the ICC?

Yes. Trigger mechanism through the Security Council may create obstacle for countries to join the ICC.

b. Two important roles of the Security Council as mentioned in the Statute are: i) to refer/defer a case to/from the ICC; and ii) to provide financial contribution; if the Council refer a case to the ICC. Do you think these roles are necessary?

I do not think that the Security Council should be given power to refer or defer a case as well as to provide financial contribution to the ICC. The ICC will always be a playground for P5 countries if this condition is not mitigated.

c. Do you think the ICC should be fully independent from the Security Council?
It is a must.

3. Do you think the universality of the ICC is an important issue?

The ICC should be fully detached from the Security Council and then the universality status of the ICC can be obtain.

a. One of the highlights of the Rome Statute is complementarity principle to allow national jurisdiction to exercise upon cases. In your opinion, which one is more important, complementarity principle or the universality of the ICC?

Complementarity. It is very important.

4. In 2010, at Kampala Review Conference, States agreed to amend the Rome Statute so that the ICC could exercise jurisdiction on aggression once the amendment come into force. What do you think about the Kampala Review Conference?

The outcome of Kampala Review Conference is really positive. Now we do have mechanism to try crime of aggression. However, we need to determine which institution should be able to determine when an act of aggression is taken place. This is very important.

a. What is your expectation from the upcoming conference in 2017?

We need to make sure that it is not the Security Council to determine when an act of aggression is taken place.

We also need to study whether a sovereign act by a government will be considered as crime of aggression. Our Constitution allows the President to declare war. We need to asses this.
5. **Asian countries, including Indonesia, have shown little interest to the Rome Statute of the Court. One may argue for Asian countries to wait until all P5 countries accepted the Statute, do you agree with this argument and what is the significant for that?**

I agree. We will be in the status of wait and see until we can see that the ICC can truly serve the interest of global justice.

a. *Do you think Indonesia is ready to accept the Rome Statute?*

We are ready. We have accommodated ICC crimes into our new draft criminal code.

b. *If, and only if, there’s an opportunity to amend the Rome Statute, which part of it will be the most concern for Indonesia?*

Article on the role of the Prosecutor to conduct pro prio motu investigation.

c. *What do you think about the standpoint for the new government towards the Rome Statute?*

It will be similar to the previous administration.

Thank you
Interview with Abdul Kadir Jaelani
Monday, 27th October 2014, (Former Indonesian delegate to Rome Conference and current Director for Economic, Socio and Cultural Treaties of the Republic of Indonesia MoFa)

1. How you know about the International Criminal Court?

I got involved with the issue of the International Criminal Court since Preparatory Committee meeting in 1995. I also involved with all discussions and preparation meetings in Jakarta.

a. What do you think about the ICC?

The ICC is a new international institution with one of its goals is to stop impunity. By the creation of the ICC, states will take further its commitments upon crimes of humanity, genocide, war crimes and aggression. If states fail to uphold its commitment then it will be taken over by the ICC. This is the very essence of the principle of complementarity.

b. Do you think the international community needs ICC?

To some extent, yes, we need the ICC.

c. With the existence of the ICC, should we forget other mechanisms in international criminal justice, such as Ad Hoc Tribunals?

I believe so. One reason for the establishment of the ICC is because we know that Ad Hoc Tribunals are posed with several low points,
either procedurally or institutionally.

2. 2012 marked the 10th anniversary of the ICC and ever since, discussion on how to strengthen the ICC has been speeding up. One of the discussions is the work relationship between the ICC and the Security Council. Do you think the current relationship between the two is ideal for the ICC to fulfill its mandates?

This is a very delicate issue. At the Rome Conference, many developing countries expressed their hope for the ICC to be detached from the Security Council. However, this approach is a bit utopic for me. I know the Security Council is a dilemma for some countries, but to be frank, they can use the Security Council for their own benefit. To protect their interests; even Indonesia can make a good use of the Security Council.

The Security Council is not a bad thing but I am not saying is a good thing either.

If you ask me ‘should the ICC free from the Security Council’, I will agree to that, but I am not sure if it will guarantee the ICC free from politicization.

The only reason we don’t want the ICC has link with the Security Council is to avoid politicization of the ICC.

We must not forget, judges can also do political role. We cannot guarantee that the judges and the prosecutor will be free from politics. Perhaps, this is more dangerous for some countries. It will be more undesirable because everything is up for political consideration of individuals.

This situation will be different with the Security Council as there are
mechanisms and procedures.

*What do you think about the role of the Assembly of States Parties of the ICC in this respect?*

It is the same. It will subject to political consideration. What’s the difference with the Security Council? The different is that in the ASP there are hundreds of countries whilst in the Security Council there are fifteen countries.

*Even the fact that in the ASP they don’t have veto rights?*

It is not necessarily better. One state one vote is not always a good thing. Like I said, sometime countries can benefit from veto right. Look at Myanmar that enjoys its ties with China. If it’s not because of China’s veto, Myanmar has collapsed.

*Two important roles of the Security Council as mentioned in the Statute are: i) to refer/defer a case to/from the ICC; and ii) provide financial contribution; if the Council refer a case to the ICC. Do you think these roles are necessary?*

Same with the above, it is not a bad thing but it is not necessarily a good thing.

**Do you think the universality of the ICC is an important issue?**

It is true. Universality of the ICC is very essential.

*a. One of the highlights of the Rome Statute is complementarity principle to allow national jurisdiction to exercise upon cases. In your opinion, which one is more important, complementarity principle or the universality of the ICC?*
Universality of the Rome Statute is an important thing, but to achieve that we need an effective and good implementation of the complementarity principle.

4. **In 2010, at Kampala Review Conference, States agreed to amend the Rome Statute so that the ICC could exercise jurisdiction on aggression once the amendment come into force. What do you think about the Kampala Review Conference?**

At the Kampala Review Conference, every states tried to find a win-win solution but at the end of the day every state loose, including the United States.

**a. What is your expectation from the upcoming conference in 2017?**

I wish to see the next conference to be able to review the implementation of the Rome Statute by the ICC. Most importantly, we need to review again the definition of aggression.

If Indonesia is to attend the next review conference, I think we should focus on how the ICC implements the principle of complementarity.

Crimes of aggression will be an obstacle for the ICC, because it is very delicate and overlapping with chapter VII.

5. **Asian countries, including Indonesia, have shown little interest to the Rome Statute of the Court. One may argue for Asian countries to wait until all P5 countries accepted the Statute, do you agree with this argument and what is the significant for that?**
Yes, some ASEAN countries have constitutional issues to really adopt and implement the Rome Statute. For Malaysia and Thailand, responsibility of their King is really an important issue.

a. Do you think Indonesia is ready to accept the Rome Statute?

I support Indonesia to join the ICC. I think we are ready; but if you asked me on Indonesia’s political readiness to join the Court that’s different context, I do not think we are ready in that area. Many people still ‘cautious’ to the Rome Statute.

b. If, and only if, there’s an opportunity to amend the Rome Statute, which part of it will be the most concern for Indonesia?

Nothing. However, if we really talking into that direction, I think we need to strengthen the principle of complementarity. Bear in mind though that amending the Rome Statute is, again, like opening a Pandora box.

Thank you
Interview with Rizal Yasma
Wednesday, 23rd November 2014 (Colonel Navy, Head of Law and Human Rights Department of the Legal Development Agency of the Indonesian National Defence Forces)

1. How you know about the International Criminal Court?

I was the representative from the military on the Working Group that was established on the first National Plan of Action on Human rights (RANHAM) 1998. One of the agenda of the first RANHAM is to prepare Indonesia to accede the Rome Statute.

a. What do you think about the ICC?

The ICC is a breakthrough unlike previous tribunals that were established on ad hoc basis. The ICC is the first permanent court that has successfully established.

b. Do you think the international community needs ICC?

Yes, this will differentiate the ICC with other tribunals that are also known as the courts of victor’s justice.

c. With the existence of the ICC, should we forget other mechanisms in international criminal justice, such as Ad Hoc Tribunals?

Yugoslavia case is still running until now. It shows that ad hoc tribunal is still needed. However, in the future, we should really moving forward towards the direction of the ICC as court of global justice.

2. 2012 marked the 10th anniversary of the ICC and ever since, discussion on how to strengthen the ICC has been speeding up. One of the discussions is
the work relationship between the ICC and the Security Council. Do you think the current relationship between the two is ideal for the ICC to fulfill its mandates?

It is firmly stated in the Rome Statute that the ICC is an independent judicial institution. The role of the Security Council in this regard is to complement the work of the ICC, where countries refused to stop ICC crimes within their area of jurisdiction, then the Security can step in and complement the ICC.

a. Do you think the current relationship between the ICC and the Security Council will be an obstacle for countries to join the ICC?

This is interesting. Three of the P5 countries namely the United States, China and Russia have yet joined the ICC. China has publicly stated that they will not join the ICC. I am not sure about Russia but the United States was one of the pioneer countries on the creation of the ICC. They refused to join because I think they see the ICC is politically weighted.

We have not joined the ICC because of this condition; that not all P5 countries yet joined the ICC, especially the United States. Another reason is that I do not think Indonesia ready to join the ICC. We need to amend our legislation on Court of Human Rights before join the ICC.

Also, in my opinion, our friends from the military and the police are not yet ready. We need to continue the socialization of the Rome Statute so that everyone can be on the same page. [He mentioned a case where the commander of a battalion was replaced because that said commander was considered neglectful. He refused the case to be quoted]

We need to have national consensus on elements that are governed under the Rome Statute, for example: how far can we interpret an act as
an neglectful act and then accommodate this into our legislation.

We also need a better communication between the military and national police. Post Suharto regime, the Indonesian military is not entrusted to deal with the issue of national security. The Indonesian military focuses on national defense and the national police should take care issue of national security. We cannot step in in this area if the national police does not ask us to step in. This needs to be clearly regulated because we want to be able to decide which institution shall be responsible if a wrongful act is occurring.

[He mentioned two more cases]

I think it is still going to be difficult. We have two generals, now chairmen of two political parties, being accused of several human rights violations. These generals have attended trials. Courts have made their rulings but people still try to relate politics with this issue. We need to see composition in our Parliament.

However, I know for sure that the upcoming RANHAM will still stipulate the Rome Statute as one instrument that needs to be acceded.

It is unfortunate though, that the Ministry of Defense has issued letter of objection for Indonesia to accede the Rome Statute.

b. Ministry of Defense? Is this because of the visit of Prof Denny Indrayana (former Vice Minister of Legal Affairs and Human Rights) to the Hague one or two years ago?

[Laughing] Yes

c. Is it because Prof Denny made a public statement at the Hague that
Indonesia will join the Rome Statute at the end of year 2014? Also the fact that none of his delegation were representatives from any ministries?

[Laughing and not answering]

d. **Two important roles of the Security Council as mentioned in the Statute are: i) to refer/defer a case to/from the ICC; and ii) to provide financial contribution; if the Council refer a case to the ICC. Do you think these roles are necessary?**

I think the role to defer a case from the ICC is an act of intervention to the ICC itself. I will support if the Security Council provide financial contribution to the ICC. I know that the process in the ICC is very long and expensive. So financial support from the Security Council might help.

[Repeating a story about Uhuru Kenyatta]

e. **Do you think the ICC should be fully independent from the Security Council?**

Yes it is the ideal situation. It is just a bit unfortunate that role of the Security Council is still too big. Maybe countries need to sit again and talk about this.

3. **Do you think the universality of the ICC is an important issue?**

Yes it is very important.

a. **One of the highlights of the Rome Statute is complementarity principle to allow national jurisdiction to exercise upon cases. In your opinion,
which one is more important, complementarity principle or the universality of the ICC?

I think it is more important to priorities domestic proceedings. It is the right of a country to try its own national. I also concern with the possibility of multiple interpretation on “unable” and “unwilling”.

4. In 2010, at Kampala Review Conference, States agreed to amend the Rome Statute so that the ICC could exercise jurisdiction on aggression once the amendment come into force. What do you think about the Kampala Review Conference?

This is a very delicate issue. I think Kampala Review Conference is not optimal. Sometimes NATO countries, for the sake of humanitarian intervention, or even the United States with its war against terrorism committed this act of aggression. I am not satisfied with the outcome of Kampala Review Conference.

a. What is your expectation from the upcoming conference in 2017?

I think it is going to be trouble some if the Security Council to determine an act of aggression. Those P5 countries hold veto rights. We might see a deadlock. I wish to see an alternate forum that is more independent and democratic to decide an act of aggression.

5. Asian countries, including Indonesia, have shown little interest to the Rome Statute of the Court. One may argue for Asian countries to wait until all P5 countries accepted the Statute, do you agree with this argument and what is the significant for that?

I think we need to improve our domestic legislation. [Telling a story of Majapahit and Soekarno regime which are irrelevant]
a. Do you think this lack of participation from ASEAN countries because they think there are some flaws in the Rome Statute?

On the Minister of Defense’s letter that I mentioned earlier, there are so many articles in the Rome Statute that might be subject to a multiple interpretation. This might pose threat to our sovereignty.

b. Do you think Indonesia is ready to accept the Rome Statute?

We are ready but I think we have a lot of homework [Laughing]

c. If, and only if, there’s an opportunity to amend the Rome Statute, which part of it will be the most concern for Indonesia?

I think we should give more time to the ICC. The Rome Statute is a product of a very long struggle. We can learn from Norway. They have accepted the Rome Statute but at the same time they try to fix their domestic laws. I am trying to say that the implementation of the Rome Statute to many countries will take time. I do not think we should amend the Rome Statute in near future.

d. What do you think about the standpoint for the new government towards the Rome Statute?

I think we will continue our preparation to join the ICC. Also, I think the new Minister for Legal Affairs and Human Rights will rectify previous commitment by Prof. Indrayana. The new Minister Defense is also a person that is forward looking, so I am positive that we will continue to prepare our self for the Rome Statute.

Thank you
Interview with Prof. Hikmahanto Juwana
Wednesday, 23rd November 2014 (Professor in international Law and former candidate for the position of the Minister of Foreign Affairs)

1. **How you know about the International Criminal Court?**

I teach international law and I personally think that the International Criminal Court is something that gets over-debated in Indonesia. I feel that in understanding the International Criminal Court we must not forget the intersection between international law and international politics.

This is where the problem lies. As a court, it should be ideally independent. However, several jurisdiction of the ICC is overlapping with the authority of the UN Security Council, especially when it relates to the peace maintenance.

I do believe that the ICC and the UN Security Council can be an ideal pair if only the ICC has gained its full political legitimacy. I think this is an area that really concerns me.

*a. What do you mean?*

Not every state has become member to the ICC, especially the United States. I am really firm on this mater and this will always be my position.

*b. Do you think the international community needs ICC?*

It depends, for me there are three things:

- First, we must always understand how international politics works. We have to see how non member states with veto power in the Security Council can influence the work of the Court; and
how this situation can create imbalance and instead, degrading the true spirit of the International Criminal Court.

- Secondly, the International Criminal Court is a product of the west. The international community will see whether the International Criminal Court will serve the interest of justice. Whether it only allows prosecutions towards small states or it works as well to the big players, such as the United States.

- Thirdly, we need to see how Non Surrender Agreement, imposed by the United States towards a great number of member states, affects the international community. I mean obviously the International Criminal Court was established with certain goals and purposes. How this unilateral act can put the objectives aside is something that of a concern.

So basically, from assessment of these three criteria, I think the international community does not need the International Criminal Court. Not until it can serve the interest of international justice.

c. With the existence of the ICC, should we forget other mechanisms in international criminal justice, such as Ad Hoc Tribunals?

Indonesia has an ad hoc court that adopts several important points from the Rome Statute in the establishing law. For me, legal independency in trying our own domestic cases is far more important; while at the same time I support the effort to strengthen the International Criminal Court. If time comes and the ideal International Criminal Court is also there, then I will support the International Criminal Court.

2. 2012 marked the 10th anniversary of the ICC and ever since, discussion on how to strengthen the ICC has been speeding up. One of the discussions is the work relationship between the ICC and the Security Council. Do you
think the current relationship between the two is ideal for the ICC to fulfill its mandates?

No I don’t think so. There are three great powers in the permanent five that have not yet joined the International Criminal Court: Russia, China and the United States.

These powers have control on several important issues; among others is maintenance of peace.

a. Do you think this relationship can be perceived as an obstacle for countries in accepting the Rome Statute?

Obviously.

b. Are you suggesting that countries may prevent their participation to the ICC because of this relationship?

Yes.

c. Two important roles of the Security Council as mentioned in the Statute are: i) to refer/defer a case to/from the ICC; and ii) to provide financial contribution; if the Council refer a case to the ICC. Do you think these roles are necessary?

It is dilemmatic for me to see the Indonesian government to pay significant financial contribution to both the United Nations and the International Criminal Court whilst at the same time we know that both systems are prone to politicization.

d. Do you think the ICC should be fully independent from the Security Council?
Yes. As long as the United States, Israel and other countries not yet accepted the Rome Statute, then the link between the two is just like confirming the status quo. We will be very far from the spirit of establishment of the International Criminal Court in that case.

3. **Do you think the universality of the ICC is an important issue?**

Yes. Very important.

a. One of the highlights of the Rome Statute is complementarity principle to allow national jurisdiction to exercise upon cases. In your opinion, which one is more important, complementarity principle or the universality of the ICC?

   Universality, of course. We need assurance that the International Criminal Court can work towards every states. Small states and even bigger and more powerful states.

4. **In 2010, at Kampala Review Conference, States agreed to amend the Rome Statute so that the ICC could exercise jurisdiction on aggression once the amendment come into force. What do you think about the Kampala Review Conference?**

   For me, amendment of the Rome Statute is not an important issue. The International Criminal Court still can work ideally as long as the international community is equipped with good commitment.

   a. **What is your expectation from the upcoming conference in 2017?**

   I hope there will be an alternative solution on that.
b. What do you mean?

I am fully aware that peace maintenance is the Security Council’s domain. It’s just that the Security Council is not democratic. We have witnessed many situations that the Security Council failed to perform its duty when peace maintenance was breached by one of their own.

c. Can you be more specific?

Nothing has been done on Iraq case and many more.

5. Asian countries, including Indonesia, have shown little interest to the Rome Statute of the Court. One may argue for Asian countries to wait until all P5 countries accepted the Statute, do you agree with this argument and what is the significant for that?

Yes, again, it is important to see the International Criminal Court works not only towards small states but big players as well. In Indonesia, we have partially adopted the Rome Statute to our legal system by the establishment of the Human Rights court. This should be improved so that we can try cases on our own. We will join the ICC when the time is right.

a. In your opinion, why countries are so reluctant in accepting the Rome Statute? What do you think about the Rome Statute?

We must always remember that, for example, African states are those who firstly supported the ICC, but now we can see that the ICC implement different approach towards different states. States began to reconsider their position towards the Rome Statute. I think states still want to see what will happen on crime of aggression after 2017.
b. **Do you think Indonesia is ready to accept the Rome Statute?**

Like I said. We have the instruments. We should always optimize these instruments so that we can conduct our own trials and investigations. For example, Regulation No. 26/2000 on the Establishment of the Human Rights Court needs to be improved. So many local home works needs to be done to improve our legal capacity, especially in the context of crimes of the International Criminal Court.

c. **If, and only if, there’s an opportunity to amend the Rome Statute, which part of it will be the most concern for Indonesia?**

Amendment is not an issue that is of important for Indonesia.

d. **New government will be elected, what is your prediction with the new government’s standpoint on the issue of accession to the Rome Statute of the ICC?**

I cannot comment upon this question

Thank you
Interview with Diajeng Wulan Christianty
Friday, 13th November 2014 (Researcher and Lecturer at Padjajaran University)

1. How you know about the International Criminal Court?

I started to learn about the ICC when I wrote a thesis on commander responsibility in 2000. At that time, the Indonesian government was formulating the draft for legislation No 26/2000 on Human Rights Court. By this legislation, we have partially adopted the Rome Statute actually. So basically, at that time, researching on the legislation made me understands about the Rome Statute that entered into force on July 2002.

a. What do you think about the ICC?

It’s an international mechanism that deals with individuals. The ICC is a long awaited Court since Nuremberg, Tokyo, Yugoslavia and Rwanda Tribunals. The ICC is the outcome to critics that say Nuremberg and Tokyo were being victor’s justice courts and Yugoslavia and Rwanda were being selective justice courts.

The ICC is expected to serve as court of global justice and to fight against impunity. This is a very noble purpose of the Court. The nature of ICC crimes will always involve states officials.

I think it will be difficult for countries to prosecute, for example, crimes against humanity or genocide because tendency of states to protect its own state organs.

This is when the necessity to have a global court is obvious.

b. Do you think the international community needs ICC?
Yes, from past experiences we have seen that states tend to fail to prosecute ICC crimes.

c. *With the existence of the ICC, should we forget other mechanisms in international criminal justice, such as Ad Hoc Tribunals?*

Ad Hoc Tribunals are now irrelevant. The ICC was established because we got enough of Ad Hoc Tribunals. We must not forget that when the Security Council established Ad Hoc Tribunals, there was a big debate whether the Security Council is empowered to do so under Chapter VII of the UN Charter. It is really difficult for me to see the relevance of the authority of the Security Council between “to maintain security and peace” and to “create international tribunals”. If we rely on this mechanism (ad hoc tribunals), we will always get backward to selective justice, not global justice.

It will be a different case if we talk about the need to prosecute past crimes prior 2002.

2. *2012 marked the 10th anniversary of the ICC and ever since, discussion on how to strengthen the ICC has been speeding up. One of the discussions is the work relationship between the ICC and the Security Council. Do you think the current relationship between the two is ideal for the ICC to fulfill its mandates?*

Article 13(b) of the Rome Statute is basically an expansion of jurisdiction for the ICC, because basically the ICC has no jurisdiction to non-states parties. Article 13(b) of the Rome Statute fills this gap. The United States refused the lack of power given to the Security Council but on the other side, countries feel reluctant to give the Security Council role in the work of the ICC. The relationship is not ideal but it’s the reality.
a. *Do you think the current relationship between the ICC and the Security Council will be an obstacle for countries to join the ICC?*

I think so. There are some countries that think the ICC should be fully independent from the Security Council. However, it is also the concern of the United States if we derogate the role of the Security Council.

b. *Two important roles of the Security Council as mentioned in the Statute are: i) to refer/defer a case to/from the ICC; and ii) to provide financial contribution; if the Council refer a case to the ICC. Do you think these roles are necessary?*

Darfur case shows that in practice there might be some confusion in referring and deferring power of the Security Council. I think we need to review this mechanism.

c. *Do you think the ICC should be fully independent from the Security Council?*

The ICC should be fully independent from the Security Council, but we cannot ignore the UN Charter. It should be ideal but Rome Statute treaty should never in conflict with the UN Charter.

3. *Do you think the universality of the ICC is an important issue?*

It is important to fulfill state consent in worldwide context. During the Rome Conference there are three types of countries: i) countries that support universal jurisdiction, ii) countries that support limited universal jurisdiction to territorial, apprehending and state of nationality, and iii) jurisdiction to member states only. The outcome is that the ICC needs
states consent.

4. In 2010, at Kampala Review Conference, States agreed to amend the Rome Statute so that the ICC could exercise jurisdiction on aggression once the amendment come into force. What do you think about the Kampala Review Conference?

Aggression is a major concern because it will challenge a sovereign act of a country. The ICC will not try crimes of aggression unless the Security Council decides that there is an act of aggression. This is major problem that need more discussion.

a. What is your expectation from the upcoming conference in 2017?

My ideal is for an act of aggression not to be decided by the Security Council. I think the ICC or some kind of committee or other organ should decide it. There should be alternative organ to decide an act of aggression. It will be difficult for the ICC to be effective if the Security Council is given power to decide an act of aggression. This will also be a justification for countries not to join the ICC.

Maybe General Assembly?

5. Asian countries, including Indonesia, have shown little interest to the Rome Statute of the Court. One may argue for Asian countries to wait until all P5 countries accepted the Statute, do you agree with this argument and what is the significant for that?

It is very hard for me to understand a non-member state can bring another non-member state to the ICC because the first non member state is a P5 member state. I still undecided whether Indonesia need to join the ICC or not. I agree that we may just wait and see at least until all P5
countries are member states to the Rome Statute.

a. What do you think about the Rome Statute?

We need to observe and study more on the Rome Statute as well as the practice of the ICC.

b. Do you think Indonesia is ready to accept the Rome Statute?

I think we are ready but we need to be prepared and study the Rome Statute more.

c. If, and only if, there’s an opportunity to amend the Rome Statute, which part of it will be the most concern for Indonesia?

Article 27 and article 98 (1)

d. What do you think about the standpoint for the new government towards the Rome Statute?

I think the new government should continue to prepare Indonesia join the ICC whilst at the same time observe more on the Rome Statute and the ICC.

Thank you
Interview with Damos Dumoli Agusman
Tuesday, 28th October 2014 (Secretary to Directorate General of Law and Treaties of the Ministry of Foreign Affairs, former Director of Economic, Socio and Cultural Treaties)

1. How you know about the International Criminal Court?

Back then in late 90s I was posted in The Hague as political coordinator for the Indonesian embassy in the Netherland. One of my tasks at that time was to participate and monitor closely on the preparation of the International Criminal Court.

a. What do you think about the ICC?

The ICC is an important landmark in the context of international criminal law. One must not forget however, that the ICC is very intrusive.

b. What do you mean?

The ICC is given mandate to prosecute individuals responsible for heinous crimes. However at the Rome Conference, there was a gap jurisdiction for the ICC. ICC does not have universal jurisdiction because the United States challenged the proposal. The United States insisted that the ICC works as a subordinate to the UN Security Council. Thus, negotiation on several articles of the Rome Statute took place.

c. Do you think the international community needs ICC?

It depends. We need to assess the practice of the ICC. Whether it is impartial or not.
d. *With the existence of the ICC, should we forget other mechanisms in international criminal justice, such as Ad Hoc Tribunals?*

Yes, the promise at the Rome Conference was that to create a permanent institution that should replace ad hoc tribunals. This has been a long debate. There are pros and cons on the practice of the ad hoc tribunals but yeah, it should replace ad hoc tribunals.

2. *2012 marked the 10th anniversary of the ICC and ever since, discussion on how to strengthen the ICC has been speeding up. One of the discussions is the work relationship between the ICC and the Security Council. Do you think the current relationship between the two is ideal for the ICC to fulfill its mandates?*

No. The influence of the United States on the politics of the UN Security Council is still really strong. I often see the Security Council provided double standards on certain matters because of the politics of its members.

a. *Do you think the current relationship between the ICC and the Security Council will be an obstacle for countries to join the ICC?*

Yes. Like it or not, the Security Council is a political forum. They don’t understand international justice. All that matter is how to protect each country’s best interests. I would regret if Indonesia joined the ICC before the United States does.

b. *Two important roles of the Security Council as mentioned in the Statute are: i) to refer/defer a case to/from the ICC; and ii) to provide financial contribution; if the Council refer a case to the ICC. Do you think these roles are necessary?*
Like I said, the ICC is lacking in its jurisdictional base. It needs the Security Council. However, we can not ignore the fact that the Security Council is a political body that might create ‘political’ influence to the ICC.

c. Do you think the ICC should be fully independent from the Security Council?

As of now: no. Their relationship is to fill the jurisdictional link of the ICC.

3. Do you think the universality of the ICC is an important issue?

The ICC is dealing with erga omnes crimes. I think universality is really important but as so far the ICC has not achieved this, the role of the Security Council becomes relevant, but I think it will be great if we could have some kind of watchdog body on the practice of the Security Council.

4. In 2010, at Kampala Review Conference, States agreed to amend the Rome Statute so that the ICC could exercise jurisdiction on aggression once the amendment come into force. What do you think about the Kampala Review Conference?

I really hope that it was the ICC to determine aggression. This is the ideal but then again, aggression is something that becomes the domain of the Security Council under chapter VII of the UN Charter.

5. Asian countries, including Indonesia, have shown little interest to the Rome Statute of the Court. One may argue for Asian countries to wait until all P5 countries accepted the Statute, do you agree with this argument and what is the significant for that?
To some extent I do agree. Most ASEAN countries, including Indonesia is more focused now on human rights instrument.

a. What do you think about the Rome Statute?
   Controversial. I think so many controversial articles. We need to study the Rome Statute and the practice of the ICC.

b. Do you think Indonesia is ready to accept the Rome Statute?
   We are ready but need to continue development on our legal infrastructure so that we can try our own cases domestically.

c. If, and only if, there’s an opportunity to amend the Rome Statute, which part of it will be the most concern for Indonesia?
   You tell me. I will be waiting for the outcome of your research. But I think articles that empower the Security Council needs further assessment.

d. What do you think about the standpoint for the new government towards the Rome Statute?
   The new government will continue to prepare Indonesia join the ICC, and this time it will be bottom up approach.

e. What do you mean?
   Involving all stakeholders before deciding to join.

Thank you
Interview with Ahmad Shaleh Bawazier
Wednesday, 29th October 2014 (Section Head for Extradition and international Law of the Directorate of Political, Security and Territorial Treaties of the Ministry of Foreign Affairs)

1. How you know about the International Criminal Court?

I was posted in the Hague, the Netherlands and also participated to Kampala Review Conference. Also, my line of work allows me to have interaction with many relevant stakeholders that concern with Indonesia to join the ICC

a. What do you think about the ICC?

I think the establishment of the ICC was really monumental. More than 100 countries participated! I think it was a long struggle so that now every 17 of July many celebrate it as the day of international justice.

b. Do you think the international community needs ICC?

Yes. It has been a long awaited institution. Now we need to work together hand in hand to strengthen our national legislation and at the same time provide support to the ICC

c. With the existence of the ICC, should we forget other mechanisms in international criminal justice, such as Ad Hoc Tribunals?

It is going to be difficult. That’s the sole domain of the UN Security Council no?

2. 2012 marked the 10th anniversary of the ICC and ever since, discussion on
how to strengthen the ICC has been speeding up. One of the discussions is the work relationship between the ICC and the Security Council. Do you think the current relationship between the two is ideal for the ICC to fulfill its mandates?

The ICC needs strong support from the United States, Russia and China. These countries are the remaining permanent member countries that yet join the ICC.

a. Do you think the current relationship between the ICC and the Security Council will be an obstacle for countries to join the ICC?

Not necessarily. I think the Security Council can complement the ICC.

b. Two important roles of the Security Council as mentioned in the Statute are: i) to refer/defer a case to/from the ICC; and ii) to provide financial contribution; if the Council refer a case to the ICC. Do you think these roles are necessary?

With the current situation that the ICC is yet achieved its universal status, I can see the logic for the Security Council to refer a case to the ICC. However, this needs strong monitoring. On the other hand, deferral role of the Security Council is really political. I can not tolerate this role of the Security Council. For me it’s a no.

c. Do you think the ICC should be fully independent from the Security Council?

Ideally yes.

3. Do you think the universality of the ICC is an important issue?
Really important. Speaking on universality, I think the principle of complementarity of the Rome Statute is also important. Each has its own merit.

4. In 2010, at Kampala Review Conference, States agreed to amend the Rome Statute so that the ICC could exercise jurisdiction on aggression once the amendment come into force. What do you think about the Kampala Review Conference?

I think every country looses. That is why we need another conference to activate crime of aggression in 2017. The United States put a lot of proposal. But I think the definition on the crime of aggression fails to satisfy everyone.

5. Asian countries, including Indonesia, have shown little interest to the Rome Statute of the Court. One may argue for Asian countries to wait until all P5 countries accepted the Statute, do you agree with this argument and what is the significant for that?

Yes. We need to observe carefully on the position of the permanent members of the Security Council, especially the United States.

a. What do you think about the Rome Statute?

It is not ideal but it is a land mark.

b. Do you think Indonesia is ready to accept the Rome Statute?

We still have lack of political will on joining the ICC. This might be attributed to the misconception of Indonesian public to the ICC. But I think we need to continue development of our legal infrastructure so that when the time has come we have less issues in accepting the
Rome Statute.

c. *If, and only if, there’s an opportunity to amend the Rome Statute, which part of it will be the most concern for Indonesia?*

Article on deferral power of the UN Security Council.

d. *What do you think about the standpoint for the new government towards the Rome Statute?*

No idea.

Thank you
Annex 6

Paper Presentation to an Audience Lead by Former Vice Minister of Foreign Affairs of Republic of Indonesia

Former Vice Minister of Foreign Affairs, Bpk. Dino Patti Djalal

Question and Answering Session with the Audience
The Author delivers his paper on Indonesia and the ICC (the forum was named ‘Rookie Forum’).
Coverage of the Presentation to the Ministry’s Journal
(in photo: 2nd presentation (private) at the office of the former Vice Minister)
Annex 7

List of References

Bibliography


Bassiouni, M. Cheriff 'From Versailles to Rwanda in Seventy-Five Years: the Need to Establish a Permanent International Criminal Court' (1997) 10 *Harvard International Human Rights Journal*


Billington, Mike, 'UN "Uniting for Peace" Resolution Could Demand End to U.S. War on Iraq' (2003) *Executive Intelligence Review*

Boissier, Pierre, *From Solferino to Tsushima: History of the International Committee of the red Cross* (Henry Dunant Institute, 1963)


Bos, Adrian, 'The International Criminal Court: A Perspective' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute, Issues,
Negotiations, Results (Kluwer law International, 1999)

Brown, Chris, Understanding International Relations (New York Press, 2001)


Colitti, Mariacarmen , 'Geographical and Jurisdictional Reach of ICC: Gaps in the International Criminal Justice System and a Role for Internationalized Bodies' in Cesare P. R. Romano, Andre Nollkaemper and Jann K. Kleffner (eds), Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo and Cambodia (Oxford University Press, 2004)


Dunant, Henry, A Memory of Solferino -English ed. (American Red Cross, 1959)


Freidel, Frank, Francis Lieber, Nineteenth-Century Liberal (Louisiana State University Press, 1947)
Hall, Christopher Keith, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross*


Krasno, Jean and Mitushi Das, 'The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge, 2008)


Mathur, Kuldeep, ‘Interviewing: Art and Skill’ in S.K. Verma and M. Afzal Wani (eds), Legal Research and Methodology, (Indian Law Institute, 2001)


Mochochoko, Phakiso, and Giorgia Tortora, 'The Management Committee for the Special Court for Sierra Leone' in Cesare P. R. Romano, Andre Nollkaemper and Jann K. Kleffner (eds), Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo and Cambodia (Oxford University Press, 2004)


Morris, Virginia, and Michael P. Scharf, An Insider’s Guide to the International
Criminal Tribunal for the Former Yugoslavia (Transnational Press, 1995)


Note from the head of the US delegation to the UN Secretary General (20 September 1950) 5 UNGAOR (279th plenary meeting) Annexes (Agenda Item 68) 2-3 UN Doc A/1377


Petersen, Keith S., 'The Uses of the Uniting for Peace Resolution since 1950' (1959) 13(2) International Organization

Prost, Kimberly & Angelika Schlunk, ‘Article 98”, in Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article


Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented to the Preliminary Peace Conference (29 March 1919), reprinted in *American Journal of International Law* 14 (1920)


Schiff, Benjamin N., Building the International Criminal Court (Cambridge University Press, 2008)


Temprosa, Francis Tom, & Clyde Alton, ‘Withdrawals from the Rome Statute: Continuing the saga of institutional (il)legitimacy’ (2017), 37 *Michigan Journal of International Law*

Toon, Valerie, 'International Criminal Court: Reservation of Non-State Parties in Southeast Asia' (2004) 26 *Contemporary Southeast Asia*


Wechsler, Herbert, *Principles, Politics and Fundamental Law: Selected Essays*
(Harvard University Press, 1961)

Wright, Quincy, A Study of War (University of Chicago Press, 1956)


**Internet sources**


205
The International Criminal Court, *Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir* <https://www.icc-cpi.int/CourtRecords/CR2013_02245.PDF>.

The International Criminal Court, *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Al Bashir* <https://www.icc-cpi.int/pages/record.aspx?uri=1287184>.

The International Criminal Court, *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Al Bashir* <https://www.icc-cpi.int/pages/record.aspx?uri=1384955>.

The International Criminal Court, *Decision on the Non compliance of the Republic of Chad with the Cooperation Request Issues by the Court regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir* <https://www.icc-cpi.int/pages/record.aspx?uri=1573530>.


The International Criminal Court, **Statement before the UN Security Council on Situation in Darfur, (8 June 2017)**<https://www.icc-cpi.int/Pages/item.aspx?name=170608-otp-stat-UNSC>.


The United Nations, **S/RES/1422 (2002)** adopted 12 July 2002


U.S Department of state, *Harold H. Koh’s Keynote Speech at the Annual Meeting of the American Society of International Law in Washington DC, March 21, 2010*


**Cases**


Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, International Court of Justice, 2004.