

The International Criminal Court : An Historic Step to Combat Impunity

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What will be known as the *Rome Statute of the International Criminal Court* was adopted on July 17, 1998, at the conclusion of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Statute, which is an international treaty, provides for the establishment of an international criminal court upon its ratification or accession by sixty States, a process that may take several years. Once the treaty comes into force, the Court will be in a position to try individuals for four categories of international crimes : genocide, crimes against humanity, war crimes and aggression. There are important pre-conditions to the exercise of jurisdiction by the Court. First, national justice systems must have been deficient; in effect, the Court is only “complementary” to existing domestic judicial mechanisms and may operate only when they have failed, for a variety of reasons specified in the Statute, to act. Second, the Court may only try individuals who are nationals of States parties to the treaty, or individuals who are accused of committing crimes on the territories of States parties. If found guilty, offenders may be sentenced to terms of life imprisonment.

The adoption of the *Rome Statute* is the conclusion of efforts at the establishment of international justice which can be traced to the end of the First World War. But the limited examples of international criminal justice for such serious crimes have been confined to *ad hoc* institutions, created so as to deal, retroactively, with particular situations — Nazi Germany, Japan, the former Yugoslavia and Rwanda. The new Court will operate only prospectively, trying crimes that occur after its creation. As a permanent international institution, it will work in close association with the United Nations although it is formally independent.

This paper presents a brief overview of the *Rome Statute* and the features of the new International Criminal Court.

I. HISTORICAL BACKGROUND

Historians of international criminal law often begin with the medieval trial of Sir Peter of Hagenbach, who was tried and executed because of his reign of terror in the fortified town of Breisach.¹ But the *Treaty of Versailles* provides the first contemporary experiment in international justice. Article 227 contemplated the trial of the Kaiser by an international tribunal, although this never took place because of the Netherlands' refusal to extradite.² The *Treaty of Versailles* also envisaged the trial before Allied military tribunals of persons accused of violating the laws and customs of war.³ Germany subsequently opposed the surrender of those chosen for trial by the Allies, arguing that the trial of many of its principal military and naval leaders would imperil its Government's existence. A compromise was effected, deemed to be compatible with article 228 of the *Treaty of Versailles*, whereby the Supreme Court of the Empire in Leipzig would judge those charged by the Allies. Lists were prepared naming 896 Germans, but only a handful were ever actually brought to trial under charges laid according to Germany's Military Penal Code and its Imperial Penal Code.⁴

During the inter-war period, there were attempts to create a permanent international criminal court, and in 1937 a treaty to this effect was signed by thirteen states, but it never came into force.⁵ As the Second World War drew to

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1. R.K. Woetzel, *The Nuremberg Trials in International Law*, London : Stevens & Sons, 1962, at pp. 19-20.
 2. *Treaty of Peace between the Allied and Associated Powers and Germany* ("Treaty of Versailles"), (1919) T.S. 4.
 3. *Ibid.* art. 228.
 4. Although most of the trials were rather perfunctory, two important precedents that continue to be cited to this day addressed the question of the defence of superior orders : *Empire v. Dithmar and Boldt* (Hospital Ship "Llandoverly Castle"), (1921) 21 I.L.R. 437, 16 A.J.I.L. 708, *German War Trials, Report of Proceedings before the Supreme Court in Leipzig*, Cmd. 1450, London : H.M.S.O., 1921, at pp. 56-57; *Empire v. Neumann* (Hospital Ship "Dover Castle"), (1921) 21 I.L.R. 430, 16 A.J.I.L. 704, *German War Trials, Report of Proceedings before the Supreme Court in Leipzig*, Cmd. 1450, London : H.M.S.O., 1921, at pp. 12-13. The two decisions are considered by the Supreme Court of Canada in *R. v. Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 112 D.L.R. (4th) 513, 150 N.R. 370.
 5. *Convention for the Creation of an International Penal Court*, Geneva, November 16, 1937, in B. Ferencz, *An International Criminal Court : A Step Towards World Peace — A Documentary History and Analysis*, Dobbs Ferry, N.Y. : Oceana, 1980.

a close, the United Nations War Crimes Commission also prepared a draft statute for an international criminal court.⁶

The great breakthrough was the adoption on August 8, 1945, in London, of the *Charter of the International Military Tribunal*.⁷ The Charter was actually used for only one trial, that of twenty-three “major war criminals” of the Nazi regime which began in November 1945 and finished on October 1, 1946. The Tribunal was empowered to convict for war crimes, a concept already well-established in international law, but also for crimes against peace and crimes against humanity, whose recognition was more controversial. The International Military Tribunal’s judgment is a seminal historical document on the atrocities of the Nazi system.⁸ Companion proceedings were undertaken against Japanese war criminals before the Tokyo Tribunal under a statute that was modelled on the *Nuremberg Charter*.⁹ Most Nazi and Japanese war criminals, as well as their collaborators, were tried before national courts of the States where the crimes took place or by military tribunals set up by the Allied victors. In Germany, the most important of these were held at Nuremberg from 1946 to 1948 by American military courts, pursuant to Control Council Law No. 10.¹⁰

The *Convention for the Prevention and Punishment of the Crime of Genocide*, adopted December 9, 1948,¹¹ envisions the eventual establishment of an international criminal court.¹² In 1950, following work in International Law

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6. ‘Draft Convention for the Establishment of a United Nations War Crimes Court’, United Nations War Crimes Commission, Doc. C. 50(1), September 30, 1944, in B. Ferencz, *supra* note 5.
 7. *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.)*, (1951) 82 U.N.T.S. 279.
 8. *France v. Goering*, (1946) 23 *Trial of the Major War Criminals before the International Military Tribunal*, 13 I.L.R. 203, 41 A.J.I.L. 172.
 9. *Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo*, 4 Bevens 20, as amended, 4 Bevens 27 (“*Charter of the Tokyo Tribunal*”).
 10. *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, December 20, 1945, Official Gazette Control Council for Germany. Canada only held a handful of such trials, showing a distaste for war crimes prosecutions that has continued to this day : Patrick Brode, *Casual Slaughters and Accidental Judgments, Canadian War Crimes Prosecutions, 1944-1948*, Toronto : University of Toronto Press, 1997.
 11. *Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) 78 U.N.T.S. 277, [1949] C.T.S.27.
 12. “Establishment of a Permanent International Criminal Court for the Punishment of Acts of Genocide”, U.N. Doc. A/362, Annex.

Commission on the establishment of an international criminal jurisdiction, the General Assembly of the United Nations agreed to set up a committee charged with preparing a draft treaty.¹³ But after two postponements in the General Assembly,¹⁴ the international criminal court project was shelved for more than thirty years. At the request of the Assembly, the International Law Commission eventually returned to the issue.¹⁵ The Commission presented its final report to the General Assembly in 1994.¹⁶ But in the meantime, events had overtaken the Assembly. In May, 1993, the Security Council, in an innovative move that relied on Chapter VII of the *Charter of the United Nations*, created an *ad hoc* international tribunal for crimes committed in the former Yugoslavia since 1991.¹⁷ In November, 1994, it took a similar step for the Rwanda genocide.¹⁸

The General Assembly decided to proceed with the project, and struck an *ad hoc* Committee to examine the draft prepared by the International Law Commission.¹⁹ The Committee met during 1995 and reported back to the Assembly.²⁰ Clearly, much more work needed to be done, and the Assembly convened a Preparatory Committee intended to prepare the ground for a diplomatic conference.²¹ The Preparatory Committee met for sessions of several weeks in 1996, 1997 and 1998. Its final report was submitted to the Diplomatic Conference held in Rome at the headquarters of the Food and Agriculture Organization, over five weeks beginning June 15, 1998.²² The Conference, in keeping with contemporary practice, eschewed voting on various proposals and attempted to resolve contentious matters by consensus, a process which results

13. G.A. Res. 489(V).

14. G.A. Res. 898(IX); G.A. Res. 1187(XII).

15. G.A. Res. 44/39.

16. "Draft Statute for an International Criminal Court", Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), c. II.B.I.5; and U.N. Doc. A/49/355. See : J. Crawford, "The ILC's Draft Statute of an International Tribunal", (1994) 88 A.J.I.L. 140.

17. *Statute of the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 827, Annex.

18. *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, Annex.

19. G.A. Res. 49/53.

20. "Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court", Official Records of the General Assembly, Fiftieth Session, Supplement No. 22 (A/50/22).

21. G.A. Res. 50/46.

22. U.N. Doc. A/CONF.183/2/Add.1. See : C.K. Hall, "The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court" (1997) 91 A.J.I.L. 177; C.K. Hall, "The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court" (1997) 92 A.J.I.L. 124.

in provisions with which nobody is entirely happy but with which everybody can live. By July 16, most of the issues in the Statute, including an immense number of technical details relating to comparative criminal law, had been resolved, although a few major and politically-charged questions remained to be determined. Early in the morning of July 17, which was the final day of the Rome meeting, the Bureau of the Conference, chaired by Canadian diplomat Philippe Kirsch, presented the assembled delegates with a compromise “package” drawing on the consensus texts worked out over the previous five weeks and recommending solutions for the most difficult issues. The proposal met with general agreement, although a few voices were raised in opposition, notably those of India and the United States. In the final plenary, the United States insisted that the Statute be put to a vote, despite the fact that its near unanimous support was already evident. The delegates voted in favour of the Statute, by 120 to 7, with 21 abstentions.²³

II. COMPLEMENTARITY

The fundamental premise of the Court’s existence is the principle of “complementarity”. The Statute gives national legal systems the first chance to try offenders. Only when domestic justice refuses to act may the International Criminal Court exercise jurisdiction. The principle is in some ways analogous to the approach taken by international human rights treaties, which allow the international adjudicative organs to be petitioned by individuals only when domestic remedies have been exhausted.²⁴ In many situations, domestic courts will be unwilling to proceed against their own nationals, who may be in positions of political authority, for such crimes. The Court will then be empowered to act. There may also be cases where the national legal system has broken down and is simply unable to function. Situations of complementarity are also expected to arise when national legal proceedings have amounted to sham trials, held for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court. In addition, the Court may exercise jurisdiction when national trials are not conducted independently or impartially in accordance with the norms of due process recognized by international law, or are conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.²⁵

23. *Rome Statute of the International Criminal Court*, A/CONF.183/9.

24. For example : *Optional Protocol to the International Covenant on Civil and Political Rights* (1976) 999 U.N.T.S. 171, [1976] C.T.S. 47, art. 5(1)b).

25. *Rome Statute*, *supra* note 23, art. 20.

Complementary shifts the onus back to States to ensure that they have effective mechanisms for the trial of international criminals. States are, in effect, entitled under international law to try not only their own war criminals, something they are often loathe to do, but also those who have no connection with the State itself but, for various reasons, find themselves on its territory. The concept is known as “universal jurisdiction” and an increasing number of States have amended their criminal legislation in order to allow national Courts to undertake such trials.²⁶ If the principle of complementarity is effective, then the International Criminal Court will have a small caseload. The problem of impunity will have been solved by in effect sending the ball back to those who have primary responsibility for prosecution, the national Courts.

The regime of complementarity stands in contrast to that of “primacy”, which is what is provided for the *ad hoc* tribunals.²⁷ If the prosecutor of the Yugoslav or Rwanda tribunals wishes to take a case before the *ad hoc* tribunals, there is no question of whether domestic efforts at justice have been inadequate. In the *Tadic* case, the Yugoslav tribunal sought jurisdiction over an offender whose proceedings had already begun in Germany.²⁸ There was no suggestion that justice would not be done by the German courts. But the Rwanda tribunal, in a case where it initially sought to exercise jurisdiction over an individual who had been charged by the national courts of Rwanda, decided to withdraw its request and to allow the Rwandan courts to exercise justice.²⁹

III. SUBJECT MATTER JURISDICTION

The International Criminal Court has jurisdiction over four categories of crime : genocide, crimes against humanity, war crimes and aggression.³⁰ These offences are generally recognized as being at the core of international criminal law. They have formed the basis of previous international prosecutions by tribunals at Nuremberg, Tokyo, The Hague and Arusha, and are considered to have a customary legal basis, even in the absence of a precise text. The essence

26. For example, *Criminal Code*, R.S.C. (1985), c. C-46, art. 7(3.71). See : C.B. Wagner, “The Passing of legislation allowing for trial of those accused of war crimes and crimes against humanity” (1984) 4 Windsor Yearbook of Access to Justice 143.

27. See : A.G. Karibi-Whyte, “The Twin *ad hoc* Tribunals and Primacy Over National Courts” (1998) 9 Criminal Law Forum (forthcoming).

28. *Prosecutor v. Dusko Tadic aka Dule* (IT-94-1-AR72), August 10, 1995.

29. See : W.A. Schabas, “Justice, Democracy and Impunity in Post-Genocide Rwanda : Searching for Solutions to Impossible Problems” (1997) 7 Criminal Law Forum 523.

30. *Rome Statute*, *supra* note 23, art. 5.

of these four crimes is that they essentially correspond to serious violations of human rights, although some dispute whether the Court and its Statute fall within the scope of human rights law. During the drafting of the *Rome Statute*, there were efforts to include what are known as “treaty crimes”, violations of specific conventions dealing with such matters as hijacking, terrorism, drug trafficking and torture. But the delegates to the Diplomatic Conference were unable to reach consensus on mechanisms to include these somewhat secondary matters within the jurisdiction of the Court, and they were eventually excluded.

Genocide is the first crime to be enumerated in the Statute of the Court.³¹ It was first defined in a General Assembly Resolution in 1946, and subsequently in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*.³² According to the *Convention*, genocide consists of killing or other acts with an intent to destroy, in whole or in part, a racial, ethnic, national or religious group. The definition in the 1948 *Convention* has often been criticized for its omission of political, social, economic and other groups,³³ but the delegates to the Diplomatic Conference wisely chose not to tamper with a widely accepted text. In any case, any lacunae in the *Convention* definition should fall under the heading of crimes against humanity, and there is consequently no danger of impunity.

Crimes against humanity represents an important evolution in the law, because any requirement that such crimes be committed within the context of an armed conflict is eliminated. This had been the case at Nuremberg,³⁴ and the Security Council had perpetuated the suggestion by imposing a similar requirement in the case of the former Yugoslavia.³⁵ Nevertheless, the International Criminal Tribunal for the former Yugoslavia has stated that customary law requires no such *nexus* with armed conflict and crimes against humanity,³⁶ and the *Rome Statute* establishes this principle beyond any doubt. Crimes against humanity are defined as being acts committed as part of “a widespread or systematic attack directed against any civilian population, with

31. *Ibid.* art. 6.

32. *Supra* note 11, art. II.

33. F. Chalk, “Toward a Generic Definition of Genocide”, in G.J. Andreopoulos, ed., *Genocide : Conceptual and Historical Dimensions*, Philadelphia : University of Pennsylvania Press, 1994.

34. *Supra* note 7, annex, art. 6(c).

35. *Supra* note 17, art. 5.

36. *Prosecutor v. Tadic* (Case No. IT-94-1-AR72), Judgment of the Appeals Chamber, October 2, 1995.

knowledge of the attack.”³⁷ The acts themselves are enumerated in the text, and include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, enforced disappearance, apartheid, persecution and other inhumane acts. Particularly important is the attention given to gender-related crimes, which are defined as “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.” The reference to “forced pregnancy” was extremely controversial as some States saw this as an implicit recognition of the right to abortion. Use of the term “gender” in the provision dealing with persecution was also a source of considerable debate, and led, as a compromise, to the addition of a definition : “the term ‘gender’ refers to the two sexes, male and female, within the context of society.”³⁸

On the scale of seriousness, war crimes generally fall somewhat below the thresholds for genocide and crimes against humanity, if only because they are punishable as individual acts and do not require any special intent element or evidence that they are widespread or systematic. However, the *Rome Statute* sends a signal to the prosecuted in the *chapeau* of the war crimes provision : “The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.”³⁹ The war crimes provisions are extremely detailed, and represent an obsession with codification that may ultimately result in excessively narrow interpretations by the Court. War crimes are divided into four categories, the first two concerned with international armed conflict, the second two with internal armed conflict. They correspond to those offences known as “grave breaches” of the *Geneva Conventions of August 12, 1949*⁴⁰ and of *Protocol Additional I*,⁴¹ to serious violations of the laws and customs of war and in particular of the *Hague Regulations*, to violations of common article 3 of the *Geneva Conventions*, and

37. *Rome Statute*, *supra* note 23, art. 7. See : D. Donat-Cattin, “Crimes against Humanity” in F. LATTANZI, ed., *The International Criminal Court, Comments on the Draft Statute*, Naples : Editoriale Scientifica, 1998 at pp. 49-78.

38. *Rome Statute*, *supra* note 23, art. 7(3).

39. *Ibid.* art. 8(1).

40. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (1950) 75 U.N.T.S. 31, [1965] C.T.S. 20; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, (1950) 75 U.N.T.S. 85, [1965] C.T.S. 20; *Geneva Convention Relative to the Treatment of Prisoners of War*, (1950) 75 U.N.T.S. 135, [1965] C.T.S. 20; *Geneva Convention Relative to the Protection of Civilians*, (1950) 75 U.N.T.S. 287, [1965] C.T.S. 20.

41. *Protocol Additional I to the 1949 Geneva Conventions and Relating to The Protection of Victims of International Armed Conflicts*, (1979) 1125 U.N.T.S. 3, [1991] C.T.S. 2.

to certain breaches of *Protocol Additional II*.⁴² Despite the fact that the detailed provisions largely reflect customary norms, there are some innovations, for example in the prohibition of recruitment of child soldiers.⁴³ Another new offence, “[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory,”⁴⁴ was decried by Israel as a cynical political gambit by its adversaries and led Israel to vote against the Statute. One of the great inadequacies of the list is its failure to adopt a general prohibition of weapons that cause unnecessary suffering. The Statute prohibits use of poisonous gas,⁴⁵ and of dumdum bullets,⁴⁶ but not chemical, biological and nuclear weapons!⁴⁷

Aggression was the most difficult of the crimes to define, although a General Assembly Resolution provides all of the elements necessary for a satisfactory text.⁴⁸ The heart of the problems was clarifying the role of the Security Council which, under the *Charter of the United Nations*, has the mandate to determine when aggression occurs.⁴⁹ Despite the efforts of the Non-Aligned Movement, no consensus could be reached. Thus, aggression is part of the subject matter jurisdiction of the Court, but subject to the subsequent adoption of a provision by the Assembly of States Parties defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.⁵⁰

The four crimes make up the “automatic jurisdiction” of the Court, in that any State, in ratifying the Statute, accepts jurisdiction over them. A last-minute compromise designed to lure France into the final consensus added the possibility of “opting out” on jurisdiction over war crimes. Under article 124, a State, on becoming a party to the Statute, may declare that, for a period of seven

42. *Protocol Additional II to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts*, (1979) 1125 U.N.T.S. 3, [1991] C.T.S. 2.

43. *Rome Statute*, *supra* note 23, art. 8(2)(b)(xxvi).

44. *Ibid.* art. 8(2)(b)(viii).

45. *Ibid.* art. 8(2)(b)(xviii).

46. *Ibid.* art. 8(2)(b)(xix).

47. *Ibid.* art. 8(2)(b)(xx). See : R.S. Clark, “Methods of Warfare that Cause Unnecessary Suffering are Inherently Indiscriminate” (1998) 28 *California Western Int’l L. J.* 379.

48. G.A. Res. 3314(XXIX).

49. *Charter of the United Nations*, [1945] C.T.S. 7, art. 39.

50. *Rome Statute*, *supra* note 23, art. 5(2).

years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to war crimes. Such a “deal” was severely criticized at the close of the conference by some non-governmental organizations. In practice, it represents a rather small concession. The history of international war crimes tribunals in Nuremberg, Tokyo, The Hague and Arusha shows that war crimes are rarely, if ever, prosecuted separately from crimes against humanity. In other words, once a war crime is of sufficient gravity to deserve the attention of an international prosecutor, it has attained a level of seriousness so as to meet the threshold for crimes against humanity. The possibility that individuals will escape international criminal responsibility because a few States decide to opt out pursuant to article 124 seems remote indeed, and can hardly be considered a major blemish on the Statute.

IV. JURISDICTION OVER THE OFFENDER

The International Criminal Court may establish jurisdiction over individuals on two bases. They may be tried if they are nationals of a State party to the Statute, and they may be tried if the crime has been committed on the territory of a State party of the Statute.⁵¹ This result is a compromise between two extreme positions, vigorously defended at the Diplomatic Conference by Germany and the United States. Germany wished for the Court to exercise universal jurisdiction, given that the States parties would all be competent, as a question of international law, to exercise universal jurisdiction, and therefore in a position to transfer or delegate this to the international tribunal. The United States desired a far more limited scope for the Court, limiting its jurisdiction to nationals of a State party. In this way, as long as the United States remained outside the treaty regime, no American citizen could ever be tried by the International Court. The United States argued that the German proposal would eliminate any distinction between States that had ratified the Statute and those that had not. Germany answered that under the United States proposal, obvious candidates for the Court’s jurisdiction would escape justice because of the unlikelyhood that their own State would ever ratify the Statute.

Both proposals had their flaws. As the debate unfolded on the German proposal, it became clear that many States actually disagree with the proposition that universal jurisdiction exists for the core crimes as a question of customary law, even though this view has been widely defended by scholars. Thus, the Conference may well have set back the development of the law on this point by showing, academic commentators to the contrary, that the claims of universal

51. *Ibid.* art. 12(2).

jurisdiction to customary status may be exaggerated. By insisting upon an exaggeratedly optimistic conception of the law as it now stands, Germany may have achieved the opposite of what it intended. On this point, the United States noted its unsuccessful efforts to have Pol Pot prosecuted by such States as Canada, Spain and Israel under the universal jurisdiction provisions of their national legislations. Universal jurisdiction does not exist in reality, argued the United States. But in doing so, it seemed to defeat its own claim that the Court could not assume universal jurisdiction. If the United States was agreeable to prosecuting Pol Pot under universal jurisdiction, how could it oppose, as a question of principle, the International Court doing the same? The answer would appear to be that universal jurisdiction is acceptable for Cambodians but not for Americans, acceptable for Pol Pot but not for William Calley or Robert McNamara.

The resulting provision means that during the foreseeable future, many international criminals will still escape the jurisdiction of the International Criminal Court. But this should surprise nobody, given the fact that the Court is created by treaty and is based on the consent of States. The argument that "rogue States" will not ratify has its shortcomings, because the democracy of today may be the rogue State of tomorrow, as the record in human rights treaties has shown. The two genocides in recent decades, those of Cambodia and Rwanda, were both committed on States parties to the *Genocide Convention*.⁵² In addition, many States may see the value in ratifying the *Statute* as a protection against foreign military intervention, even if aggression as such remains undefined. Had the *Statute* existed decades ago, Grenada, Panama, Cambodia and Viet Nam would all have been protected against war crimes committed by foreign soldiers on their own territory by virtue of their ratification. In conclusion, the jurisdiction over the person that is set out in the Rome *Statute* is incomplete yet sufficient enough to promise a Court that will make its mark against impunity.

V. RELATIONSHIP WITH THE SECURITY COUNCIL

The two *ad hoc* tribunals were created by decisions of the Security Council of the United Nations, acting under Chapter VII of the *Charter of the United Nations*. Their potency and effectiveness derives from the binding force of Council decisions and the Council's ability to adopt further implementation

52. Cambodia acceded to the *Genocide Convention* on October 14, 1950, Rwanda on April 16, 1975. Other oft-cited candidates for international justice are also long-time participants in the *Genocide Convention* including Yugoslavia (August 29, 1950), Iraq (January 20, 1959), Congo (May 31, 1962), Iran (August 14, 1956), Afghanistan (March 22, 1956), Algeria (October 31, 1963), and so on.

measures. But any role for the Council carries with it the danger of political interference. The undemocratic composition of the Council, with its five permanent members all of whom have a veto power, representing an outdated conception of world power, makes any involvement for it even more unpalatable. In its 1994 draft statute, the International Law Commission felt that political realities dictated a form of veto by the Security Council on any prosecution by the Court.⁵³ The proposed provision was widely interpreted as meaning that a situation would escape the jurisdiction of the Court as long as it was on the agenda of the Council. A compromise proposal developed by Singapore at the August, 1997 meeting of the Preparatory Committee recognized a possible right for the Council to demand a stay of proceedings, but required the Council to act affirmatively by resolution, thus allowing one permanent member or any seven of its members to block such a measure. The final version, article 16 of the *Rome Statute*, takes this a step further, requiring the Security Council to renew any such resolution every twelve months.

In exercising this extraordinary power, the Security Council is required to act pursuant to Chapter VII of the Charter, that is, in response to threats to the peace, breaches of the peace and acts of aggression. The Council has given this notion a large scope in recent years, reaching deep into the field of human rights in a manner that could hardly have been intended by the drafters of the Charter. In imposing a Chapter VII qualification as a criterion for Security Council intervention in the work of the Court, the *Rome Statute* would seem to give the Court the possibility of judicial review of Security Council decisions, a power that thus far has escaped organs created under the Charter itself.

It may well be argued that article 16 of the *Rome Statute* is completely unnecessary. If the Security Council is the supreme law-making body of the United Nations, pursuant to article 25 of the *Charter of the United Nations*, and if the obligations under the Charter prevail over any incompatible obligation resulting from another treaty, then the Security Council could presumably order a stay of proceedings before the Court in any case, relying on Charter article 103. It is to be hoped that both bodies will respect the mission of the other, the Security Council exercising its power to intervene with prudence and circumspection and only in the rarest of cases, and the Court proceeding with great caution in matters pending before the Security Council that touch on sensitive issues of international peace and security.

53. *Supra* note 12, art. 23(3).

VI. THE “GENERAL PART” OF THE ROME STATUTE

In contrast with the legal instruments upon which international prosecutions have been based in the past, the *Rome Statute* includes a bold new initiative in what is really comparative criminal law. The Statute contains what common-law criminal codes call a “general part” and what Romano-Germanic codes define as “general criminal law.” These are basic rules governing the non-retroactivity of offences and punishments, participation in criminal offences by accomplices and conspirators, and the admissibility of defences such as duress, self-defence, mistake of fact or of law and obedience to superior orders. Much of this is highly technical and, in essence, a distillation of principles of law common to most if not all national systems.

One area in which international criminal law goes well beyond most domestic law is in its attitude to commanders or superiors. Under the command responsibility principle, developed at trials following the close of the Second World War, military commanders can be held liable for the acts of their subordinates even where there is no proof that an order was given or even that the commander knew of the acts committed by the subordinates. In its most extreme form, this amounts to a type of criminal liability for negligence. It was highly controversial when first bruited in 1945,⁵⁴ but has since become more accepted, and the principle of command responsibility is recognized in *Protocol Additional I*⁵⁵ as well as in the statutes of the *ad hoc* tribunals.⁵⁶ The *Rome Statute* takes this one further step, providing for the command responsibility not only of those in a military hierarchy but also civilian superiors. Nevertheless, civilian superiors are held to a lower standard, and can only be prosecuted on this basis if they were wilfully blind as to the acts committed by those subject to their supervision.⁵⁷

54. *United States of America v. Yamashita*, (1948) 4 L.R.T.W.C. 1, 36-37; *In re Yamashita*, 327 U.S. 1 (1945); *Canada v. Meyer* (“*Abbaye Ardenne Case*”), (1948) 4 L.R.T.W.C. 97, 109. On the *Yamashita case*, see : A.M. Prévost, “Race and War Crimes : The 1945 War Crimes Trial of General Tomoyaki Yamashita” (1992) 14 H.R.Q. 303; B. Landrum, “The Yamashita War Crime Trial : Command Responsibility Then and Now” (1995) 149 Mil. L. Rev. 293. On the *Meyer case*, see P. Brode, *Casual Slaughters and Accidental Judgments*, Toronto : University of Toronto Press, 1997.

55. *Supra* note 23, art. 86(2).

56. Art. 7(3) of the *Yugoslav Statute*, *supra* note 17; art. 6(3) of the *Rwanda Statute*, *supra* note 18.

57. *Rome Statute*, *supra* note 23, art. 28.

Codifying general principles may be aimed at fettering judicial discretion. This would seem to be the case with respect to the defence of duress or coercion. The International Criminal Tribunal for the former Yugoslavia, which has no detailed “general part” in its Statute, has had to make its own rulings on the admissibility of defences. In the case of duress, it has decided that such a defence may never be entertained in the case of crimes against humanity.⁵⁸ But the *Rome Statute* overrules the Tribunal, allowing for the defence of duress to any charge before the Court.⁵⁹ The *Rome Statute* also departs from existing international criminal law in the case of the defence of superior orders. A text in the *Nuremberg Charter* formally outlawed resort to such a defence, saying the argument could only be invoked in mitigation of sentence but not to challenge guilt.⁶⁰ Similar provisions appear in the *Statutes* of the two *ad hoc* tribunals. But the *Rome Statute* allows the defence on the condition that the order not be “manifestly unlawful.”⁶¹ While it does not completely exclude the defence in cases of genocide and crimes against humanity, it does state that orders to commit such crimes are, by definition, manifestly unlawful. Although it codifies the rules governing some defences, the Statute does not prevent the Court from admitting other defences,⁶² and under this provision it may eventually allow defences such as military necessity and reprisal.

VII. PROCEDURE

Cases before the Court may be initiated by any of the States parties, by the Security Council acting pursuant to Chapter VII of the *Charter of the United Nations*, and by the Prosecutor, acting *proprio motu*.⁶³ In the latter case, the Prosecutor cannot proceed until authorization has been obtained from the Pre-Trial Chamber of the judges. In cases where the States parties or the Security Council initiate the prosecution, the Prosecutor may in the exercise of his or her discretion decide to drop the case, but in such circumstances must justify its decision before the Pre-Trial Chamber.⁶⁴

58. *Prosecutor v. Erdemovic* (Case No. IT-96-22-T), Judgment of the Appeals Chamber, October 7, 1997.

59. *Rome Statute*, *supra* note 23, art. 31(1)d).

60. *Supra* note 7, art. 8.

61. *Rome Statute*, *supra* note 23, art. 33.

62. *Ibid.* art. 31(3).

63. *Ibid.* art. 13.

64. *Ibid.* art. 53.

The Office of the Prosecutor is a separate and independent organ of the Court. It is headed by the Prosecutor, who is assisted by one or more Deputy Prosecutors.⁶⁵ The Prosecutor and the Deputy Prosecutors are elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The independence of the Prosecutor was a major issue in the preparatory work of the Statute, some States invoking the improbable scenario of the out-of-control “Dr. Strangelove prosecutor.” Judicial review of the Prosecutor by the Pre-Trial Chamber was the compromise formula enabling an enlargement of the Prosecutor’s autonomous powers.

There are to be eighteen judges, elected on secret ballot by a two-thirds majority of the Assembly of States Parties. The judges are to be nominated by the States parties and are drawn from two groups, specialists in criminal law and in international law, and are expected to be representative of the major legal systems. The Statute specifically provides for “[a] fair representation of female and male judges”,⁶⁶ a standard that falls somewhat short of calls for full gender balance but that will certainly prevent the Court from emulating the International Court of Justice, which had its first woman member in history only in 1996. Once elected, the judges elect three of their number, the President, and the two Vice-Presidents, who together make up the Presidency. The Presidency is responsible for the administration of the Court and other functions established by the Statute.⁶⁷ Members of the Presidency sit full-time at the Court’s seat in The Hague, the remaining fifteen judges being on call to sit as cases arise. The President sits on the Appeals Division together with four other judges. The Court also has a Trial Division and a Pre-Trial Division, each made up of no less than six judges. The Statute suggests that the international law specialists will tend to sit in the Appeals division, whilst the criminal law experts, particularly those with significant trial experience, will be directed towards the Trial and Pre-Trial Divisions. Trials are heard by benches of three judges who decide by majority vote. The Pre-Trial Chambers are composed of either three judges or by a single judge, depending on the matter before the Court.

65. *Ibid.* art. 42.

66. *Ibid.* art. 36(8)(a)(iii).

67. *Ibid.* art. 38.

The Registry, headed by the Registrar, is “responsible for the non-judicial aspects of the administration and servicing of the Court.”⁶⁸ The Registrar is elected by an absolute majority of the judges, but taking into account any recommendation by the Assembly of States Parties.

Both investigation and trial are governed by procedural rules that draw on both inquisitorial and accusatorial legal approaches, that is, the common law and Romano-Germanic systems. For example, the operation of the Pre-Trial Chamber is in many ways analogous to that of the *chambre d'accusation* in the French system.⁶⁹ Like the instructing magistrate of the inquisitorial system, the Prosecutor is required to “investigate incriminating and exonerating circumstances equally.”⁷⁰ The provisions governing trial leave many of the details to the Rules, yet to be adopted, and do not indicate any clear bias favourable to either inquisitorial or accusatorial systems. Practice before the *ad hoc* tribunals has shown that procedures vary considerably depending on the predisposition of the presiding magistrate, and that within general provisions of the sort found in the Statute there is a considerable degree of flexibility with respect to the orientation of the procedural regime. In any case, by the time a matter gets to trial, even the inquisitorial system becomes more and more accusatorial. One aspect of the inquisitorial system is essentially ruled out, however, the trial *in absentia*. While the guilty plea procedure familiar to common law systems is allowed for, a detailed provision carefully regulates its operation.⁷¹

Detailed provisions outline the rights of suspects or accused at both the investigation and trial phase of the proceedings. These are drawn from international human rights instruments, principally article 14 of the *International Covenant on Civil and Political Rights*,⁷² but in some cases go beyond the existing texts. For example, both the suspect at the investigation phase and the accused at the trial phase have the right to remain silent without their silence being used by the Prosecution in any way to suggest culpability.⁷³ While this right is recognized in some legal systems, others do not respect it, and there is no authority on an international level to support it being considered a fundamental

68. *Ibid.* art. 43.

69. *Ibid.* art. 57-58.

70. *Ibid.* art. 54(1)(a).

71. *Ibid.* art. 65.

72. *International Covenant on Civil and Political Rights*, (1976) 999 U.N.T.S. 171, [1976] C.T.S. 47.

73. *Ibid.* art. 55(2)(b), 67(1)(g).

right. The accused is entitled “[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.”⁷⁴ This is somewhat broader than the *International Covenant*, which states that the accused is entitled “[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”⁷⁵ Other “new” rights are also granted to the accused : to make an unsworn oral or written statement in his or her defence;⁷⁶ and not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.⁷⁷ There are no “reverse onus” references in the definitions of crimes so the import of the latter right is unclear. But judges might give it a broad interpretation and rule that a variety of evidentiary presumptions, which are really no more than common-sense deductions from the proof, run afoul of the provision. It also remains to be seen whether human rights tribunals, internationally or domestically, will be inspired by the innovations of the Statute and use its terms in a dynamic interpretation of the somewhat aging provisions under which they are governed.

Upon conviction, the Court may sentence an offender to life imprisonment, or to a fixed term with a maximum of thirty years.⁷⁸ The Court may only impose life imprisonment “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” Sentences are to be served in prisons of States parties to the Statute, in accordance with agreements negotiated with the Court.⁷⁹ In all cases, the sentence is reviewed after two-thirds of it has been served, or in the case of a sentence of life imprisonment, after twenty-five years.⁸⁰ The sentencing provisions represented an extremely delicate compromise. Several States in Latin America have constitutional provisions prohibiting life imprisonment. Others, in Europe, have recognized the same principle through the caselaw of their constitutional courts. But there were extreme views on the other end, particularly from many Arab and Islamic States, and Commonwealth Caribbean States, desiring that the Statute recognize the death penalty. Capital punishment was out of the question, and even the United States, which employs the death penalty enthusiastically within

74. *Ibid.* art. 67(1)(a).

75. *Supra* note 72, art. 14(3)(a).

76. *Rome Statute*, *supra* note 23, art. 67(1)(h).

77. *Ibid.* art. 67(1)(i).

78. *Ibid.* art. 77.

79. *Ibid.* art. 103.

80. *Ibid.* art. 110.

many of its internal jurisdictions, spoke against its use as an international sanction. Were the death penalty to be allowed under the *Rome Statute*, many States might have refused to cooperate with the Court in matters of extradition or surrender. By excluding the death penalty and allowing life imprisonment only in extremely serious cases, and always subject to mandatory review, the Statute sends a progressive message of clemency that, it is to be hoped, will support the efforts of penal law reformers within domestic systems.⁸¹

A growing concern within international human rights law for the situation of the victims of human rights abuses is reflected in several provisions of the Statute.⁸² The most important is article 75, which allows the Court to provide for reparations to victims of the crimes that it adjudicates. The Court is to “establish principles” with respect to reparations, including restitution, compensation and rehabilitation. Upon request and even, in exceptional circumstances, on its own initiative, the Court may “determine the scope and extent of any damage, loss and injury to, or in respect of, victims.” The Court is empowered to order a convicted person to make reparation. A Trust Fund is established under the Statute into which monetary reparations are to be paid and from which they are to be distributed.⁸³ Execution of these orders will depend largely upon co-operation by States parties, and may require them to make amendments to their own civil legislation.

At the heart of the obligations assumed by States parties is the duty to cooperate with the Court at various phases of investigation and trial.⁸⁴ Upon receipt of an arrest warrant from the Prosecutor, States parties are required to give effect to the warrant.⁸⁵ The Statute refers to “surrender” rather than “extradition” out of concern that States may invoke domestic legal provisions that prohibit “extradition” of their own nationals.⁸⁶ Any interpretation of the Statute allowing States to refuse to extradite their own nationals would have devastating consequences for the effectiveness of the Court.

81. W.A. Schabas, “Sentencing and the International Tribunals : For a Human Rights Approach” (1997) 7 *Duke Journal of Comparative and International Law* 461-517.

82. D. Donat-Cattin, “The Role of Victims in the ICC Proceedings”, in F. Lattanzi, ed., *supra* note 37 at pp. 251-272.

83. *Ibid.* art. 79.

84. *Ibid.* art. 86.

85. *Ibid.* art. 59(1).

86. *Ibid.* art. 89, 102.

CONCLUSION

The Statute will come into force upon its ratification by sixty States. Estimates vary considerably about how long this may take, from a few years to as long as a decade or more. Some argue, as well, that as long as big States such as India, China and the United States of America stay outside the system, the Court can never be really effective. But there are good reasons to remain optimistic about an early entry into force of the Statute and a dynamic and vigorous role for the Court, even if important countries and even continents remain somewhat aloof.

In the final vote on the Statute, 120 of the delegations voted in its favour. This is an impressive critical mass of States, many of them quite small and quite underdeveloped, for whom the creation of the Court is an important development. For example, with a few exceptions, sub-Saharan Africa voted strongly for the Court and supported the work of the Diplomatic Conference. This is an area plagued by armed conflict where many States are desperately searching for mechanisms to reduce and to prevent further disorder. The International Criminal Court offers them one element towards some solutions. States that have experienced armed conflict involving foreign military forces should also have no difficulty appreciating the interest of the Court. Ratification of the Statute will bring the international institution to bear on all atrocities committed within their own borders, even by foreign soldiers

In the end, most States will ratify the Statute for the same reasons that they have ratified international human rights instruments. All of the major human rights treaties have ratification rates that now go well beyond 100. The *Geneva Conventions* have been ratified by virtually every State in the world. Why should there be any less enthusiasm to ratify the Statute? The history of human rights and humanitarian instruments demonstrates that narrow self-interest has little to do with why States decide to participate in such regimes rather than stay aloof. From this perspective, sixty ratifications should be attainable and in a relatively short time.

The promise of the Court is that it will help to reduce human rights violations. This is often presented as a question of general deterrence. The end of impunity and the threat of punishment, it is said, will discourage others from committing similar offences. The premise is difficult to prove or to disprove, but it is certainly questionable. Is it realistic to conclude that Hitler, Goering, Eichmann, Pol Pot, Karadzic and Bagosora would have been deterred by the threat of punishment? We know that Milosevic was not. Although deterrence is certainly somewhere on the periphery of international justice, the core of the International Criminal Court may well have more to do with the establishment

of the truth of major atrocities in circumstances where domestic courts are unable or unwilling to act. For example, the principal contribution of the Nuremberg judgment may well be its clarification of the facts of the Nazi atrocities. Nuremberg puts the truth of the Holocaust beyond question, something that continues to elude “historians”. The Hague is doing the same for Bosnia, and Arusha for Rwanda. The *Rome Statute* confirms the valuable accomplishments of the tribunals at Nuremberg, Tokyo, The Hague and Arusha, and ensures that their legacies will continue. It is an historic step in the international protection of human rights.