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INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
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**A LEGAL APPRAISAL OF JURISDICTIONAL,
ADMISSIBILITY AND ENFORCEMENT ISSUES
IN THE ESTABLISHMENT OF
THE INTERNATIONAL CRIMINAL COURT**

BY

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**INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA**

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BY

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**A thesis submitted in fulfilment of the requirement
for the degree of
Master of Comparative Laws**

**Ahmad Ibrahim Kulliyah of Laws
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ABSTRACT

An international criminal court has been called the missing link in the international legal system. The International Court of Justice at The Hague handles only cases between States, not individuals. Without an international criminal court for dealing with individual responsibility as an enforcement mechanism, acts of genocide and egregious violations of human rights often go unpunished. Therefore, the establishment of a permanent international criminal court is a dream for the international community for more than 50 years. That dream has become a reality when the Rome Statute established the International Criminal Court (ICC) on 17 July 1998. The ICC has jurisdiction over four heinous crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

Nevertheless, there are a number of issues arising out of the establishment of the ICC which need to be resolved before the Court can operate effectively. It is thus the aim of the present research to make an appraisal on some of the issues concerning the establishment of the International Criminal Court. However, since the issues are many and varied, the present research confines itself only to three main issues, namely: jurisdictional, admissibility and enforcement issues.

A detailed analysis of the three issues provides us with some guidance on whether the ICC could achieve the objective of its establishment, namely: to end impunity, to remedy deficiencies of the two Ad Hoc Tribunals (ICTY and ICTR), to achieve justice for all and to deter future perpetrators of international crimes.

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(ICC)

.ICTR ICTY

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws

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The Agreement on Privileges and Immunities of the International Criminal Court, 2002

The International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973

The Geneva Conventions Relating to Protection of Victims of Armed Conflict, 1929

The Hague Convention Respecting the Laws and Customs of War on Land, 1907

LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
ALL ER	All English Reports
GA	General Assembly
GAOR	General Assembly Official Records
ICC	International Criminal Court
ICHRDD	International Centre for Human Rights and Democratic Development
ICRC	International Committee of Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDFR	Institute of Diplomacy and Foreign Relations
IJIL	Indian Journal of International Law
ILC	International Law Commission
ILM	International Legal Materials
IMT	International Military Tribunal
LCHR	The Lawyers Committee of Human Rights
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organization
NGO	Non Governmental Organization
PCNICC	Preparatory Commission for the Establishment of International Criminal Court
UN	United Nations
UNTS	United Nations Treaty Series
U.S	United States of America

CHAPTER 1

INTRODUCTION

It has been 50 years since the United Nations first recognized the need to establish an international criminal court to prosecute crimes such as genocide. In Resolution 260 of 9 December 1948, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. In the same resolution, the General Assembly also invited the International Law Commission (ILC) ‘to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.’¹

¹‘Establishment of an International Criminal Court – Overview’, <<http://www.un.org/law/icc/general/overview.htm>> (accessed 21 April 2003)

Following the ILC's conclusion that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both considerable and possible, the General Assembly established a committee to prepare proposals relating to the establishment of such a court. The committee prepared a draft statute in 1951. However, the General Assembly decided to postpone consideration of the draft statute pending the adoption of a definition of aggression.

Since that time, the question of the establishment of an international criminal court has been considered periodically. In December 1989, in response to a request by Trinidad and Tobago,² the General Assembly asked the ILC to resume work on an international criminal court with jurisdiction over drug trafficking.³

The advent of the establishment of the ICTY and ICTR in 1993 and 1994, respectively, fuelled the widespread belief that a permanent international criminal court was desirable and practical. The Preparatory Committee for the Establishment of an International

² Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary General, UN GAOR, 47th Session, Annex 44, Agenda Item 152, UN Doc. A/44/49(1989)

³ UNGA Res. 44/39, UN GAOR, 44th Session, Supp. No. 49, at 311, UN Doc.A/44/49(1989).

Criminal Court set up by the General Assembly, met six times in 1996-98 to prepare the text of the Statute of the Court. All these efforts culminated in the convening of the Rome Conference, attended by 160 States, from 15 June to 17 July 1998, which adopted the Rome Statute on the last day of the Conference by a vote of 120 in favor, 7 against and 21 abstentions.⁴

The main objective of the present research is to make an appraisal on some of the issues concerning the establishment of the International Criminal Court. However, since the issues are many and varied, the present research will be confined only to three main issues, namely: jurisdictional, admissibility and enforcement issues. A detailed analysis of these three issues is necessary in order to find out whether the International Criminal Court is able to operate effectively. Therefore, the procedural and substantive law issues are not within the purview of this research.

⁴ For a detailed history of the Rome Conference's deliberations, see Arsanjani, Mahnoush . H, "Developments In International Criminal Law: The Rome Statute Of The International Criminal Court", 93 *A.J.I.L* 22 (1999).

There has been extensive literature in the area of international criminal law in general and International Criminal Court in particular. Nevertheless, there seems to be lack of specific studies addressing the three issues together. Therefore, it is hoped that the present research will be able to fill the gap and be a humble contribution to the law relating to the International Criminal Court.

The present research is in the form of a doctrinal legal research as the aim is to evaluate the concept and relevant rules pertaining to the underlined issues. It relies on two main techniques, namely use of library and use of Internet. The library-based research was primarily conducted at the library of the International Islamic University Malaysia, the library of University of Malaya, the library of the Attorney General's Chambers Malaysia and the library of Institute of Diplomacy and Foreign Relations (IDFR). It involves the collection of cases, articles, databases, journals, bulletins and newspaper cuttings. The main references have been made to the Rome Statute of the International Criminal Court, the Geneva Conventions 1949, the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

Furthermore, most up-to-date materials were taken from the Internet, especially the text of the Rome Statute, the latest list of ratifications, Elements of Crimes, the Rules of Procedure and the Evidence of the Court.

The present research is divided into 6 chapters. Chapter 1 is the introduction. Chapter 2 deals with the historical development of the International Criminal Court. In this Chapter, first of all analysis of the concept of international crime and individual criminal liability under international law is made, followed by the enforcement of international criminal law by national courts and international courts and tribunals (ICTY and ICTR). Next, the need for a permanent International Criminal Court is stressed. Finally, the main features of the ICC are highlighted, followed by concluding remarks.

Chapter 3 is concerned with jurisdiction of the International Criminal Court. A detailed analysis is made on jurisdiction *ratione materiae* (subject matter jurisdiction). After that, the issue of whether the jurisdiction of the ICC is a retreat from the principle of universal