involvement of the Security Council from the proceedings of the ICC. As remarked already, the judicial function of the ICC and the political function of the Security Council would have to be concurrent with international or internal conflicts. Furthermore, as an enforcement organ, the Security Council's participation into the ICC system would be indispensable. Accordingly, though the Council's political influence must be eliminated from the ICC's judicial proceedings so as to keep its independence, final decision to select the most suitable way of resolving a conflict should be reserved to the Security Council. If we ignored the reality of international politics and carried the simple analogy of domestic criminal system to the ICC, we would end up creating a theoretically independent court, but with no efficacy.

In any case, the Diplomatic Conference's answers to these issues will show not only an advancement of implementing system of international criminal law, but probably its inherent limitations in the current international community. For the purpose of making much clearer the features proper to this system, a further examination will be required, including that on the discussions in the Diplomatic Conference.
would have to accept the ICC’s jurisdiction automatically as to the core crimes, once it ratifies the Statute.

Compared with the ILC Draft, in addition, the limitation imposed on the role of the ICC by the principle of complementarity is more restricted by illustrating the concrete cases that a state is “unwilling or unable genuinely to carry out the investigation and prosecution.” To put it another way, reserved domain to national jurisdiction is relatively narrowed down.

In consequence, we can find here a general tendency in the Zutphen Draft that as the effectiveness of the ICC’s function being emphasized, the hurdles originated from state sovereignty are lowered.

As to the state cooperation system, however, there seem to remain strong obstacles of sovereignty to hinder the effective conduct of the proceedings. Application of national law to the procedure of a suspect’s transfer, exception of the national security and indirect implementation of the ICC’s measures through national authorities show particularly a policy of weighting state sovereignty at the cost of its effectiveness. As pointed out above, as far as state cooperation is concerned, the ICC system can not get rid of the old-fashioned framework of judicial cooperation between sovereign states. In this respect, it can be said figuratively that the entrance to the Court would come to be much wider, but the courtroom itself would not necessarily be so extended.

As regards the relation to the Security Council, much is unsettled at the present stage. It is presumed that this problem will give rise to a heated controversy in the Diplomatic Conference, and probably some political compromise will have to be made for the purpose of finalizing the Statute. In any event, it seems impossible to exclude fully any
intent of each state party.

VI. Conclusion

Concentrating on the two problems: the balancing with state sovereignty and the relation to the political function of the Security Council, this article has examined the major unresolved issues in the Zutphen Draft. Since these issues will be discussed and settled in the Diplomatic Conference, it may be overhasty to illustrate the decisive characteristics of the ICC system concerning the two problems just above. Nevertheless, from the scrutiny of the discussions in the Preparatory Committee and of the relevant articles of the Zutphen Draft, we can outline the following features.

As to the subject-matter jurisdiction, the Preparatory Committee has turned the ILC’s strategy to its own new one. The ILC adopted the policy that the concrete definition of the crimes under the ICC’s jurisdiction was left to the customary law or existing treaties and that the Statute of the ICC would deal with only procedural aspects. On the contrary, the Zutphen Draft enumerates the specific offensive acts as the subject-matter jurisdiction in the Statute itself. By this change of policy, the ICC would be able to exercise its jurisdiction without proving whether or not a certain act is a crime under customary law or under the particular treaty. In other words, the Zutphen Draft centers a state’s consent requirement to the ICC’s subject-matter jurisdiction upon the ratification of the Statute.

The same may be said, no doubt, of the jurisdictional regime. As already pointed out, the Zutphen Draft expands the inherent jurisdiction to all of the core crimes and repeals the double consents requirement concerning these crimes. By this amendment, if adopted, a state
concerning a state's failure would be limited to a judicial one. As to this point, the Appeals Chamber of the ICTY emphasized the difference of its finding from that made by a fact-finding body at the request of the Security Council. According to its opinion, the determination of latter may set forth the views of the relevant body on the question of whether or not a certain state has breached international standards. In addition, its conclusions may include suggestions or recommendations for action by the Security Council. By contrast, the Tribunal engages in a judicial activity proper: acting upon all the principle and rules of judicial propriety, it establishes formally whether or not a certain state has breached its international obligation to cooperate with the Tribunal and does not include any recommendations or suggestions. In this regard, wide discretion is left to the Security Council to determine whether or not to take sanctions against the violating state, and if any, what action should be taken.

Furthermore, the Chamber did not deny the possibility of sanctioning measures taken by a state or other international organizations. It stated, in particular, that in the case of repeated and blatant breaches of Article 29 by the same State; and provided the Security Council had not decided that it enjoyed exclusive powers on the matter, the situation being part of a general condition of threat to the peace, collective action to be taken through other intergovernmental organizations would be warranted.

Accordingly, even if the ICC adopted the same mechanism as the ICTY has, its effective functioning would be inevitably dependent on the political expediency of the Security Council or on the political

83. Prosecutor v. Tihomir Blaskic, supra note 73, paras. 33-36.
84. Id. para. 36.
violations of international humanitarian law committed in the territory of the former Yugoslavia. A logical corollary of this is that any time a State fails to fulfil its obligation under Article 29, thereby preventing the International Tribunal from discharging the mission entrusted to it by the Security Council, the International Tribunal is entitled to report this non-observance to the Security Council.

It follows from this that the notification to the Security Council is based on the Council’s status as a parent body of the Tribunal. However, what is particular in this case is that the Security Council is not only the parent body, but the organ vested with strong enforcement or sanctioning power under Chapter VII of the UN Charter. In other words, the ICTY’s mechanism against the state’s failure depends on the dual function of the Security Council: that of parent organ and that of enforcement organ in the UN system. If a parent body should be notified under the ICC’s mechanism as well, a proposed “Council of States Parties” would probably be a relevant organ. But, though the detailed power of this organ is unknown at the present stage, it would not, without doubt, have a power to impose sanctions comparable to the Security Council. For the purpose of securing effective counter-measures, accordingly, the notification should be addressed to the Security Council, like in the case of non-performance of the ICJ’s judgement (article 94 of the UN Charter).

In any case, the important point to note is that the ICC’s finding

81. Prosecutor v. Tihomir Blaskic, supra note 73, para. 33.
82. According to the Press Release of 3 April 1998 (L/2864), an agreement was reached on the establishment of an “Assembly of States Parties” in the sixth session of the Preparatory Committee. But detailed function of this organ has not presented yet as of 6 April 1998.
are provided for to be notified to the Security Council. Later, under Rule 7 bis added as an amendment of the Rules, non-compliance with an obligation under article 29 relating to any proceedings before the Chamber or Judge shall be reported to the Security Council (paragraph A), and also non-compliance with a request by the Prosecutor, such as request for information, conduct of investigations and provisional measures shall be notified to the Security Council (paragraph B). Furthermore, under the so-called Rule 61 proceedings, the Trial Chamber in open court can certify that the failure to effect personal service of the indictment was due in whole or in part to a failure or refusal of a state to cooperate with the Tribunal, and the President shall notify the Security Council thereof.

The Appeals Chamber explained the reason why the Security Council shall be notified as follows:

The International Tribunal's power to report to the Security Council is derived from the relationship between the two institutions. The Security Council established the International Tribunal pursuant to Chapter VII of the United Nations Charter for the purpose of the prosecution of persons responsible for serious

From the viewpoint of the penetration of its power into the territory of states parties as well, state cooperation system of the ICC would be less advanced than those of the ad hoc Tribunals.

(3) Mechanism against a failure of cooperation

For the purpose of securing state cooperation, a strong mechanism for responding to a failure of cooperation is needed. The ILC Draft has no relevant provisions. In the Preparatory Committee, on the contrary, many delegations have argued the necessity of such mechanism. As the result of this, the provision on this point is inserted in the Zutphen Draft. Article 78[52] paragraph 6 provides for as follows: "where a State Party fails to comply with a request by the Court contrary to the provisions of the Statute, thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to [the Council of States Parties][or][the United Nations General Assembly][or, where the Security Council referred the matter to the Court][to the Security Council][so that necessary measures may be taken to enable the Court to exercise its jurisdiction]." This is not at present fully elaborated and, in particular as the square brackets indicate, does not determine yet which of three organs are referred the matter for taking necessary measures. But it is at least obvious that this mechanism is fundamentally modeled on that of the ICTY.

The Statute of the ICTY itself does not provide for the measures to be taken in the case of non-compliance. The Rules of Procedure and Evidence, however, provides in detail for the notification to the Security Council. Originally, non-compliance with a request for deferral (Rule 11) and failure to execute a warrant or transfer order (Rule 59)
investigations and inspections would be conducted *with the consent of the requested state*, the Zutphen Draft can be understood to support fully an indirect system, under which all the conducts of ICC’s proceedings in the territory of the states parties, irrespective of its involving with crimes, rely upon their individual consent or the implementing legislation.

It must be noted, however, that due to the principle of complementarity, the ICC can be seized of a case only if the state is unwilling or unable to carry out the investigation or prosecution, such as the case that domestic criminal proceedings are undertaken for the purpose of shielding the person concerned from criminal responsibility (article 11[35]). Following the Appeals Chamber’s opinion, it is just in such case that the direct conduct of the ICC should be allowed within the territory of the state party without any implementing legislation or special agreement. If all the measures of the ICC, including execution of search or arrest warrants, seizure of evidentiary materials and protection of witnesses and so on, could be taken only through the official channels, that would be contradictory to the ICC’s basic function to be complementary to national criminal justice system.

Theoretically speaking, such indirect system means that the ICC system would remain in the traditional framework of “horizontal” relation, in which each sovereign state, while being prohibited from exercising its enforcement jurisdiction within the territory of other states79, can only request judicial cooperation from other states.

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interview of a witness might discourage the witness from speaking the truth, and might also imperil his own life or personal integrity. It follows that it would be contrary to the very purpose and function of the International Tribunal to have state officials present on such occasions. The states and entities of the former Yugoslavia are obliged to cooperate with the International Tribunal in such a manner as to enable the International Tribunal to discharge its functions. This obligation, which was restated in the Dayton and Paris Accords, also requires them to allow the Prosecutor and the defence to fulfil their tasks free from any possible impediment or hindrance.\(^{78}\)

It follows from the explanation above that the Chamber interpreted the obligation of cooperation under the Statute as allowing such direct activities within the territory of the state under special circumstances. Strictly speaking, the Statute has an equal binding force over all member states of the United Nations, and it does not explicitly provide for the distinction as the Chamber pointed out. However, taking into account the effective functioning of the Tribunal, the Appeals Chamber tried to interpret the Statute flexibly and differentiate the nature of obligation to cooperate according to the state's involvement with the crime alleged. In consequence, this stressed on the predominant status of the ICTY over the states which were closely connected with the crime under its jurisdiction.

Turning to the cooperation system of the ICC, the Zutphen Draft does not make this point clear. It has no provision indicating such distinction between the states where the crimes have been committed and other third states. Instead, as article 82[55] provides that on-site

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78. *Id.* para. 53.
The Appeals Chamber in the Blaskic case divided the acts of Tribunal into two categories: (1) those which may require the cooperation of the prosecutorial or judicial organs of the state where the individual is located (conduct of on-site investigations, execution of search or arrest warrants, seizure of evidentiary material, etc.); and (2) those which may be carried out by the private individual who is the addressee of a subpoena or order, acting either by himself or together with an investigator designated by the Prosecutor or by defence counsel (taking of witness statements, production of documents, delivery of video-tapes and other evidentiary material, appearance in court at the Hague, etc.). As to the first category of acts, the Chamber pointed out that it could not take any measures in the territory of the state without the authorization by national legislation or special agreements. But it said, at the same time, that this was subject to an exception which related to the state or entities of the former Yugoslavia, and that some activities such as, in particular, the conduct of on-site investigations, might justifiably be carried out by the Tribunal itself.\(^{77}\)

The Appeals Chamber explained the reason to distinguish the state or entities of the former Yugoslavia from other states as follows: the former is the states or entities (i) on the territory of which crimes may have been perpetrated; and in addition, (ii) some authorities of which might be implicated in the commission of these crimes. Consequently, in the case of those states, to go through the official channels for identifying, summoning and interviewing witnesses, or to conduct on-site investigations, might jeopardize investigations by the Prosecutor or defence counsel. In particular, the presence of state officials at the

\(^{77}\) Id. para. 55.
State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings: those documents might prove crucial for deciding whether the accused is innocent or guilty. The very raison d'être of the International Tribunal would then be undermined.  

Like in the case of the ICTY, many of the crimes falling within the jurisdiction of the ICC are also likely to involve military officials, in many cases commanders, and to require investigation of sensitive matters of national security. In some case, states outside the territory of the state where the crime occurred may have information based on sensitive intelligence sources. Furthermore, it must also be noted that in the case where the ICC requests a state to cooperate, that state would be "unwilling or unable genuinely to carry out the investigation or prosecution." In such case, there would be the possibility that the state requested would try to escape its obligation of cooperation on the pretext of its national security. Accordingly, if the ICC system admitted such exception, it would be tantamount to granting officially a broad reserved domain of state sovereignty at discretion. In these respects, elements of state sovereignty seem to be overweighted in the state cooperation system.

(2) The ICC’s activities in the territory of state party

In relation to state sovereignty, it is necessary to examine the ICC’s power to conduct its proceedings directly within the territory of a state party.

76. Prosecutor v. Tihomir Blaskic, supra note 73, para. 65.
problem involving in the "national security" exception in responding to the claim of Croatia as follows:

[T]o grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the International Tribunal, and "defeat its essential object and purpose". The International Tribunal was established for the prosecution of persons responsible for war crimes, crimes against humanity and genocide; these are crimes related to armed conflict and military operations. It is, therefore, evident that military documents or other evidentiary material connected with military operations may be of crucial importance, either for the Prosecutor or the defence, to prove or disprove the alleged culpability of an indictee, particularly when command responsibility is involved (in this case military documents may be needed to establish or disprove the chain of command, the degree of control over the troops exercised by a military commander, the extent to which he was cognisant of the actions undertaken by his subordinates, etc.). To admit that a
cerning other forms of cooperation similarly have two options; Option 1 provides for no grounds for refusal of cooperation, and Option 2 provides for several cases where a state can refuse to cooperate. In the latter option, several grounds for refusal are enumerated, such as non-surrender of nationals, application of evidentiary requirement provided by the law of a requested state and refusal of the request based on the national security, public order and other essential interests. In the light of the experiences of the ICTY and the ICTR, if the Option 2 adopted, the ICC’s functioning would be undoubtedly impeded. For example, the Appeals Chamber of the ICTY pointed out the

[Option 2: A State Party may deny a request for [surrender] [transfer] [extradition] only if:
  (a) with respect to a crime under [article 5[20] (b) through (e)] [article 5[20] (e)], it has not accepted the jurisdiction of the Court;
  (b) the person is a national of the requested State;
  (c) the person has been investigated or has been proceeded against, convicted or acquitted in the requested State or another State for the offence for which his [surrender] [transfer] [extradition] is sought [, except that a request may not be denied if the Court has determined that the case is admissible under article 11[35]];
  (d) the information submitted in support of the request does not meet the minimum evidentiary requirements of the requested State, as set forth in article 80[53 bis], paragraph 1 (c);]
  (e) compliance with the request would put it in breach of an existing obligation that arises from [a peremptory norm of] general international law [treaty] obligation undertaken to another State.]

75. Article 82[55] Other forms of cooperation [and judicial and legal [mutual] assistance]

Option 1
A State Party shall not deny a request for assistance from the Court.

Option 2
A State Party may deny a request for assistance, in whole or in part, only if:
  (a) with respect to a crime [under [article 5[20] (b) through (e)] [article 5[20] (e)], it has not accepted the jurisdiction of the Court;
  (b) the authorities of the requested State would be prohibited by its national laws from carrying out the action requested with regard to the investigation
ICTY, remarked that states were in breach not only when they were confronted with a specific situation whereby they could not execute arrest warrants or orders of the tribunal, but even before this possible occurrence by failing to pass the implementing legislation if such legislation was needed under national law.\(^71\)

Moreover, the Tentative Guideline for National Implementing Legislation made by the ICTY in 1995 provided that the judicial authority “shall approve the transfer of an arrested accused to the custody of the International Tribunal without resort to extradition proceedings” (emphasis added). Therefore, states are not allowed to make use of their national law in order to legitimate their non-compliance. In addition, the Appeals Chamber in the Blaskic case also confirmed that “whenever such implementing legislation turns out to be in conflict with the spirit and the word of the Statute, a well-known principle of international law can be relied upon to prevent States from shielding behind their national law in order to evade international obligations.\(^73\)”

In contrast with the above obligation under the ICTY Statute, it can not to be denied that the proposed obligation of cooperation under the ICC system would be much weaker. Further, this weakness would be underlined by the existence of exception to this obligation. Article 79\(^[53]\)\(^74\) concerning the surrender of a suspect and article 82\([55]\)\(^75\) concerning

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74. Article 79[53] paragraph 2: [Option 1: No grounds for refusal.]
than that of the ICTY.

Such feature is also found in the role of national law in the cooperation system. As regards the surrender of person to the ICC, Article 79[53] paragraph 1 bis\(^70\) provides that the national law of a requested State shall govern the condition or procedure for granting or denying a request. The crucial problem here is that this article does not make it clear whether the national law to be applied is ordinary extradition law used for transferring a person to other states, or special law enacted for implementing the Statute of the ICC. If the extradition law was used, a requested person could rely on the defences available in ordinary extradition procedure, such as non-extradition of nationals, political offence exception and double criminality.

As to the ICTY, the resolution 827 (1993) which established the Tribunal apparently states that all states “shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.” Concerning the measures to be taken by this resolution, Judge Cassese, the then president of the

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70. Article 79[53] [Surrender] [Transfer] [Extradition] of persons to the court:
1. The Court may transmit a request for the arrest and [surrender] [transfer] [extradition] of a person, along with the supporting material outlined in article 80[53 bis], to any State on the territory of which that person may be found, and shall request the cooperation of that State in the arrest and [surrender] [transfer] [extradition] of such person. States Parties shall, in accordance with the provisions of this Part [and the procedure under their national law], comply with requests for arrest and [surrender] [transfer] [extradition] without [undue] delay.

[1 bis. The national law of a requested State shall govern the [conditions] [procedure] for granting or denying a request for [surrender] [transfer] [extradition] [except as otherwise provided in this Part].]
to make requests to states parties for cooperation. As compared with the article 29 of the Statute of the ICTY, however, the defect of the ICC’s system is evident. Article 29\(^69\) of the ICTY Statute contains two obligations: obligation to cooperate with the Tribunal in the investigation and prosecution, and obligation to comply with any request for assistance or an order issued by a Trial Chamber. In this system, cooperation is first to be expected. When it fails, the Tribunal can issue the request or order to be complied with by states. This obligation of compliance indicates the “vertical” relation between the Tribunal and states as opposed to the “horizontal” relation between sovereign states in the traditional judicial cooperation. Therefore, in the sense that the Zutphen Draft does not clearly provide for the obligation of compliance, it can be said that it would not be based on the “vertical” relation as the ICTY is. From this, it is safe to say that the ICC’s state cooperation system, as the result of compromise of the two positions above, gives more weight to concern for state sovereignty

channel or any other appropriate channel as may be designated by each State Party upon ratification, accession or approval. Such designation and subsequent changes shall be done in accordance with the Rules of Procedure.

(b) When appropriate, without prejudice to the provisions of paragraph 1 (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

69. Article 29 Cooperation and judicial assistance:

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

   (a) the identification and location of persons;
   (b) the taking of testimony and the production of evidence;
   (C) the service of documents;
   (d) the arrest or detention of persons;
   (e) the surrender or the transfer of the accused to the International Tribunal.
person before it. It is, therefore, essential that the Statute provide the ICC with sound, workable and predictable framework to secure the cooperation of states.

At the early stage of the Preparatory Committee, two basic positions on state cooperation emerged. One position emphasized that the legal framework governing cooperation between states and the ICC should be broadly similar to that existing between states on the basis of extradition and legal assistance agreements. According to this approach, the framework of cooperation would be set forth explicitly by each state's national law, and the procedure in which each state would meet its obligations would be also controlled by its national law. On the contrary, the other position held that state cooperation with the ICC required a fundamentally different approach and that traditional exceptions to state cooperation with other states, such as lack of dual criminality, political or military offense, nationality, and sufficiency of the evidence, did not have relevance to cooperation with the ICC\textsuperscript{66}.

As the result of this opposition, the policy of the Zutphen Draft on state cooperation is equivocal. Article 77[51]\textsuperscript{67}provides, in general, that states parties shall fully cooperate with the ICC in its investigation and prosecution of the crimes without undue delay. In addition, Article 78[52]\textsuperscript{68}clearly stipulates that the ICC shall have the authority  

\textsuperscript{66}. Report of the Preparatory Committee, supra note 3, para. 310.  
\textsuperscript{67}. Article 77[51] General obligation to cooperate: States Parties shall, in accordance with the provisions of this [Part] [Statute], fully cooperate with the Court in its investigation and prosecution of crimes under this Statute. States Parties shall so cooperate without [undue] delay.  
\textsuperscript{68}. Article 78[52][Requests for cooperation: general provisions]:  
1. Authorities competent to make and receive requests/Channels for communication of requests  
(a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic
In addition, it seems inadequate to bring forward the relation between the Security Council and the ICJ as a supporting evidence of deleting such clause. In fact, the UN Charter and the Statute of the ICJ do not prohibit the same case from being dealt with simultaneously by the Council and the ICJ, and actually there was no case that the ICJ refrained from adjudicating a dispute on the sole ground that the Council was exercising its responsibility. In the light of the practices of the ICJ, however, it has sometimes avoided judging the highly political cases by exercising some technical rules, such as “mootness” and “standing”. Due to lack of the systematic procedure to avoid such conflict, the ICJ has had to make use of such techniques. Considering this, it would be better to introduce in advance into the Statute the mechanism to evade the situation in which the ICC’s function would disturb the responsibilities of the Council.

In this respect, Option 2 seems to be suitable procedure which will assure the ICC’s judicial independence and offer to the Council the power to suspend the proceedings in an exceptional case.

V. State cooperation

(1) Obligation of cooperation

Since the ICC would not have its own police force, the effectiveness of the ICC would depend largely upon the cooperation of national jurisdiction in obtaining evidence and securing the presence of accused.

Council. It would also impede the credibility and effectiveness of the ICC to the greatest extent and most of the purpose of establishing a permanent international criminal court would be lost.

From the realistic point of view, however, it is not acceptable that the ICC should carry out its function irrespective of any activities of the Security Council to restore international peace and security. Because, while admitting in principle the formula "no peace without justice," we have to imagine a case where "peace" and "justice" would be conflicting. Considering, for example, the peace process of Cambodia, the negotiation among the conflicting parties started on the initiative of the five permanent members of the Security Council, and in 1991, the civil war was brought to an end by a series of three UN-brokered Paris Conference Agreements. Admittedly, one of parties of this negotiation was headed by Pol Pot. Supposeing a state filed a complaint to the ICC in the midst of negotiation, alleging that Pol Pot should be charged with genocide. Probably the peace process would not expect to be proceeded successfully without any influence of such complaint. In such case, the Security Council may as well suspend the proceedings of the ICC.

If the Prosecutor is empowered to continue the proceedings regardless of such situation, he or she, while exercising judicial competence on legal consideration, would in substance result in exerting political influence over the conflict. On receiving a complaint, the Prosecutor must initiate an investigation except the case where there is no reasonable basis for a prosecution. In this proceeding, the Prosecutor is not given any discretion to consider the political circumstances in which the complaint has been lodged, for such discretion would be incompatible with the impartiality and fairness of the ICC.
the Security Council to make a positive decision to prevent the initiation of an investigation or prosecution by the ICC in regard to a situation the Council was seized with. According to this mechanism, an affirmative vote of nine members of the Council including five permanent members is necessary to stop the ICC's proceedings. Furthermore, if such decision was made, it would only suspend the ICC's proceedings within a limited period: twelve months. The Council would have to make the same decision for extending the period. Speaking to the attitude of the delegations in the Preparatory Committee to this problem, a great number of states, including China, the Russian Federation and the United Kingdom, have expressed interest in Option 2, while a few states strongly support the original version of this paragraph: Option 1. This will be a most serious and difficult problem in the Diplomatic Conference.

If Option 1 was adopted, it is no doubt that the ICC would be subject to a strong and continuous political influence of the Security

peace and for which it is exercising its functions under Chapter VII of the Charter of the United Nations]. [unless the Security Council otherwise decides] [without the prior consent of the Security Council].

Option 2
1. [Subject to paragraph 2 of this article], no prosecution may be commenced [or proceeded with] under this Statute [for a period of twelve months] where the Security Council has [decided that there is a threat to or breach of the peace or an act of aggression and], acting under Chapter VII of the Charter of the United Nations, [given a direction] [taken a [formal and specific] decision] to that effect.

2. [Notification] [A formal decision of the Security Council to the effect] that the Security Council is continuing to act may be renewed at intervals of twelve months [by a subsequent decision].]

3. [Should no action be taken by the Security Council in accordance with Chapter VII of the Charter of the United Nations within a reasonable time, the Court may exercise its jurisdiction in respect of the situation referred to in paragraph 1 of this article.]]]
states criticized that this would subject the ICC to the political influence of the Security Council. It is also pointed out that this mechanism could be used to shield nationals or allies of the five permanent members from criminal prosecution and that it would underline the inequality between the permanent five and other states. Moreover, the example of the ICJ was mentioned in support of deleting this paragraph, having ruled that a case was admissible before it even if the situation was simultaneously being dealt with by the Security Council. On the contrary, some states including the United States and France have strongly objected to deleting this provision. According to their argument, in most cases, the Council's decision likely would affect the timing of the referral and not permanently deny the referral. Once such a referral of a situation goes forward to the ICC, individual cases brought by the Prosecutor would not be reviewed by the Security Council.

In the course of discussion, Singapore submitted a new proposal, which is at present Option 2 contained in Article 10[23] of the Zutphen Draft. Option 2 reverses the burden of this paragraph by requiring

59. Article 23 Action by the Security Council:
3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

60. Yearbook of the International Law Commission, supra note 13, at 45.
62. Article 10[23] paragraph 3:
Option 1
No prosecution may be commenced under this Statute arising from a situation [[pertaining to international peace and security or an act of aggression] which [is being dealt with] [actively] by the Security Council] [as a threat to or breach of the peace or an act of aggression] [under Chapter VII of the Charter], [where the Security Council has decided that there is a threat to or breach of the
individual communication procedure under the Optional Protocol to the ICCPR and the 1503 procedure of the Economic and Social Council, it is obvious that the definite criteria and the objective procedure for screening the communications would be absolutely necessary. Without them, the Prosecutor could not be immune from criticism as an arbitrary exercise or abuse of the power. In this regard, the proposed article seems insufficient.

(4) Political control by the Security Council

In relation to the Security Council, the ILC Draft set out the restriction on the functioning of the ICC. Pursuant to the article 23 paragraph 3, no prosecution could be initiated in connection with a situation being dealt with by the Security Council under Chapter VII, unless it decides otherwise. Thus, the Council would be able to preclude proceedings before the ICC by taking up a matter for consideration under its Chapter VII authority. The commentary explains that this provision is an acknowledgment of the priority given by Article 12 of the UN Charter and need for coordination between the ICC and the Council. Considering that Chapter VII situations are precisely those in which crimes within the ICC's jurisdiction are most likely to be committed, it seems clear that this mechanism would seriously affect the ICC's independent functioning.

In the Preparatory Committee, an overwhelming majority of

59. Article 23 Action by the Security Council:

3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

60. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, supra note 13, at 45.
have enough information and resources to monitor and react to cases of serious human rights abuses. This will be particularly true for cases in countries outside the political and media spotlight. In such case, like in the UN human rights protection system, information from various NGOs would be indispensable for deciding whether to initiate the ICC’s proceedings. For this purpose, the system is necessary that the Prosecutor is empowered to gather information from NGOs as well as UN organs and other inter-governmental organizations, and on the basis of it, to decide to initiate investigations of his or her own accord.

Contrary to these arguments, the opponent states, in particular the United States, have emphasized the importance of some political clout behind the Prosecutor. They have argued that such political clout could be attained through the referral by the Security Council or a state party; otherwise the Prosecutor was essentially on his own and might well encounter great resistance from states parties which could view his or her efforts as political intent or as simply responding to pressure by interest groups which had their own political agenda58.

In my opinion, it is not unusual for the international organs piercing through the so-called domestic jurisdiction to be criticized as suffering political bias. Thus opponent states’ argument is not so persuasive. Rather, of great importance is to establish objective criteria and system to choose particular situations to be investigated among vast numbers of information which many NGOs and individuals would send to the Prosecutor. In the light of the experiences of the

future genocide and other serious violations of international humanitarian law rests substantially on its credibility as an international judicial system able to prosecute these crimes. States parties and the Security Council are political bodies, driven by political considerations. If the decision to initiate the proceedings is left only to them, accused persons as well as states custody over them could expect that the ICC’s proceedings for them would not start for political reasons. Only the independent Prosecutor who can carry out investigation and initiate proceedings \textit{ex officio}, can guarantee the credibility and offer real deterrence to future violations.

Secondly, the experiences of some international human rights treaties have proven clearly that state complaint procedures are seldom, if ever, effective. For example, article 41 of the International Convention on Civil and Political Rights (ICCPR) provides for state complaint mechanism, but it has never been used so far. The same is the case with other treaties which have a similar procedure, such as the American Convention on Human rights, the African Charter on Human and People’s Rights and the Convention against Torture. Generally speaking, states are reluctant to bring complaints against nationals, and particularly officials, of other states, for fear that this would interfere with diplomatic or economic relations and would be perceived as a politically motivated and hostile action. Similarly, It would be unrealistic to expect the Security Council to refer situations irrespective of current political considerations. In any case, unless the Prosecutor is given the power to trigger the proceedings on objective and judicial basis, the ICC would be at risk of being used as a selective tool, prosecuting only cases that are politically expedient.

Thirdly, states parties and the Security Council will not always
Prosecutor “shall initiate investigations ex-officio\textsuperscript{56}.” But it is quite clear that this power is completely different from one which was argued in the Working Group to be given to the Prosecutor. As the latter group of states pointed out, even under the ILC Draft, the Prosecutor can investigate and prosecute independently as the Prosecutor of the \textit{ad hoc} Tribunals has done to date. What is required by the supporting states is, on the contrary, not the independence of the Prosecutor within its proceedings, but the independence concerning selection of the situation the prosecutor can initiate his or her motion. In this regard, if article 46[25bis]\textsuperscript{57} are admitted, Prosecutor’s power to initiate the proceedings \textit{ex officio} would be much stronger than that of the Prosecutor of the \textit{ad hoc} Tribunals and could be comparable to the Security Council and a state party.

The argument that supports giving such special power to the Prosecutor is mainly based on the following three reasons. Firstly, the efficacy of the proposed ICC in contributing to the prevention of

\begin{footnotesize}

\footnote{56. Article 18 (1) of the Statute of Yugoslavia Tribunals and article 17 (1) of that of Rwanda Tribunal similarly provide as follows:}

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

\footnote{57. Article 46[25bis] Prosecutor:}

The Prosecutor [may] [shall] initiate investigations \textit{ex officio} \textit{proprio motu} [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. [The Prosecutor may, for the purpose of initiating an investigation, receive information on alleged crimes under article 5[20] (a) to (d) from Governments, intergovernmental and non-governmental organizations, victims and associations representing them, or other reliable sources.]

\end{footnotesize}
ctioning of the ICC would probably be influenced by the political consideration of the Security Council. However, article 10[23] paragraph 1 does not make clear whether the Security Council can add such limitations or refer only entire situations, so that the balance between the ICC’s function and the Security Council’s function in the referral system remains vague yet.

(3) Prosecutor’s investigation *ex officio*

As mentioned above, the ILC Draft does not admit the Prosecutor’s power to initiate an investigation *ex officio*. According to the commentary, though one member suggested that the Prosecutor should be authorized to initiate an investigation in the absence of a complaint, yet other members felt that the investigation and prosecution should not be undertaken in the absence of the support of a state or the Security Council, at least at the present stage of development of the international legal system\(^5\).

In the Working Group 3 of the Preparatory Committee, an increasing number of states supported giving the Prosecutor the power to initiate investigations and complaints on his or her own motion. They usually cited the authority of the Prosecutor of the ICTY and the ICTR to do so, but a large number of states opposed to this idea. The latter argued that the Prosecutor of the ICC would have the same independence as the Prosecutor of the both Tribunals to initiate an investigation once a situation had been brought to his or her attention by the Security Council or a state\(^5\).

Indeed, both Statutes of the ICTY and the ICTR provides that the

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54. *Id.* at 46.

18-1-333 (香法'98) — 44 —
As to the referral by the Security Council, there remains another crucial problem. As pointed out above, pursuant to the Zutphen Draft, the Security Council is authorized to refer to the ICC only a “matter” or a “situation”, not an individual case. But, according to the commentary of the ILC Draft, the possibility that the Security Council can refer a particular case to the ICC was pointed out by some members of the ILC\textsuperscript{53}, though the wording of the ILC Draft is almost same to the Zutphen Draft. If so interpreted, the independence of the Prosecutor will be undoubtedly limited. Even though it was interpreted rigidly not to contain an individual case, another interpretive problem would arise: could the Security Council restrict the scope of a “situation” to a particular time or to particular nationalities? In the case of the ICTY, it has the power to prosecute persons responsible for “serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” More restrictively, in the case of the ICTR, its power to prosecute is limited to “serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994” (emphasis added). These limitations fixed the extent of the Prosecutor’s discretion to investigate on his or her own initiative. Thus, if the referral by the Security Council to the ICC could be interpreted to include such geographical and temporal scope of the situation or limitation to suspects of a particular nationality, the function which the Court would necessarily assume in those referral cases would significantly strengthen the situation of the Prosecutor and of the Court itself.

Statement by Justice Louise Arbour, \textit{supra} note 48.

53. \textit{Yearbook of the International Law Commission}, \textit{supra} note 13, at 44.
should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. Such decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression …… This approach would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII\textsuperscript{51}.

As far as the ICC is based on a treaty, namely consent of a state, we can not deny the possibility and necessity of an ad hoc tribunal for the states which do not ratify the Statute of the ICC even in the post-ICC period. If gross violation of international humanitarian law took place in the territory of non-state party of the ICC’s Statute, the Security Council might set up a different ad hoc tribunal besides the ICC. Otherwise, from a viewpoint of the financial and personnel resources, the organization of the ICC itself might be used as an ad hoc tribunal. In such case, under the different statute made by the resolution of the Security Council, the Prosecutor and the Judges of the ICC would be authorized to initiate proceedings on the cases in relation to a non-state party of the ICC’s Statute\textsuperscript{52}.

\textsuperscript{51} Report of the Secretary-General, \textit{supra} note 21, paras. 20-23.

\textsuperscript{52} Justice Louise Arbour pointed out this issue as follows:

\[E\]ven if the statute were silent on that point, it could not displace the authority of the Security Council to create in the future ad hoc Tribunals such as the existing ones. If only for that reason it would seem preferable for the statute to contemplate a reference to the Court by the Security Council, acting under Chapter VII of the United Nations Charter. In such cases, the non-consensual characteristic
ment under "opt-in" system. In other words, other hurdles to be got over for the function of the ICC, such as state's ratification of the Statute and admissibility (principle of complementarity), are required just as in the case of state complaint.

From this, another question will be aroused: can this provision exclude at all a future possibility that the Security Council will establish another ad hoc tribunal in addition to the ICC? As stated earlier, one of the purposes of establishing the ICC is to remedy the limitations of ad hoc tribunals based on political expediency. Accordingly, it would be undesirable to set up a new ad hoc tribunal after the establishment of the ICC. From the legal viewpoint, however, the Statute cannot prohibit the Security Council from establishing such tribunal. Because the decision of setting up such tribunal will be based on Chapter VII of the UN Charter and, pursuant to article 103 of the Charter, the obligation of member states under the Charter shall prevail over their obligations under any other international agreement. Furthermore, considering the reason that the ICTY and the ICTR were established by the Security Council’s resolution, such possibility cannot be actually denied. The Secretary-General explained that reason as follows:

[T]he treaty approach incurs the disadvantage of requiring considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective. ........ In the light of the disadvantages of the treaty approach in this particular case ........ the Secretary-General believes that the International Tribunal

...
jurisdiction with respect to crimes listed in the Statute as a consequence of the referral of a matter or situation to the ICC by the Security Council. The commentary to the ILC Draft explains that this power may be exercised in circumstances where the Council might have authority to establish an *ad hoc* tribunal under Chapter VII of the UN Charter. This means that the Council will make use of the ICC as an alternative to establishing a new *ad hoc* tribunal in the future. Noting the experiences of the former Yugoslavia and Rwanda, many delegations have considered that this kind of trigger mechanism would be necessary for the effective activities of the ICC, particularly in case that no state could decide to file a complaint for fear of being involved in political disorder of the states in which the crimes under the ICC’s jurisdiction took place.

More advantageously, this referral allows the ICC to dispense with requirement of the acceptance by a state party of the jurisdiction under “opt-in” system. For example, in case where a state, which does not accept the jurisdiction over crimes of terrorism, shields an offender of such crime in its territory, the ICC could initiate its proceedings over the offender only by receiving the Security Council’s referral. In this respect, state sovereignty is more restricted than in the case of state complaint. But this “skip over” effect is limited to the consent require-

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1 bis. [Notification of] [A letter from the President of the Security Council conveying] the Security Council decision to the Prosecutor of the Court shall be accompanied by all supporting material available to the Council.

1 ter. The Security Council, on the basis of a formal decision under Chapter VI of the Charter of the United Nations, may lodge a complaint with the Prosecutor specifying that crimes referred to in article 5[20] appear to have been committed.

50. *Yearbook of the International Law Commission*, supra note 13, at 44.
the Prosecutor to investigate and prosecute offenses related to a particular conflict, but not to mandate the Prosecutor to investigate offenses allegedly committed by one side only to the conflict. The greatest threat, in my view, to the legitimacy of the permanent Court, would be the credible suggestion of political manipulation of the office of the Prosecutor, or of the Court itself, for political expediency.  

For the purpose of ensuring judicial independence of the Prosecutor or the ICC itself, it would be preferable that a state party could lodge a complaint only on a “matter” or a “situation” in which such crimes appeared to have been committed. But this change would necessarily reduce a probability of a complaint by states parties which are parties of the conflict concerned or have direct interests in the crimes alleged, for they would naturally like to avoid a case in which their nationals can be tried before the ICC. For responding to such situation, other effective systems of initiati ng the proceedings are needed.

(2) Referral by the Security Council

In addition to states parties, the Security Council is also authorized to initiate the proceedings. Pursuant to article 10(23) paragraph 1 of the Zutphen Draft, which is following the ILC Draft, the ICC has


49. [Article 10(23) [[Action by] [Role of] The Security Council] [Relationship between the Security Council and the International Criminal Court]

1. [Notwithstanding article 6(21), [7[21 bis]] [and [9[22]], the Court has jurisdiction in accordance with this Statute with respect to crimes [referred to] [specified] in article 5[20] [as a consequence of the referral of] [on the basis of a [formal] decision to refer] a [matter] [situation] in which one or more crimes appear to have been committed to [the Prosecutor of] the Court by the Security
internal conflict.

Considering the above, the qualification to lodge a complaint should be open to all states parties irrespective of the direct interests in the crimes under the ICC’s jurisdiction.

Second issue to be resolved relates to an object on which a state party can make a complaint with the Prosecutor. Both options contained in Article 45[25] states that a state party “may lodge a complaint with the Prosecutor alleging that such crime appears to have been committed.” This stipulation seems rather restrictive as compared with the referral by the Security Council of “a [matter] [situation] in which one or more crimes appear to have been committed.” In the latter case, the Prosecutor could, based on his or her own independent consideration, initiate an investigation on any crimes, as far as they took place in relation to the matter or situation referred by the Security Council. But in the former case, if a state party filed a complaint on a very limited cases, the Prosecutor’s investigation would be restricted to that crimes, even though they were only a part of mass and systematic violations of international humanitarian law. For example, in case that one of two conflicting states filed a complaint on the crimes committed by the other hostile state, the Prosecutor would have to engage in the one-sided investigation, which would lead to infringement of impartiality and fairness of the ICC system. Justice Louise Arbour, the Prosecutor of the ad hoc Tribunals, clearly pointed out this problem as follows:

[I]f the statute of the permanent Court was to required a complaint or referral for the jurisdiction of the Court to be triggered, maximum prosecutorial discretion should still be preserved. For instance, it would be appropriate to mandate
by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.” Among this kind of obligations, it includes “international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid.” Accordingly, considering the grave nature of core crimes, it is quite natural that all states may be regarded as “interested states” and can be given the right to file a complaint. According to the practices of the ICJ, the obligations *erga omnes* have not necessarily led to an *actio popularis*, or a right of any member of international community to take legal action in vindication of a public interest. However, complaint by a state party must be distinct from the procedure of the ICJ in the sense that the complaining state would not be a party of the trial before the ICC. The role of state complaint is only to “trigger” the ICC’s proceedings, and whether to investigate and prosecute depends on the Prosecutor’s or the Chamber’s independent determination.

Secondly, if the power to initiate the proceedings is limited to the particular states above, the ICC’s function will practically be impeded. Take a situation in Rwanda for example, all of the acts alleged were committed in the territory of Rwanda, all of the offenders and victims are nationals of Rwanda and most of them are staying within the territory of Rwanda. Following the latter option, no other state party but Rwanda could file a complaint. It is obvious from this that the ICC could not respond effectively to crimes committed in the situation of an

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First issue is a qualification of state which can lodge a complaint. As to this, the Zutphen Draft contains two options. One is to open it to all states parties to the Statute. The other is to restrict it to several states parties that have direct interests, such as (a) a state on the territory of which the act occurred; (b) a state of the custody; (c) a state of the nationality of a suspect; (d) a state of the nationality of victims.

The latter option, however, can be criticized for the following reasons. First, the crimes under the ICC’s subject-matter jurisdiction are mostly linked to the obligations *erga omnes*, which were explained in the *Barcelona Traction case* as “all State can be held to have a legal interest in their protection”. Furthermore, article 19 of the Draft Articles on State Responsibility also stipulates as follows: “the breach

Prevention and Punishment of the Crime of Genocide of 9 December 1948] [A State Party [which accepts the jurisdiction of the Court under article [22] with respect to a crime] may lodge a complaint [referring to a matter [situation] in which one or more crimes within the jurisdiction of the Court appear to have been committed to] [with] the Prosecutor [alleging that [a crime of genocide] [such a crime] [a crime under article 5[20], subparagraphs [(a) to (d) or any combination thereof]] appears to have been committed] [and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.]

Option 2
[A State Party [which accepts the jurisdiction of the Court under article 9 [22] with respect to a crime] [that has a direct interest] listed under (a) to (d) below may lodge a complaint with the Prosecutor alleging that [such a crime] [a crime under article 5[20] [(a) to (d) or any combination thereof]] appears to have been committed:

(a) a State on the territory of which the act [or omission] in question occurred;
(b) a State of the custody;
(c) a State of the nationality of a suspect;
(d) a State of the nationality of victims.

(1) Complaint by state party

In regard to a state complaint, Article 25\(^44\) of the ILC Draft adopts a dual system linked to the dual jurisdictional regime mentioned in Chapter III. A state party can file a complaint alleging that an act of genocide has been committed if it is a party to the Statute and, simultaneously, a party to the Genocide Convention. With respect to the other crimes under the “opt-in” system, a complaint can be filed by a state party to the Statute which has also accepted the ICC’s jurisdiction concerning the particular crime. However, if the inherent jurisdiction is extended to all core crimes as pointed out above, a state party can lodge a complaint without any prior declaration with respect to crimes against humanity, war crimes and crime of aggression (if included in the core crime) as well as genocide. In such case, the state complaint system will also give weight to the effective functioning of the ICC rather than state sovereignty, as the jurisdictional system will do.

Besides of the dual regime, the Zutphen Draft\(^45\) has two issues to be resolved concerning the state complaint.

\(^{44}\) Article 25 Complaint:
1. A State party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.

2. A State party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.

3. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.

4. In a case to which article 23 (1) applies, a complaint is not required for the initiation of an investigation.

\(^{45}\) Article 45[25] Complaint by State:
Option 1
[[A State Party which is also a Contracting Party to the Convention on the

--- 35 --- 18-1-342 (香法'98)
IV. Trigger mechanism

The trigger mechanism relates to the procedure as to who can initiate the ICC’s proceedings. If it is rigidly limited, the ICC can not respond fully to the situations where the international criminal justice is really needed. For a state party, on the contrary, if the power to initiate the ICC’s proceedings is given broadly to various states, organs or individuals, it will lead to the strong possibility that its nationals will be tried before the ICC. Thus, for avoiding a conflict between the ICC and state party’s sovereignty as far as possible, it is preferable that the power would be given only some limited states or organs. In this respect, trigger mechanism directly influences the balance between the ICC’s effective function and state sovereignty.

In addition, this power is closely linked to political function of the United Nations. As remarked earlier, in the cases of ad hoc Tribunals, the Security Council exercised the similar power and initiated the proceedings of the Tribunals on its political consideration. In the current international community, decision to initiate the proceedings has inevitably a political implication as well as judicial significance. Therefore, it is necessary to harmonize the judicial function of the ICC with the political function of the Security Council in this mechanism.

Under the ILC Draft, only particular states parties and the Security Council are able to initiate the proceedings before the ICC. In the Preparatory Committee, however, many delegations argued the necessity to expand the trigger mechanism by giving the Prosecutor the authority to initiate investigation ex officio. Thus, the Zutphen Draft has a new article to the same effect in square brackets.
As a result, the Zutphen Draft stipulates two options: Option 1 is that the inherent jurisdiction is extended to all core crimes; Option 2 is, on the other hand, that all crimes under the ICC’s jurisdiction (including genocide) are subject to the “opt-in” system. Under current situation, it is likely that a provision on the line of the Option 1 will be adopted. If so, the complicated opt-in system would apply only to crimes of terrorism, drug trafficking and crime against UN personnel. For this reason, the argument to delete these crimes from the subject-matter jurisdiction might be raised. Even if they were left, the meaning of double consents requirement would have to be changed. As pointed out above, criterion in the ILC Draft for distinguishing genocide from other crimes was whether or not the prior consent concerning the jurisdiction of international penal tribunal has been expressed. But criterion in the Zutphen Draft, though not mentioned clearly, seems to be gravity of crimes. From this, we can see a new strategy that as to the graver core crimes, effectiveness of the ICC is preferred to state sovereignty, while as to less grave other crimes, sovereignty is more weighted.

43. Article 9[22] Acceptance of the jurisdiction of the Court:
Option 1
1. A State that becomes a Party to this Statute thereby accepts the [inherent] jurisdiction of the Court with respect to the crimes referred to in article 5[20], paragraphs [(a) to (d) or any combination thereof].
2. With regard to the crimes referred to in article 5[20] other than those mentioned in paragraph 1, a State Party to this Statute may declare:
   (a) at the time it expresses its consent to be bound by the Statute; or
   (b) at a later time that it accepts the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration.
support that interpretation. For the reasons already given, the Commission concluded that the court should have inherent jurisdiction over the crime of genocide, on a complaint being made by a party to the Convention, and the draft statute so provides.\textsuperscript{39}

It is clear from this explanation that the second consent is considered to have been made by entering into the Genocide Convention which positively provides for the jurisdiction of international penal tribunal. Genocide is not, in this regard, under the special jurisdictional system profoundly different from that of other crimes. Reportedly, the strategy of the ILC for introducing this system was adopted to encourage ever greater participation in the Statute, and thereby to built up confidence in the court over time.\textsuperscript{40}

In the Preparatory Committee, however, this “opt-in” system was exposed to strong criticism. A large number of delegations supported amending article 21 of the ILC Draft to provide that the ICC would have inherent jurisdiction over all core crimes. They argued it on the following reasons. First, since genocide and the other core crimes frequently overlapped, there was no practical reason to distinguish them. Secondly, as a state would be consenting to the ICC’s jurisdiction by virtue of becoming a party to the Statute, the inherent jurisdiction was fully compatible with respect for state sovereignty.\textsuperscript{41} Thirdly, since all states could exercise universal jurisdiction over the core crimes without the consent of any other state, all states parties could cede this universal jurisdiction to the ICC.\textsuperscript{42}

40. Crawford, \textit{supra} note 25, at 144.  
ICJ's system is not necessarily based on the double consents requirement: consent to enter into the Statute and consent to refer the case to the ICJ. Moreover, it must be also noted that a case before the ICJ is under civil litigation-like proceedings, which is based on the free will of the parties concerned.

Contrary to this, under the opt-in system, double consents requirement is required rigidly in order for the ICC to exercise its jurisdiction. This principle also holds true for genocide which is seemingly only exception thereof. The commentary to article 21 explains the reason for conferring another jurisdictional system on genocide as follows:

In light of the decision to confer "inherent" jurisdiction over genocide, article 21 treats that crime separately. Genocide is a crime under international law defined by the Convention on the Prevention and Punishment of the Crime of Genocide. Unlike the treaties listed in the annex, the Convention is not based on the principle *aut dedere aut judicare*, but on the principle of territoriality. Article VI of that Convention provides that persons charged with genocide or any of the other acts enumerated in the Convention shall be tried by a competent court of the State in which the act was committed. However, as a counterpart to the non-inclusion of the principle of universality in the Convention, article VI also provides for the trial of persons by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." This can be read as an authority by States parties to the Convention which are also parties to the statute to allow the court to exercise jurisdiction over an accused who has been transferred to the court by any State. The *travaux* of article VI
“inherent” jurisdiction applicable only to genocide, the ICC could establish its jurisdiction over a case if a complaint is brought by a state which is a party both to the ICC Statute and to the Genocide Convention of 1948. In other words, the ICC could be seized of a case without the further consent of any other state. With respect to all other crimes, on the contrary, the ICC could establish jurisdiction over a case only if the prior consent were obtained from two states: the state which has custody of the suspect and the state on the territory of which alleged crime occurred. Furthermore, if the custodial state has received a request from the third state to surrender a suspect, then unless the request is rejected, the consent of the requesting state is also required. This implies, in practice, that a state who becomes a party to the Statute does not entail automatic acceptance of the ICC’s jurisdiction over the crimes listed, except genocide.

This so-called “opt-in” system is legitimated on the grounds that the ICJ has also adopted the similar system. Indeed, in order for the ICJ to have jurisdiction as to an individual case, special consents of the states concerned are required in the form of *compromis*, conflict-settlement clause or declaration provided for in article 36 of the ICJ Statute. But this system must be understood in relation to article 93 (1) of the UN Charter, which states that “all Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.” According to this article, most of the states parties to the ICJ Statute (except the non-UN members) are not given a chance to express their consents separately to enter into the Statute itself. In this respect, the

has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court’s jurisdiction with respect to the crime is also required.
state shall, if not to transfer the accused to the ICC, promptly take all necessary steps to extradite the accused to a state having requested extradition or refer the case to its competent authorities for the purpose of prosecution. This means that the Statute itself imposes the obligation aut dedere aut judicare on a state party thereto. In consequence, if State A, even though not having ratified the Montreal Convention for the Suppression of Unlawful Seizure of Aircraft, once ratifies the Statute and accepts the jurisdiction of the ICC, it has the duty, if it finds in its territory a suspect charged with the crime of the above Convention, to take one of three steps: to transfer him to the ICC, to extradite him to the other requesting state, or refer the case to its competent authorities. In this regard, the consent to be a party to the Statute will be equivalent to ratification en bloc of all the treaties listed in the Statute. Inclusion of these crimes in the subject-matter jurisdiction, consequently, would limit state sovereignty to the utmost extent for the sake of effective functioning of the ICC.

(2) Dual regime of jurisdiction

Article 21 of the ILC Draft provided for two jurisdictional regimes, depending on the crime in question. Under the regime of

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38. Article 21 Preconditions to the exercise of jurisdiction:
1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:
   (a) in a case of genocide, a complaint is brought under article 25 (1);
   (b) in any other case, a complaint is brought under article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under article 22:
      (i) by the State which has custody of the suspect with respect to the crime ("the custodial State"); and
      (ii) by the State on the territory" of which the act or omission in question occurred.
2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State
whether or not such acts had already been crimes under customary law. It is therefore equivocal whether these provisions of subparagraphs (a) to (d) are just codification of customary law or progressive development. Similarly, crimes of terrorism include specific offensive acts (subparagraphs (1) and (3)) as well as offences under conventions (subparagraph (2))36. Thus, it can no longer be said that crimes of terrorism are genuinely crimes defined by treaties like those of the ILC Draft.

Speaking to the crimes of terrorism and drug trafficking, of great importance is that the above change indicates a clear shift of legal nature of norms prohibiting the crimes under the ICC's subject-matter jurisdiction: namely from treaty-basis to the Statute-basis. Under the system of the ILC Draft, double consents of a state are required in order for the ICC to exercise its jurisdiction: consent to enter into the treaties prohibiting a certain act, and consent to enter into the Statute. Under the Zutphen Draft, to the contrary, only the consent to enter into the Statute seems to be required37. Article 79[53] paragraph 7 states that, in the case of a crime to which article 5[20] (e) applies, a

36. See, supra note 30.
37. Article 15[A] concerning the principle of *nullum crimen sine lege* provides for as follows:

1. Provided that this Statute is applicable in accordance with article 6[21], 7[21 bis], 8[21 ter], 9[22] or 10[23] a person shall not be criminally responsible under this Statute: ........

(b) in the case of a prosecution with respect to a crime referred to in article [5 [20] (e)], unless the treaty in question was applicable to the conduct of the person at the time that the conduct occurred.

But it is not clear enough whether this provision excludes the ICC's exercise of jurisdiction to the state which has not yet ratified the treaties of terrorism and drug-trafficking. Because this provision was drafted by the Working Group 2 in the third session and does not correspond correctly to the current wording of article 5 [20] drafted by the Working Group 1 in the same session.
ment that the relevant treaty should be properly applicable to the accused... Two features can be pointed out concerning this article. First, though treating both categories as the same in relation to the jurisdiction, it clearly distinguishes between them with respect to the norms characterizing a certain conduct as a crime. Secondly, therefore, all the crimes enumerated are not crimes under the Statute itself. 

In other words, it is an essential condition for the ICC's exercise of the jurisdiction that a state party has accepted in advance certain acts to be crimes either under customary law or under treaties.

The Zutphen Draft, however, blurs this point. As referred to previously, specific offensive acts are enumerated under the each category of crimes in this Draft. In the course of negotiation in the Preparatory Committee, numerous new proposals on the specific acts have been inserted into each category without being ascertained.

34. Yearbook of the International Law Commission, supra note 20, at 38.
35. For example, in article 5[20], the following acts are enumerated as crimes against humanity:
1. For the purpose of the present Statute, any of the following acts constitutes a crime against humanity when committed ........:
   (a) murder;
   (b) extermination;
   (c) enslavement;
   (d) deportation or forcible transfer of population;
   (e) [detention or] [imprisonment] [deprivation of liberty] [in flagrant violation of international law] [in violation of fundamental legal norms];
   (f) torture;
   (g) rape or other sexual abuse [of comparable gravity,] or enforced prostitution;
   (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds [and in connection with other crimes within the jurisdiction of the Court];
   (i) enforced disappearance of persons;
   (j) other inhumane acts [of a similar character] [intentionally] causing [great suffering,] or serious injury to body or to mental or physical health.
of the ILC, the subject-matter jurisdiction was divided into three categories: crimes defined by treaties, crimes under general international law and crimes under national law. Among them, the ICC could exercise its jurisdiction by a declaration of state party only against the crimes defined by treaties, which included the Genocide Convention, grave breaches of the Geneva Conventions and conventions related to terrorism (article 22). In contrast to this, as to crimes under general international law and crimes under national law, special acceptance in writing of jurisdiction by state party was required (article 26). It is obvious form this that the Working Group regarded the crimes defined by treaties as primary crimes to be dealt with by the ICC and other two as subsidiary ones.32

 Nonetheless the ILC Draft, not following the approach of the Working Group, decided to include in article 20 both crimes under general international law (subparagraphs (a) to (d)) and crimes under treaties (subparagraph (e)).33 The commentary to this article explains that the “conditions for the existence and exercise of jurisdiction of the two categories are essentially the same, subject to the obvious require-

32. As to the argument in the Working Group, it is explained as follows:

The inclusion of crimes under general international law in a separate provision of the Draft Statute was controversial. On the one hand, some members took the view that such crimes were poorly defined and questionable, and that the statute should be limited to crimes defined by treaties in force ······ The majority of the working group believed that the possible controversies over the identity and content of crimes under general international law warranted more cautious treatment than that given to treaty-based crimes, but that these crimes could not be excluded from the statute. Thus, jurisdiction over such crimes is tightly circumscribed.

Crawford, supra note 25, at 145.

33. See, supra note 28.
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is found, if it does not extradite him, shall be obliged to submit the case to its competent authorities for the purpose of prosecution. But this does not fully ensure an actual prosecution by a competent authority, let alone punishment with a suitable sentence. For this reason, it has been pointed out that there would be the possibility that a state party could use this system for shielding the alleged offender from criminal responsibility. This is, in fact, the background of Lockerbie case pending now in the International Court of Justice (ICJ). For the purpose of resolving this problem, it seems very useful to give the ICC the competence to try a person responsible for the crimes of terrorism and drug trafficking.

However, their inclusion would give rise to a problem in relation to the balancing with state sovereignty. Looking into the drafting history of the subject-matter jurisdiction, there existed a shift in fundamental strategy concerning the crimes to be covered by the ICC. Originally, in the Draft Statute set out in 1993 by the Working Group

associated personnel” means any of the following acts [when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate]:
(a) murder, kidnapping or other attack upon the person or liberty of any such personnel;
(b) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.
[Crimes involving the illicit traffic in narcotic drugs and psychotropic substances]
were moved into the categories of crimes against humanity or war crimes. As a result, crimes of terrorism, crimes involving the illicit traffic in narcotic drugs are left in the Zutphen Draft as independent crimes. In addition, crimes against United Nations and associated personnel were added by the Working Group later.

The system of aut dedere aut judicare, which the treaties related to terrorism, drug-trafficking and protection of UN personnel provide for, has been criticized for its uncertainty about punishment. Under this system, a state party in the territory of which the alleged offender

30. [Crimes of terrorism
The Court has jurisdiction with respect to the following terrorist crimes: For the purposes of the present Statute, crimes of terrorism means:
(1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them;
(2) An offence under the following Conventions:
   (a) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;
   (b) Convention for the Suppression of Unlawful Seizure of Aircraft;
   (c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;
   (d) International Convention against the Taking of Hostages;
   (e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
   (f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf;
(3) An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.]

[Crimes against United Nations and associated personnel
1. For the purpose of the present Statute, “crimes against United Nations and
international concern. Among the treaties listed are the 1949 Geneva Conventions and Additional Protocol I, the Torture Convention, and conventions dealing with international terrorism and drug trafficking. In the course of discussion in the Preparatory Committee, however, crimes related to the Geneva Conventions and the Protocol and torture

Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by Article 51 of that Convention;

(v) the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by Article 130 of that Convention;

(vi) the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as defined by Article 147 of that Convention;

(vii) Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of June 1977, as defined by Article 85 of that Protocol.


7. The crime of torture made punishable pursuant to Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.


9. Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3 (1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the Convention, are crimes with an international dimension.
is without prejudice to the powers of the Security Council under Chapter VII." But the effect of such clauses is open to question. In the current UN system in which the mechanism of “separation of powers” and “checks and balances” like in a domestic constitutional system does not exist yet, such conflict would be unavoidable. Accordingly, from the viewpoint of keeping the ICC’s independence from political consideration, to delete this crime from its subject-matter jurisdiction would be preferable. This would strengthen credibility of the ICC and, at the same time, leave the Security Council wide discretionary power as it has at present.

ii ) Crimes of terrorism and drug trafficking

Another problem concerning the crimes covered by the ICC is whether terrorism and drug trafficking should be contained in the subject-matter jurisdiction. Article 20 of the ILC Draft includes the crimes which were established under treaty provisions listed in an Annex to the Statute and constitute exceptionally serious crimes of

28. Article 20  Crimes within the jurisdiction of the Court:
The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
(a) the crime of genocide;
(b) the crime of aggression;
(c) serious violations of the laws and customs applicable in armed conflict;
(d) crimes against humanity;
(e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

29. Annex Crimes pursuant to Treaties:
1. Grave breaches of:
   (i) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, as defined by Article 50 of that Convention;
   (ii) the Geneva Convention for the Amelioration of the Condition of Wounded,
that of the permanent members.

Even if such decision were successfully made by the Security Council, another question would arise: whether the ICC could find not-guilty an individual alleged with a crime of aggression, irrespective of the Council's prior determination. If the ICC decided not-guilty, the judgement would likely have a substantial effect of judicial assessment on the political decision of the Security Council\(^{27}\). This would be inconsistent with the primary responsibility of the Council, provided in article 24 of the UN Charter, concerning the maintenance of international peace and security. Same is true of the case where the Statute will stipulate that the ICC can initiate the proceedings independently without the Security Council's prior determination. Also in such case, the ICC's decision of guilty or not-guilty of a person charged would give a negative or positive influence on the Security Council's political decision. In any situation, the ICC would be in a delicate position in relation to the Security Council.

In article 10[23] of the Zutphen Draft, some safeguard clauses are proposed for preventing such jurisdictional conflict, such as "a decision by the Security Council shall not be interpreted as ... affecting the independence of the Court" or "the findings of the Court in such cases

\(^{27}\) As to this possible reviewing function of the ICC, Professor Crawford pointed out as follows:

There is some question whether an international tribunal may indirectly review a decision of the Security Council, in the sense of deciding for itself whether certain conduct is an act of aggression. Under the Draft Statute the position is not entirely clear. The Security Council must first determine that an act of aggression has been committed by the state concerned: at least that determination will be presumed to be valid.

Crawford, supra note 25, at 147.
likely, in fact, that without this, so many complaints on this crime would be made by states, for example, on the grounds of a boundary dispute with neighboring state. If admitted, on the other hand, the limitation would probably prevent the effective function of the ICC in case that the prosecution is really necessary. Because the Security Council, in practice, often responds to situations under Chapter VII without explicitly determining the existence of an act of aggression. Under article 39 of the Charter, for the purpose of taking measures to maintain or restore international peace and security, the Council can determine the existence of three types of situations: threat to the peace, breach of the peace and act of aggression. In an individual case, the Security Council has political discretion to decide which of these situations a certain fact submitted belongs to. In the case of Iraqi invasion of Kuwait in 1990, for example, the Security Council determined the situation just as “a breach of international peace and security”26, though it seems a typical example of the act to be accused as crime of aggression. Much seriously, the Council might be unable to characterize a certain act as aggression because of the veto power. In any event, the ICC’s judicial conduct would obviously have to be subject to the political will of the Security Council and, in particular,

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2 *bis.* [A referral of a matter to the Court or] [A determination] [A formal decision] by the Security Council [under paragraph 2 above] shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of the person concerned.

2 *ter.* [A complaint of or directly related to an act of aggression brought under this Statute and the findings of the Court in such cases is without prejudice to the powers of the Security Council under Chapter VII of the Charter.]


this respect, it is not so crucial for the principle of legality whether or not the definition of aggression has already been crystallized into customary law. Because the requirement of that principle can be met, only if a state accepts the current definition of the crime of aggression by being a party to the Statute.

Much more difficult is the relation to the Security Council. Pursuant to article 23 (2) of the ILC Draft\textsuperscript{23}, a complaint of or directly related to an act of aggression could not be brought unless the Security Council has first determined that a state has committed the act of aggression which is the subject of the complaint. This rule stems from the idea that an individual's criminal responsibility for a crime of aggression necessarily presupposes an existence of aggression by state, and that such finding would be made exclusively by the Security Council acting under Chapter VII of the UN Charter. This procedural limitation is left as the first option in article 10[23]\textsuperscript{24} of the Zutphen Draft.

According to Professor Crawford, this limitation will restrict the bringing of politicized charges of aggression under the Statute\textsuperscript{25}. It is

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\textsuperscript{23} Article 23 Action by the Security Council:

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

\textsuperscript{24} Article 10[23], paragraph 2:

Option 1

[A complaint of or directly related to [an act] [a crime] of aggression [referred to in article 5[20]] may [not] be brought [under this Statute] unless the Security Council has [first] [determined] [formally decided] that the act of a State that is the subject of the complaint, [is] [is not] an act of aggression [in accordance with Chapter VII of the Charter of the United Nations].

Option 2

[The determination [under Article 39 of the Charter] of the Security Council that a State has committed an act of aggression shall be binding on the deliberation of the Court in respect of a complaint, the subject matter of which is the act of
from these citations that the ICC can work only on the premise that customary law or treaty law has prohibited these crimes in advance. In other words, the Statute itself does not impose any obligation on an individual concerning the crimes. It is fully possible, therefore, that the ICC could try a person, according to the Statute, for conduct committed prior to its entry into force\textsuperscript{21}. Under such system, ambiguous nature of the crime of aggression as the customary norm would be decisively inconsistent with the principle of legality.

In contrast to this, the Zutphen Draft, following a general agreement in the Preparatory Committee that the ICC's jurisdiction should be defined with the clarity, precision and specificity required for criminal law\textsuperscript{22}, adopts a policy to enumerate the specific offences. In addition, article 8[21ter] provides that the ICC has jurisdiction only in respect to crimes committed after the day of entry into force of the Statute or, if a state becomes a party to the Statute after its entry into force, after the deposit of its instrument of ratification. By this provision, the ICC cannot try a person responsible under the Statute for conduct committed prior to its entry into force or the ratification. In

\textsuperscript{21} In this regard, the policy of the ILC Draft is similar to that of the International Criminal Tribunal for the former Yugoslavia, as to which the Secretary-General explained as follows:

In the view of the Secretary-General, the application of the principle \textit{nullum crimen sine lege} requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

Report of the Secretary-General pursuant to Paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704 (3 May 1993), para. 34.

\textsuperscript{22} Report of the Preparatory Committee, \textit{supra} note 3, para. 52.
respect to this principle, the Zutphen Draft adopts a completely different policy from that of the ILC Draft. The commentary of the ILC Draft states, "the statute is primarily an adjectival and procedural instruction. It is not its function to define new crimes." Further, article 39 concerning the principle of legality provides as follows: "An accused shall not be held guilty: (a) in the case of a prosecution with respect to a crime referred to in article 20 (a) to (d), unless the act or omission in question constituted a crime under international law; (b) in the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the accused; at the time the act or omission occurred". It is apparent

[Provided that the acts concerned or their consequences are of sufficient gravity, acts constituting aggression [are] [include] the following:]

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State [, or the use of any weapons by a State against the territory of another State];

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond their termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.]

clearly distinguished an aggression as an act by a state from an act by an individual of planning, directing and leading that state act, many delegations spoke in favor of its inclusion. Following such development, the Zutphen Draft includes the crime of aggression and defines it provisionally as covering all the acts enumerated in the Resolution 3314, though an option are left to delete this crime at all in the Diplomatic Conference\(^1\).

The above argument against including the crime is based on the concern that if the definition thereof has not yet come to be a customary rule, it would be contrary to the principle of legality: *nullum crimen sine lege*. However, we should not overlook the fact that with

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10. [Crime of aggression
1. [For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]:
   (a) planning,
   (b) preparing,
   (c) ordering,
   (d) initiating, or
   (e) carrying out
   [an armed attack] [the use of armed force] [a war of aggression,] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council].]

[For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.]

[2. [Acts constituting [aggression] [armed attack] include the following:]

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19. [Crime of aggression
1. [For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]:
   (a) planning,
   (b) preparing,
   (c) ordering,
   (d) initiating, or
   (e) carrying out
   [an armed attack] [the use of armed force] [a war of aggression,] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council].]
i) Crime of aggression

It has been one of the most contentious topics in the Preparatory Committee as well as in the International Law Commission whether the crime of aggression should be included in the subject-matter jurisdiction. A controversy has been arisen about two issues: definition of the crime and relation to the Security Council.

Admittedly, both Charters of the Nuremberg Tribunal and Tokyo Tribunal criminalized a war of aggression in the name of “crimes against peace”. Furthermore, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States of 1970 and General Assembly Resolution 3314 on the Definition of Aggression of 1974 also regarded a war of aggression as a crime against peace. However, opinion was divided as to whether the customary rule as it has developed since 1945 covered only a war of aggression, or included all other acts of aggression for the purpose of determining individual criminal responsibility.

Most opponents to this crime argued critically that even though Resolution 3314 having offered the definition, it dealt with aggression by state, not with the crimes of individuals and was intended as a guideline for the Security Council, not as a definition for judicial use. Until the second session, many delegations have taken a negative attitude to including the crime of aggression within the ICC’s jurisdiction. In the third session, however, due to Germany’s proposal that

17. Charter of the International Military Tribunal, Article 6 (a): CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

certain extent as an extra appellate or judicial body to review the performance of national prosecutors.

In individual cases, actual application of these conditions, particularly of its vague term "genuinely", might confront with various difficulties. However, as far as the competence of determination thereof is reserved to the ICC and the conditions set out in this article are truly complied with, distribution of the jurisdiction between the ICC and a state party will be successfully conducted without disturbing effective activities of the ICC. Rather, a critical problem is whether the ICC can actually take effective measures to comply a state party with the ICC's decision, when it decides to reject the state party's request as to inadmissibility pursuant to this article. This problem will be discussed later in chapter V.

III. Jurisdictional regime

(1) Crimes covered by the ICC

The categories of crimes that the ICC will be authorized to hear will determine both its profile and range of activities. This issue relates to detailed definition of crimes under the ICC's subject-matter jurisdiction, but it is not our present concern. What is to be discussed here is the extent of the subject-matter jurisdiction which would influence the basic nature of the ICC system with respect to the two problems mentioned earlier. An important point then is whether the jurisdiction of the ICC will be limited to the so-called "core crimes" of genocide, crimes against humanity and war crimes, or it will extend to cover other crimes such as crime of aggression on one hand, and crimes of terrorism and drug trafficking on the other hand.
tor, receiving a complaint by state party or referral of the Security Council (referred to later in Chapter IV), can initiate an investigation against any crimes under its subject-matter jurisdiction. A state party, which wants to stop the proceedings on the grounds that same case is or has been investigated or prosecuted by its national authorities, must make challenge to the admissibility of the case prior to or at the commencement of the trial. Moreover, even if the Court has decided that a case is inadmissible pursuant to the criteria provided for in article 11[35], the Prosecutor may, at any time, submit a request for a review of the decision on the grounds that conditions to render the case inadmissible no longer exist or that new factors arose\textsuperscript{15}. In this respect, the ICC will have primacy over each state\textsuperscript{16} and serve to a

\begin{itemize}
  \item 15. Article 12[36] Challenges to the jurisdiction of the Court or the admissibility of a case:
  \item 2. Challenges to the admissibility of the case, pursuant to article 11[35], or challenges to the jurisdiction of the Court may be made by:
    \begin{itemize}
      \item (a) an accused [or a suspect];
      \item (b) [A State][[An interested] State Party] which has jurisdiction over the crime on the ground that it is investigating or prosecuting the case or has investigated or prosecuted [a State [State Party] of nationality of a person referred to in paragraph 2 (a) [on the ground that it is investigating or prosecuting the case or has investigated or prosecuted]] [and a State [State Party] which has received a request for cooperation];
    \end{itemize}
  \item 3. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge must take place prior to or at the commencement of the trial.
\end{itemize}

\[5. \text{If the Court has decided that a case is inadmissible pursuant to article 11[35], the Prosecutor, may, at any time, submit a request for a review of the decision, on the grounds that conditions required under article 11[35] to render the case inadmissible no longer exist or that new facts arose.}\]

a case is being investigated or prosecuted by a state with jurisdiction “unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.” This article, compared with the ILC Draft, takes up not only investigation, but also all the stages from the beginning of prosecution to the end of trial for evaluating state's unwillingness and inability. Most remarkable is that this article provides detailed criteria to be considered in determining the unwillingness and inability. Paragraph 3, dealing with the situation of unwillingness, requires the ICC to consider whether one or more of the followings exist: (a) the proceedings were undertaken for the purpose of shielding the person concerned from criminal responsibility; (b) there has been an undue delay in the proceedings which is inconsistent with an intent to bring the person to justice; and (c) proceedings were conducted in a manner which was not independent and impartial and which is inconsistent with an intent to bring the person to justice. In addition, paragraph 4 requires to consider in order for determining inability, whether, due to a total or partial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. By providing for “the Court shall determine that a case is inadmissible”, this article also clearly indicates that the competence to make the determination of admissibility belongs to the ICC itself, not to each state party and that it is the accused or the state party alleging inadmissibility that bears a burden of proof for establishing non-existence of unwillingness or inability.

Looking at this new article from the viewpoint of balance with state sovereignty, it is easily understood that this is fundamentally based on the second approach above. Under this system, the Prosecu-
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delegations succeeded to agree on a revised article 35 with a largely unbracketed\textsuperscript{13}, which is consolidated in the Zutphen Draft as article 11 [35].

According to this article\textsuperscript{14}, the ICC can not have jurisdiction where

\begin{itemize}
\item[(a)] the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
\item[(b)] the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
\item[(c)] the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under paragraph 2 of article 13[42];
\item[(d)] the case is not of sufficient gravity to justify further action by the Court.
\end{itemize}

2[3]. In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:

\begin{itemize}
\item[(a)] the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court as set out in article 5\textsuperscript{20};
\item[(b)] there has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
\item[(c)] the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
\end{itemize}

3[4]. In order to determine inability in a particular case, the Court shall consider whether, due to a total or partial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.
“and there is no reason for the court to take any further action” for the
time being; and (c) it is not of such gravity to justify further action by
the Court. This article has been criticized for not setting definite
criteria to assess the non-availability or ineffectiveness. Further,
under the conditions just above, it could not eliminate the possibility
that national prosecution would be occurred for shielding a suspect
from the ICC’s proceedings.

In the Preparatory Committee, debates revealed two different
approaches to the complementarity principle. The first emphasized
the primary right of states to prosecute international crimes and
exceptional and restricted role for the ICC. According to this argu-
ment, the ICC would be able to act only if the state were acting in bad
faith or there were an unconscionable delay in the investigation, prose-
cution or request for extradition. Some states holding this view
argued that only sovereign states could decide whether the ICC could
act in a particular case. The other approach stressed that the ICC
should act when states failed to carry out their duty to prosecute, and
criticized that the test of bad faith the first approach argued would not
apply to the case that judicial systems were acting in good faith but
were ineffective. The states supporting this approach also urged that
the ICC itself had to be able to decide whether to exercise its concurrent
jurisdiction11.

During the fourth session, an intensive discussion on this principle
has been made in an informal drafting group within the Working Group
3 on Complementarity and Trigger Mechanism12. As the result of this,

11. Hall, supra note 7, at 181.
12. As to this meetings, See, Coalition for an International Criminal Court,
Summary of Working Group 3: Complementarity and Trigger Mechanisms
-available in gopher ://gopher.igc.apc.org :70/00/orgs/icc/ngodocs/prepcom4/

II. Limitation on the role of the ICC:  
Principle of complementarity

The first point to be examined is the limitation on the ICC's activities that the Statute imposes to in relation to national jurisdiction system.

According to the preamble of the ILC Draft, the ICC is "intended to be complementary to national criminal justice systems" and would come into operation only in cases where national trial procedures "may not be available or may be ineffective." This principle of "complementarity" refers generally to the jurisdictional balance between the ICC and a national court, which is completely different from those of the ICTY and the ICTR in which the Tribunal's primacy over national jurisdiction is admitted in general9. Article 3510 of the ILC Draft states that a case is inadmissible if the crime in question is as follows: (a) it has been duly investigated by a state with jurisdiction, whose decision not to proceed with a prosecution is "apparently well-founded"; (b) it is under investigation by a state which has or may have jurisdiction,

9. Statute of the ICTY, Article 9 (2) provides:  
The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

10. Article 35 Issues of admissibility:  
The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:
(a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
(b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
(c) is not of such gravity to justify further action by the Court.
establishing the Tribunals and provided for its concrete proceedings. Owing to this, the two Tribunals could evade the risk of disturbing the political function of the Security Council, and literally “peace” could be realized through “justice”. Considering an actual international politics, however, we cannot conclude definitely that justice will lead to peace at every time and in every place. For example, it is easy to suppose a situation that one of negotiating parties for ending a conflict would become, at the same time, an accused charged with the crimes covered by the ICC. In such case, seeking for justice will probably disturb the peace process to some extent or at all. As mentioned above, the ICC system itself should be a legal and objective institution, in the course of which all procedures are performed without any political consideration. Nevertheless, it seems undeniable that so to speak “political control” over the ICC might be necessary in a certain case. The critical issue is by whom, in what case and to what extent such control should be carried out.

Focusing on the two problems above, this paper will examine in detail some remaining issues to be resolved in the Diplomatic Conference. For the purpose of this, the provisions of the Zutphen Draft will be compared with those of the ILC Draft, by which we can clarify the change of policy in dealing with these problems. Furthermore, the experiences of the two ad hoc Tribunals will be taken into account as important precedents. This will give us a perspective to review the proposed Draft from practical availability. These investigations will serve to make clear actual functions and defects of the ICC system, and more generally, to provide a preliminary analysis of the implementing system of international criminal law in the post-ICC period.
to remedy the limitations of *ad hoc* tribunals. The establishment of temporary tribunals gives rise to questions, such as why an *ad hoc* tribunal was set up in one situation and not in another; and why certain international or domestic crisis was dealt with differently from another. In particular, establishment by a binding resolution of the Security Council opens *ad hoc* tribunal up to accusations of political bias and to suspicions concerning their judicial independence. Looking forward, it would be difficult to foretell that the Security Council will always have the political will to respond to gross human rights violations, as it did in regard to the former Yugoslavia and Rwanda. It is, in fact, already widely admitted that the Security Council is experiencing, so to speak, "tribunal fatigue" and that it would probably not set up another *ad hoc* tribunal whatever the scale of the crisis meriting it. In this regard, the proposed ICC must be seen, beyond any doubt, as an objective and non-political system concerning not only its way of establishment but also all procedures thereof.

Nevertheless, it cannot be ignored that the crimes dealt with by the ICC would often be linked closely to an international or internal (or mixed) conflict which belongs to the competence of the United Nations, particularly, of the Security Council. As the cases of the former Yugoslavia and Rwanda indicated, international criminal justice for punishing a person responsible for war crimes is considered to be a part of peace-making or peace-keeping process in the region where an international or internal armed conflict has occurred. In the above two cases, it was the Security Council that determined the timing of

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impunity, the ICC system is expected to have a strong competence over national jurisdiction to exclude any possible loophole for such criminals.

It is not to be denied, on the other hand, that the international community is not so highly developed that an international criminal justice can not have a fully centralized and exclusive jurisdiction against international crimes. This means that the proposed ICC system will inevitably need cooperation of states parties in every stage of its work. Without that, it cannot even investigate and arrest a suspect, obtain an evidence and enforce a sentence. What has to be noticed here is that traditionally these activities belong to a core of state’s sovereign power and that a state is generally reluctant to give up such kind of powers. In particular, we should not overlook the fact that the ICC will be established on the treaty basis. In contrast to the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) which were established by the Security Council’s resolutions under Chapter VII, final decision whether to enter into the ICC system will be left to each state’s free will. Accordingly, if there were few states which ratified the Statute, the ICC would become a so-called “paper court”, however excellent its system and proceedings might be. From this point of view, the Statute should be acceptable to as many states as possible, clearly expressing that this system will not infringe their sovereignty. Contradictorily, the more the sovereign powers of state are reserved, the less the ICC can carry out its functions originally expected. Of great significance then is to find an appropriate balancing point between them.

As to the relation with the political function of the United Nations, it must be noted that another important purpose to establish the ICC is
Nevertheless, this does not necessarily mean that the Zutphen Draft definitely indicates a future direction of the structure and proceedings of the ICC. Far from that, most critical issues which would influence the judicial functioning of the ICC will likely remain unresolved until the Diplomatic Conference. Although most of the participant states have had no objection to establishing the ICC since the beginning of the Preparatory Committee, yet severe opposition has continued so far concerning detailed proceedings thereof. There exist many factors behind this opposition, but broadly speaking, all of these seem to originate in the disagreement on two problems: balance between the ICC’s effective function and respect for state sovereignty, and relation between a judicial function of the ICC and a political function of the United Nations.

Balancing with the state sovereignty is, in a sense, a common difficult problem that all international organizations have to face with. As mentioned later, however, the ICC system would give much graver impact upon a state internal system than the cases of other international organizations. Under the present implementing system of international criminal law, most perpetrators of gross human rights abuses and violations of international humanitarian law have not always been punished. Ideally, such violations should be dealt with by the national authorities of the state in which they are committed. Practice has shown, in fact, that governments are seldom willing to call their own nationals to account, particularly when the individuals concerned occupy positions of political or military authority. Moreover, situations of international or internal conflict may lead to the disruption or even disintegration of domestic legal systems and, as a result, no government is capable of dispensing justice at all. So as to end such
brackets and, in some parts, leaves several options to be selected in the Diplomatic Conference, we can see with this an overview of the proposed Statute as a whole and understand an outline of the ICC’s proceedings.

The Zutphen Draft consists of eleven parts with 99 articles⁶. Compared with the Draft prepared by the International Law Commission in 1994 (ILC Draft)⁶, it has additional 39 articles and new three parts: General principle of criminal law, Penalties and Final clause. Remarkable difference, however, can be found not only in its structure, but in its contents reflecting the feature of negotiating process in the Committee. In contrast to the ILC, the Preparatory Committee and its working groups have been open to all states and, particularly, to NGOs. More than sixty NGOs actually have observed the negotiations, and some of them have supplied governmental delegations with detailed analysis and recommendations concerning the ILC Draft. Many of their recommendations have been taken up by governments in the debate or in proposed amendments to the ILC Draft and given a significant impact on the drafting of a consolidated text⁷. As the result of this, the Zutphen Draft, strongly influenced by the opinions of these NGOs, includes articles and options emphasizing effectiveness, fairness and independence of the ICC more than the ILC Draft.

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proposals and amendments to particular articles have been discussed, while the results of their discussion have been presented to the plenary of the Committee at the end of each session. This approach could realize a very intensive discussion on the each part, but at the same time, made it difficult for us to grasp a whole structure of newly emerging system.

However, in an Intersessional Meeting held in Zutphen, the Netherlands from 19 to 30 January 1998, the texts of articles having been discussed in the working groups were, for the first time, consolidated and made up as a complete set of draft articles. Though this Draft Statute (Zutphen Draft) includes much unsettled wording in square working groups shall be held. The working methods should be fully transparent and should be by general agreement in order to secure the universality of the convention. Submission of reports on its debates will not be required. Interpretation and translation services will be available to the working groups;

(b) To deal with the following:
(i) Definition and elements of crimes;
(ii) Principles of criminal law and penalties;
(iii) Organization of the Court;
(iv) Procedures;
(v) Complementarity and trigger mechanism;
(vi) Cooperation with States;
(vii) Establishment of the International Criminal Court and its relationship with the United Nations;
(viii) Final clauses and financial matters;
(ix) Other matters.


4. REPORT OF THE INTERSESSIONAL MEETING FROM 19 TO 30 JANUARY 1998 IN ZUTPHEN, THE NETHERLANDS (available in gopher://gopher.igc.apc.org:70/11/orgs/icc/undocs/zutphen). In this Draft, the articles have been renumbered. Accordingly, in the following examination, these new numbers will be referred to with the previous numbers in square brackets. Unsettled words are also in square brackets.
I. Introduction

On 11 December 1995, the General Assembly of the United Nations decided to establish the Preparatory Committee on the Establishment of the International Criminal Court “to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.” The Committee has convened six sessions between March 1996 and April 1998. Meanwhile, on 15 December 1997, the General Assembly decided to hold the United Nations Conference of Plenipotentiaries (Diplomatic Conference) in Rome from 15 June to 17 July 1998. Without doubt, the final stage has come for setting up an International Criminal Court (ICC).

For the purpose of drafting the Statute of the ICC, the Preparatory Committee has adopted a piecemeal approach since its third session, and created several working groups to focus on individual parts of the Draft Statute. Thus, it is mainly in these working groups that new

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1. GA Res. 50/46, para. 2 (18 Dec. 1995).
2. GA Res. 52/160, para. 3 (15 Dec. 1997).
3. As to the Working Groups, the Report of the Preparatory Committee reads as follows:

The Preparatory Committee wishes to emphasize the usefulness of its discussions and the cooperative spirit in which the debates took place. In the light of the progress made and with an awareness of the commitment of the international community to the establishment of an international criminal court, the Preparatory Committee recommends that the General Assembly reaffirm the mandate of the Preparatory Committee and give the following directions to it:

(a) To meet three or four times up to a total of nine weeks before the diplomatic conference. To organize its work so that it will be finalized in April 1998 and so as to allow the widest possible participation of States. The work should be done in the form of open-ended working groups, concentrating on the negotiation of proposals with a view to producing a draft consolidated text of a convention to be submitted to the diplomatic conference. No simultaneous meetings of the
ARTICLE

Setting up an International Criminal Court: Some Critical Issues Left to the Diplomatic Conference

Shuichi Furuya*

I. Introduction
II. Limitation on the role of the ICC: Principle of complementarity
III. Jurisdictional regime
   (1) Crimes covered by the ICC
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IV. Trigger mechanism
   (1) Complaint by state party
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   (3) Mechanism against a failure of cooperation
VI. Conclusion

* This article is an expanded and revised version of the paper originally prepared for the author's intervention: “Balance and evaluation of the project on the International Criminal Court” in the international seminar “Justice and Sanction for International Crimes” sponsored by the Instituto de Estudios Internacionales y Europeos Francisco de Vitoria of the Universidad Carlos III de Madrid. Most parts of this article were written in March 1998 and relied on the materials which were available as of 3 April 1998.

This research was supported in part by a grant-in-aid for scientific research of 1997–98 from the Japanese Ministry of Education, Science, Sports and Culture.