THE 19TH ANNUAL McDONALD CONSTITUTIONAL LECTURE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE

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In this article, I aim to comment on the future of international criminal justice through an examination of the development of international and universal jurisdiction over, and individual liability for, atrocity crimes. I will discuss the history of the development of international criminal law, and the establishment, jurisdiction, and contributions of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, and the International Criminal Court (ICC). In regard to the ICC, I will highlight issues which the court is facing, and which are ongoing in the context of international criminal justice. In particular, I will highlight: jurisdiction, complementarity and cooperation, due procedure and confidential information, and the role of victims. Finally, I will make some brief comments on the importance of the active assistance of the United States (U.S.) and other states for ensuring the aims of the ICC and international criminal justice are achieved.

Dans cet article, je commenterai l'avenir de la justice pénale internationale en examinant le développement de la compétence internationale et universelle ainsi que la responsabilité individuelle à l'égard des crimes atroces. J'aborderai l'historique du droit pénale international et la mise en place, la compétence et les contributions du tribunal pénal international pour le Rwanda et celui de l'ex-Yougoslavie ainsi que de la Cour pénale internationale (CPI). En ce qui a trait à la CPI, je soulignerai les questions qui se présentent au tribunal, les questions actuelles du contexte de la justice pénale internationale. Je soulignerai notamment la compétence, la complémentarité et la coopération, le recours et les renseignements confidentiels ainsi que le rôle des victimes. Enfin, je ferai quelques brefs commentaires sur l'importance de l'assistance directe des États-Unis (É.-U.) et d'autres États visant à garantir que les objectifs de la CPI et de la justice pénale internationale soient atteints.

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Given significant developments in international criminal justice since the ideas in this article were first presented, it has been substantially updated to reflect recent events. Kate Allan, an LL.M. student at Harvard Law School, is gratefully acknowleded for her research and editorial contribution to this article.

I. INTRODUCTION

International criminal justice did not exist prior to the Second World War. It was born out of the ashes of the Holocaust and is the enduring legacy of the 1945 Nuremberg trials of the major Nazi leaders. With the benefit of hindsight, it should be acknowledged that the Nuremberg trials represented "victors' justice" before a multinational, rather than an international court. Nevertheless, it must also be acknowledged that, judged by the international standards of 1945, and illustrated by the fact that some of the Nazi leaders were acquitted, the trials were basically fair.

In the context of modern international criminal justice, the important feature of Nuremberg was the recognition of a new species of offence — crimes against humanity. It was recognized, as the name suggests, that there are some crimes so heinous and shocking to the conscience of all people, no matter the continent on which they live, that they are crimes against all of humankind. These are the crimes that are increasingly and appropriately called "atrocity crimes." The concept of crimes against humanity implied that all members of the human race are victims and as such have the inherent right to demand the trial and punishment of the perpetrators of such crimes. This, in turn, led to the recognition of universal jurisdiction for such crimes. The idea was born that the evil perpetrators of crimes against humanity could be brought to justice wherever they might be apprehended.[1]

I aim to comment on the future of international criminal justice through an examination of the development of international and universal jurisdiction over, and individual liability for, atrocity crimes. I will discuss the history of the development of international criminal law and the establishment, jurisdiction, and contributions of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, and the International Criminal Court (ICC). In regard to the ICC, I will highlight issues which the court is facing and which are ongoing in the context of international criminal justice. In particular, I will highlight: jurisdiction, complementarity and cooperation, due procedure and confidential information, and the role of victims. Finally, I will make some brief comments on the importance of the active assistance of the United States (U.S.) and other states for ensuring the aims of the ICC and international criminal justice are achieved.

1 Until that time, universal jurisdiction was recognized only for piracy. See Sean D. Murphy, *Principles of International Law* (St. Paul, Minnesota: Thomson/West, 2006) at 246.

II. TOWARDS INTERNATIONAL CRIMINAL JUSTICE

The first manifestation of international jurisdiction in international criminal law is to be found in the "grave breach" provisions of the 1949 Geneva conventions.[2] One finds that in respect of serious war crimes, all state parties to the conventions assume a number of obligations with regard to international armed conflict. These include the "undertaking to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" defined in the conventions.[3] These provisions go on to place state parties "under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."[4] If a state party is unable to bring such a person before its own courts it is obliged to hand that person, in accordance with its own legislation, to a state party that has jurisdiction over them.[5]

The first United Nations (UN) international convention to include a provision for universal jurisdiction was the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*.[6] Under this convention, Apartheid was declared to be a crime against humanity and universal jurisdiction was conferred on the courts of all countries as "international penal

2 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, art.50 (entered into force 21 October 1950) [First Geneva Convention]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, art. 51 (entered into force 21 October 1950)[Second Geneva Convention]; *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, art. 130 (entered into force 21 October 1950) [Third Geneva Convention];, and *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, art. 147 (entered into force 21 October 1950) [Fourth Geneva Convention]. Articles 50, 51, and 130 of the first, second, and third Geneva conventions respectively state that grave breaches involve any of the following acts: willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, and extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. Article 147 of the Fourth Geneva Convention also includes unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the convention, and taking of hostages, not justified by military necessity and carried out unlawfully and wantonly.

3 First Geneva Convention, *ibid.* at article 49; Second Geneva Convention, *ibid.* at article 50; Third Geneva Convention, *ibid.* at article 129; and Fourth Geneva Convention, *ibid.* at article 146.

4 *Ibid.*

5 *Ibid.*

6 G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1974) at 75.

tribunal[s] having jurisdiction."[7] This was the second UN convention to refer to an "international penal tribunal having jurisdiction." The first, although it did not confer universal jurisdiction on domestic courts, was the Genocide Convention of 1948.[8] These references reflected the assumption in the aftermath of the Nuremberg trials that there would soon be an international criminal court created by way of a multilateral treaty. That expectation, however, was overshadowed by the Cold War and would not resurface for almost half a century.

In the absence of an international criminal court, the UN continued to use universal jurisdiction to encourage the prosecution of persons who were suspected of committing atrocity crimes and to encourage measures to deny such persons a safe haven in countries that were unable to charge or extradite them. We thus find universal jurisdiction conferred on states parties to the Torture Convention of 1984.[9] Most famously, we find universal jurisdiction

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7 *Ibid.* at article IV. Article IV of the convention provides as follows:

> The States Parties to the present Convention undertake:
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> (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime;
>
> (b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.

And, in turn, article V provides as follows:

> Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.

8 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, article VI (entered into force 12 January 1951) [Genocide Convention]. Article VI provides as follows:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

9 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984) 197 [Torture Convention]. Article V provides as follows:

> 1) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

used in the thirteen international and multilateral conventions dealing with international terrorism.[10]

Also, mirroring the Nuremberg Charter, the 1945 UN Charter[11] for the first time outlawed the use of military force, save under the authority of the

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(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim was a national of that State if that State considers it appropriate.

2) Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.

3) This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

10 The international conventions are:

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, 1035 U.N.T.S. 167, 13 I.L.M. 41 (entered into force 20 February 1977); *International Convention against the Taking of Hostages*, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979), 245; *International Convention for the Suppression of Terrorist Bombings*, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, U.N. Doc. A/52/49 (1998) 389; *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, S. Treaty Doc. No. 106-49, 39 I.L.M. 270 (entered into force 10 April 2002); *International Convention for the Suppression of Acts of Nuclear Terrorism*, 9 December 1999, S. Treaty Doc. No. 106-49, 39 I.L.M. 270 (entered into force 10 April 2002).

The multilateral conventions are:

Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 704 U.N.T.S. 219; *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 U.N.T.S. 105 (entered into force 14 October 1971); *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 U.N.T.S. 178 (entered into force 26 January 1973); *Convention on the Physical Protection of Nuclear Material*, 3 March 1980, 1456 U.N.T.S. 125; *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, 24 February 1988, 27 I.L.M. 627 (entered into force 6 August 1989) supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, 1678 U.N.T.S. 221 (entered into force 1 March 1992); *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, 1678 U.N.T.S 304 (entered into force 1 March 1992); *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991, 30 I.L.M. 721 (entered into force 21 June 1998).

11 *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [UN Charter].

UN Security Council and absent self-defence.[12]

Soon after these developments, on 10 September 1948 the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR).[13] The UDHR was not intended to be binding on states parties, but rather to encourage them to respect the human rights of all individuals and peoples.[14] The UDHR led to two principal treaties, both approved by the General Assembly in 1966 — the *International Covention on Civil and Political Rights*,[15] and the *International Covention on Economic, Social and Cultural Rights*.[16] It took another decade before these treaties attracted sufficient ratifications to bring them into operation.[17]

12 Article 2(4) of the *Charter of the United Nations* states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 51 states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

13 Forty-eight states voted in favor and eight (Saudi Arabia, South Africa, the Soviet Union and four European states controlled by the Soviet Union) abstained. At that time the United Nations' membership consisted of fifty-six nations.

14 It was originally envisaged that such human rights obligations would be enshrined in a binding convention, however concerns raised by states parties led to a political compromise in the adoption of a nonbinding declaration. These concerns included that the document did not adequately represent social and economic rights, that social and economic rights could not be accorded the same status as civil and political rights because they were positive rather than passive obligations, and that states may be held to account for ongoing practices, for example, the ongoing racial and gender discrimination in the United States.

15 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR].

16 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976).

17 Factors leading to the adoption of the "soft law" of the UDHR and Cold War tensions also played a role in the adoption of two treaties governing civil and political, and economic, social and cultural rights. The primary concern of western states was that civil and political rights imposed passive obligations, which imposed different obligations and required different enforcement mechanisms than economic, social and cultural rights, which by their nature raised positive obligations. The difference is evident in the two conventions: ICCPR envisaged the creation of individual rights against the state for breaches of obligations through domestic legislation and a right of recourse to the Human Rights Committee which was established by it; ICESCR, on the other, hand envisages programmatic obligations requiring states to, in effect, adopt policies aiming towards progressive achievement of the rights.

Between 1948 and 1976 a number of other specialized human rights treaties entered into force. Among them was the *International Convention on the Eliminations of all Forms of Racial Discrimination*,[18] the *Convention on the Elimination of all Forms of Discrimination against Women*,[19] and the *Convention on the Rights of the Child*.[20] Since 1948, eight of the UN international human rights treaties have established organs or bodies that have been responsible for an influential body of "soft law."[21]

These developments undermined the strict sovereignty of nations. The behaviour of governments toward their own people became the business of other governments and of the global community. The first important manifestation of this new reach of international human rights was the manner in which the UN, regional groups of nations, and individual governments opposed Apartheid in South Africa. The response of the South African government — to the effect that this was an "internal affair" — fell largely on deaf ears. This approach to sovereignty reached its apogee with the humanitarian intervention of North Atlantic Treaty Organization (NATO) forces in 1998 to protect the Albanian population of the Serb province of Kosovo. The consequence is the recognition, if not acceptance, by the UN of the "responsibility to protect."[22]

18 *International Convention on the Eliminations of all Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969).

19 *Convention on the Elimination of all Forms of Discrimination against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46; (1981) 193.

20 *Convention on the Rights of the Child*, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) 167.

21 These are the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination Against Women, the Committee against Torture and the Optional Protocol to the Convention Against Torture, the Committee on the Rights of the Child, the Committee on Migrant Workers, and the Committee on the Rights of Persons with Disabilities. The UN also established the Human Rights Commission in 1946 under the terms of the UN Charter. The Commission was succeeded by the Human Rights Council created by the General Assembly on 15 March 2006. The Council's main purpose is to address human rights violations and make recommendations to the General Assembly. It is also a complaints mechanism for individuals and organizations.

22 A September 2005 World Summit Outcome Document endorsed the concept of the responsibility to protect. The United Nations Security Council Resolution 1674 of April 28, 2006 adopted the provisions of paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and commits the Security Council to action to protect civilians in armed conflict. *2005 World Summit Document*, G.A. Res. 60/1, UN GAOR, 2005, U.N. Doc. A/RES/60/1.

III. THE ESTABLISHMENT OF INTERNATIONAL TRIBUNALS: THE ICTY AND THE ICTR

Another consequence of the internationalization of humanitarian and human rights law was an increasing call for an international mechanism to bring to justice those who have committed atrocity crimes. It became more widely accepted that if the new international laws were not enforced the whole endeavour would founder. However, political will was absent and it was only in May 1993 that the Security Council, in the face of reports of widespread war crimes being committed in the former Yugoslavia, established the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY).[23] Western powers mustered the political will to persuade a post-Cold War UN Security Council to take this unanticipated action. There can be no doubt that had the atrocities not been committed in Europe, such action would not have been taken. And, having established this precedent, the Security Council could hardly resist a request for a similar ad hoc criminal tribunal in Africa in the face of the genocide committed in Rwanda. That International Criminal Tribunal for Rwanda (ICTR) was established in November 1994.[24]

Gender Crimes

It was not widely assumed or accepted that international criminal courts could work or that they could hold fair trials. It was not anticipated that the judges of these tribunals would succeed in substantially advancing, and giving content and meaning to international humanitarian law. However, the two UN ad hoc tribunals were substantially successful with regard to the investigation and prosecution of war crimes committed in the former Yugoslavia and Rwanda. Fair trials have been held both in The Hague and in Arusha, and international humanitarian law has been significantly developed in the process.

The most dramatic illustration of the development of the law is to be found in relation to gender crimes. Crimes such as systematic mass rape, sexual assault, sexual slavery, and forced prostitution have been perpetrated in many wars. Yet international humanitarian law was wanting in the acknowledgement and prosecution of these crimes. The two ad hoc tribunals were responsible for positive developments in this area of the law, especially so in relation to both fashioning a definition of rape as an international crime and

23 SC res. 827, UN SCOR, 48th Sess., 3217th Mtg., UN Doc. S/Res/827 (1993).
24 SC res. 955, UN SCOR, 49th Sess., 3453rd Mtg, UN Doc. S/Res/955 (1994).

to the prosecution of these crimes. The Rwanda tribunal held that the use of systematic rape constituted genocide.[25] The Yugoslavia tribunal held that gender crimes might constitute grave breaches of the Geneva conventions,[26] and violate the laws or customs of war.[27] And they have both linked rape to crimes against humanity.[28] These advances are now appropriately reflected in the *Rome Statute of the International Criminal Court.*[29]

Increasing the Profile of International Humanitarian Law

Another important consequence of the work of the two tribunals has been the high degree of visibility they have given to international humanitarian law. Before these tribunals were established, the subject was taught at some army colleges around the world. It was not often, however, mentioned in the media and the public was scarcely aware of it. That has radically changed and hardly a day goes by without some or other reference to international humanitarian law in the media of most countries. When wars are fought today greater attention is given to the protection of civilians. This is a recent phenomenon that was, for all intents and purposes, absent prior to the establishment of the UN ad hoc tribunals.

It is important to recognize the role played by the United States (U.S.) in these developments. Without support from Washington, it is unlikely that the ad hoc tribunals would have been established. And, having been established, they certainly would not have become viable institutions without the political and economic will of the U.S. It was not only a matter of the human and

25 See *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judgement, (2 September 1998) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.ictr.org> [*Akayesu*]; *Prosecutor v Musema*, ICTR-96-13-T, Judgement, (27 January 2000) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.ictr.org>; and *Prosecutor v Gacumbitsi*, ICTR-2001-64-T, Judgement (17 June 2004) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.ictr.org>.

26 *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, IT-96-21-T, Judgement, (16 November 1998) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/> [*Celibici judgment*].

27 *Ibid.*; and *Prosecutor v Furundzija*, IT-95-17/1-T, Judgement (10 December 1998) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

28 *Akayesu, supra* note 26; *Prosecutor v Kunarac et al.*, IT-96-23-T, IT-96-23.1-T, Judgement, (22 February 2001) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/>; *Prosecutor v Kvocka*, IT-98-30.1-T, Judgement (2 November 2001) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/>; and *Prosecutor v Stakic*, IT-97-24-T, Judgement (31 July 2003) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/>.

29 1 July 2002, 2187 U.N.T.S. 90 [Rome Statute].

financial resources that the U.S. made available to them, but also political influence that ensured that the tribunals succeeded. Senior Serb and Croat defendants would not have stood trial in The Hague but for pressure from Washington. It was the threat of withholding significant financial support that induced the Croatian and Serb governments to hand over for trial leaders who had been indicted by the ICTY. I refer in this regard to Slobodan Milosevic, Miroslav Krstic, Ante Gotovina, and Radovan Karadzic.

When the UN developed "tribunal fatigue," and became concerned with the drain on its budget of the two ad hoc tribunals, they decided to establish what have been called "hybrid tribunals." They were set up in East Timor, Sierra Leone, Cambodia, and, most recently, Lebanon. These courts are not established by the Security Council under chapter VII of the UN Charter, but by agreement between the Secretary General and the respective governments. They have both domestic judges and prosecutors appointed by the respective home states, and international judges appointed by the Secretary General of the UN. They are funded by the government concerned, with the assistance of voluntary contributions of interested member states. Again, the U.S. has been a major contributor to these courts.

IV. THE INTERNATIONAL CRIMINAL COURT

Establishment of the ICC

Tribunal fatique, resource constraints, and the encouragement of the U.S. led the then Secretary General of the UN, Kofi Annan, to call for the diplomatic conference in Rome in June 1998, at which a statute for a permanent international criminal court was finalized. The conference followed many years of negotiation over draft statutes to establish such a court. At the request of the UN General Assembly, the International Law Commission (ILC) produced a draft statute in 1951 and a revised statute in 1953. However, given subsequent international events and Cold War tensions, the draft was only periodically considered and was in effect shelved until Trinidad and Tobago raised the need for an international enforcement mechanism to deal with drug trafficking in 1989. At that time, the General Assembly requested that the ILC resume work on the proposed court, and over the course of the next nine years, several drafts were prepared by the ILC and the General-Assembly appointed ad hoc and preparatory committees.[30] Negotiations resulted in a

30 These were the Ad Hoc Committee on the Establishment of the International Criminal Court, and

widely acceptable consolidated draft, which was submitted to the diplomatic conference convened by the Secretary General.[31]

I would suggest that it is a matter for deep regret that the United States military dampened President Bill Clinton's initial enthusiasm for the ICC and that, at the end of the Rome conference, the U.S. voted against the statute. It joined only six other nations in adopting this negative approach.[32] Positive votes were cast by 120 nations. I need hardly refer to the strong opposition to the ICC displayed by the first administration of President George W. Bush, the legislation his administration persuaded Congress to approve,[33] and the Bilateral Immunity Agreements that ratifying states were forced to enter into to ensure the receipt of ongoing military aid.[34] The legislation and bilateral agreements were designed to shield U.S. nationals from prosecution for offences committed in peacekeeping and military operations around the world, and undermine any prospect of success by the ICC in its early and most fragile years.

At the Rome conference an important role was played by Canada in leading the so-called "like-minded nations." It was those nations that not only themselves ratified the Rome treaty but also helped persuade other governments to do so. It was appropriate that a Canadian diplomat and lawyer, Philippe Kirsch, chaired the Rome meeting and was later elected as the first president of the ICC.

The Rome Statute established an unusually high bar to the ICC becoming operational, as it required the ratification of no less than sixty nations. Most optimistic supporters of the court thought it might take a decade or more for that to be achieved. It took just under four years, and the court's life and jurisdiction began on 1 July 2002. Today there are 108 ratifications.

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the Preparatory Committee on the Establishment of the International Criminal Court.

31 Jefferey L. Dunoff, Steven R. Ratner & David Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented Approach,* 2d ed. (New York, NY: Aspen Publishers, 2006) at 658.

32 *Ibid.* at 658-9. These were China, Iraq, Israel, Libya, Qatar, and Yemen. Concerns included "the extent to which states might need to consent to the jurisdiction of the Court before it could hear a case,' the question of 'who could initiate an investigation and prosecution, [and] ... the extent to which the Court could act in the face of ongoing domestic proceedings over the same facts."

33 *Ibid.* at 666. The *American Servicemembers' Protection Act* of 2002 contained provisions, among others, prohibiting the provision of military aid to countries which had ratified the Rome Statute, and permitting the President to authorize military force to free any US military held by the ICC.

34 *Ibid.* The Bilateral Immunity Agreements prohibit the state party to the agreement from surrendering to the ICC a broad scope of persons including current and former government officials, military personnel and U.S. employees and nationals. As of March 2006, 108 countries had entered into such agreements, but around fifty countries have refused to sign them. The U.S. has cut aid to some states refusing to enter into them.

Jurisdiction, Complementarity, and Cooperation

I shall not describe the detail of the Rome Statute. I refer only to those provisions relevant to an assessment of where the ICC stands today and its prospects for the future. The first is the system called "complementarity." The ICC is effectively a court of last, and not first, resort. It differs in this respect from the ad hoc tribunals that enjoyed primacy in respect of jurisdiction. This meant that they could decide which cases should come before them and which before domestic courts. Under the system of complementarity it is states parties that have the first call on whether situations and cases should come before their domestic courts and, only if they are unwilling or unable to prosecute suspects, does the jurisdiction of the ICC come into operation. Under article 17 of the Rome Statute, the ICC shall determine a case to be inadmissible where 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."[35] It will also be obliged to declare a case inadmissible if it "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."[36] The ICC may not prosecute a person who has already been tried for conduct which is the subject of the complaint, if such trial was held in good faith and not for the purpose of shielding the person from the jurisdiction of the ICC.[37] Finally, the ICC may decline jurisdiction if a case is not of sufficient gravity to justify action by the court.[38]

Situations may come before the ICC by reference from governments, the UN Security Council, or by the Office of the Prosecutor exercising powers under the Rome Statute.[39] The last-mentioned power is controlled by the Pre-Trial Chamber of the ICC. When the first prosecutor was appointed, it was widely assumed that the first situations before the court would come by way of the last-mentioned route, i.e., from the prosecutor's own investigations and references. That was not to be.

The situations in the Democratic Republic of the Congo (DRC), Uganda, and the Central African Republic (CAR) were referred to the prosecutor by

35 *Supra* note 30 at article 17(1)(a).
36 *Ibid.* at article 17(1)(b).
37 *Ibid.* at articles 17(1)(c) and 20(3).
38 *Ibid.* at article 17(1)(d).
39 *Ibid.* at article 42.

the governments of those countries.[40] On 31 March 2005, the situation in the Darfur region of Sudan was referred to the prosecutor by the Security Council acting under its peremptory powers under chapter VII of the UN Charter.[41] There have been some complaints from African leaders that the ICC appears to be concentrating only on situations in Africa. This is hardly a fair criticism, having regard to the fact that the ICC has not itself chosen any of the four situations. The chief prosecutor has announced that he is investigating a number of other situations including Colombia, Kenya, and Georgia.

I need hardly emphasize that any international court is completely reliant upon the cooperation of governments for the execution of its orders and requests. Whether states have the political will to furnish such cooperation is a political question peculiar to the country involved. The ICC has issued thirteen warrants of arrest. Of these, four have been executed and the accused persons surrendered to the court — three in respect of the DRC and one in respect of the CAR. Although President Museveni of Uganda referred the situation regarding the Lords Resistance Army (LRA) to the ICC, his government has consistently failed to take steps to apprehend Joseph Kony and the other leaders of the LRA against whom the court has issued warrants of arrest. The two warrants of arrest issued in the Darfur situation have been outstanding for over two years.

A decision on the prosecutor's application for a third arrest warrant against President Al-Bashir of Sudan was rendered on 4 March 2009, when Pre-Trial Chamber I issued a warrant for his arrest.[42] This application has created much controversy; some African states, in particular Libya and South Africa, have requested that the Security Council exercise its powers under article 16 of the Rome Statute to have the ICC defer its proceedings against Al-Bashir for a period of twelve months.[43] They argue that the issue of an arrest warrant will hinder the peace process, and undermine Sudan's sovereignty.[44] The request

40 The request from President Museveni was announced by the prosecutor on 29 January 2004; the letter of request from the DRC was announced by the prosecutor on 19 April 19 2004; and, the letter of request from the CAR was announced by the prosecutor on 7 January 2005.

41 SC res. 1593, UN SCOR, 60th Sess., 5158th Mtg, UN Doc. S/Res/1593 (2005).

42 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01-09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (4 March 2009) (International Criminal Court, Pre-Trial Chamber I), online: ICC <http://www2.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

43 Rome Statute, *supra* note 30 at article 16. Article 16 reads as follows:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

44 See Antoaneta Bezlova, "CHINA/SUDAN: Move to Get Al-Bashir Off Genocide Charges"

has still to come before the council. It is my hope that the council will not react positively to this request and certainly not in the absence of convincing evidence that the Sudanese government is serious about bringing an end to its egregious violations of human rights in Darfur, and a firm undertaking to bring those responsible for them to account before appropriate domestic courts.

Due Procedure and Confidential Information

One serious problem facing the prosecutor has recently been resolved. The prosecutor appropriately made it known that he had received confidential information, some of which tended to be exculpatory of the accused person, Lubanga. He was not permitted by the providers of the information (the United Nations) to disclose some 200 documents to either the accused or even to the trial chamber judges. He offered redacted versions but those were rejected by the defence. A trial chamber had ruled that the inability of the prosecutor to disclose the information would result in an unfair trial and it ordered a conditional stay of the proceedings and the release of Lubanga.[45] Prior to the hearing by the appeals chamber on the prosecutor's appeal, the providers of the information agreed to allow the information to be furnished to judges of the trial chamber and so, for the time being, removed that issue from consideration by the appeals chamber. However, the trial chamber had granted a conditional stay of the trial and added an order for the release of Lubanga. That decision was successfully appealed by the prosecutor. The appeals chamber, in a majority judgment, held that the order for the release of Lubanga, in all the circumstances, was not warranted.[46] It noted that if a trial chamber orders a permanent and irreversible stay of proceedings, an order for the release of the accused would be appropriate, subject to an appeal. In the present case, however, having regard to the conditional stay, the release order was inappropriate. The case has been referred back to the trial chamber.

Inter Press Service News Agency (31 July 2008), online: Inter Press Service <http://ipsnews.net/news.asp?idnews=43392>; Johnathon Fanton, "The UN Security Council and Omar al-Bashir" Chicago Tribune (9 October 2008) online: ChicagoTribune.com <http://www.chicagotribune.com/news/nationworld/chi-oped1009justiceoct09,0,5470901.story>; "Jordan, Yemen, and South Africa Oppose Charging Sudanese President by ICC Prosecutor" *Al-Jazeerah: Cross-Cultural Understanding* (27 July 2008) online: CCUN <http://www.ccun.org/News/2008/July/27%20n/Jordan,%20Yemen,%20and%20South%20Africa%20Oppose%20Charging%20Sudanese%20President%20by%20ICC%20Prosecutor.htm>.

45 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1401, Interlocutory Decision (13 June 2008) (International Criminal Court, Trial Chamber), online: ICC <http://www.icc-cpi.int/>.

46 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1487, Interlocutory Decision (21 October 2008) (International Criminal Court, Trial Chamber), online: ICC <http://www.icc-cpi.int/>.

In my view the importance of the approach of the trial and appeals chambers lies in the independence that the judges demonstrated. They clearly and appropriately regarded the fairness of trials before the ICC as fundamental and paramount. This could not have been easy for them in the face of the low number of defendants who have been arrested. The first trial is yet to begin.

The Role of Victims

The further problem facing the ICC arises from the central role given in the Rome Statute to victims. In the cases of the ICTY and ICTR the voices of victims could only be heard through the judges and prosecutors, and by way of amicus curiae briefs. On the other hand, the Rome Statute and the ICC rules of procedure grant the victims a substantial and independent role in proceedings before the ICC. They may present their views to the court at all stages of the proceedings if their interests are affected.

Article 68(3) of the Rome Statute reads as follows:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives and victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Under the rules, a victim is a person who has suffered harm as a result of the commission of any crime within the jurisdiction of the court.[47]

For good reason, in my opinion, the prosecutor has opposed the participation of victims at the preliminary examination and pre-trial stage of proceedings. However, the appeals chamber dismissed an appeal from a pre-trial chamber determination that victims are indeed entitled to participate at the investigation stage of proceedings.[48] Furthermore, the pre-trial chamber held that it was not necessary at the pre-trial stage for the court "to make a definitive determination of the harm suffered by the victims" and that a "single in-

47 International Criminal Court, *Rules of Procedure and Evidence*, ICC-ASP/1/3 (entered into force 9 September 2002), rule 85, online ICC <http://www2.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf>.

48 *Situation in the Democratic Republic of the Congo*, ICC-01/04-168 , *Judgement on the Prosecutor's Application for Extraordinary Review of Pre-trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal* (13 July 2006)(International Criminal Court, Appeals Chamber) online: <http://www.icc-cpi.int/>.

stance of harm suffered was sufficient."[49] More importantly, it held that it was also unnecessary at that stage to determine the person or persons responsible for the harm.[50] It follows that the applicant is not required at that stage of the proceedings to establish any harm related to the charge against the accused. The pre-trial chamber stated that that issue would be determined at the relevant later stages of the proceedings.[51] To be admitted as "a victim of a case," there has to be a direct or indirect relationship between the harm suffered and the crimes for which the defendant is believed to be responsible and for which the trial chamber has issued an arrest warrant.[52]

As a result, victims have acquired the right to make representations at all stages of the proceedings, including the evaluation by the prosecutor on whether to investigate or prosecute.[53] Under rule 50(1), all victims known to the prosecutor must be notified of his or her intention to request authorization for an investigation from a pre-trial chamber. It follows that victim participation at all the subsequent stages of the proceedings are permitted. Thus, article 19(3) provides that where the court is requested by the prosecutor to rule on the admissibility of a case, victims "can submit observations" to the court. The court must notify "victims or their legal representatives who have already participated in the proceedings or, as far as possible, those who have communicated with the Court in respect of the case in question, of the decision to hold a confirmation of charges hearing."[54] At hearings before the trial court, the legal representatives of the victims may make both written and oral representations subject to the right of the chamber to limit participation to written submissions.[55] They can also be authorized to question witnesses, experts, or the accused.[56] The chamber's decision whether to allow questioning depends on the circumstances of the case, the interests of witnesses, and the need to

49 *Situation in Democratic Republic of the Congo*, ICC-01/04-101, *Decision on the Application for Participation in the Proceedings of VPRS*, 1 – 6 (17 January 2006) (International Criminal Court, Pre-Trial Chamber) online: <http://www.icc-cpi.int/> at para. 82.

50 *Ibid.* at para. 94.

51 *Ibid.* at para. 100.

52 *Prosecutor v Thomas Lubanga Dyilo*, ICC/01/04-01/06, Interlocutory Decision (29 June 2006) (International Criminal Court, Trial Chamber), online: ICC <http://www.icc-cpi.int/> at para. 6.

53 Rome Statute, *supra* note 35 at article 15. Article 15(3) provides that:

> If the prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the pre-trial chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the pre-trial chamber, in accordance with the rules of procedure and evidence.

54 *Rules of Procedure and Evidence*, *supra* note 48 at rule 92(3).

55 *Ibid.* at rule 91(2).

56 *Ibid.* at rule 91(3)(a).

protect the interests of the accused. The need for a fair, impartial, and expeditious trial is also to be taken into account.[57] Finally, the provisions of rule 93 authorize the court to seek the views of victims or their legal representatives on any issue.

I have three concerns concerning victim participation. The first is that the pre-trial chamber has admitted victims at a premature stage of the proceedings and this could well impede the efficiency of the prosecutor's investigations. From my own experience, I can vouch for the necessity for prosecutors to have a free hand in pursuing investigations. Not infrequently, investigations are made during ongoing wars. The safety and indeed the lives of investigators and informants can easily be compromised if their identities are made public. Giving access to victims and their representatives to the policies and records of the investigators may be calculated to seriously prejudice their work and compromise the safety of persons crucial to the investigations.

My second concern is that at the first stage of a victim's admission to the proceedings there is no requirement that the interest relate to the crime charged. This has already resulted in a multiplicity of applications to pre-trial chamber and may also be calculated to prejudice the efficiency of the court. Just too much of the judges' and other court personnel's time is already being devoted to these applications.

My third concern is the potential that the rights given to victims might intrude upon the fair-trial rights of the accused. It is one thing to have those accused face the might of a well-resourced prosecutor and submit themselves and their witnesses to cross-examination by her or his representatives. Now, in addition, persons accused will find themselves also questioned by the legal representatives of the victims. It could impact upon the complexities of pre-trial discovery and trial preparation.

I hasten to add that I am fully supportive of greater representation of victims in court proceedings. This is not a situation that would be considered unusual in civil law criminal proceedings where the investigating judge, at all times, remains in control of the investigations and initial proceedings, and will be free to interact with victims. It is also important to recognize that the commission of massive crimes implicates huge numbers of victims and, in that respect, prosecutions are different from domestic criminal proceedings which usually involve small numbers of victims. Furthermore, wide representation of victims is a more difficult fit with common law adversarial trials that are,

57 *Ibid.* at rule 91(3)(b).

in most cases, dominated by cross-examination. It is my hope that the ICC judges will fashion appropriate rules of practice to manage all of these new complex procedures in a manner that will ensure the fairness of trials. That, after all, is the crucial issue that will determine the success and legacy of the ICC and its ability to contribute to international justice.

V. THE WAY FORWARD?

So much for the present, what of the future? A substantial forward momentum has developed in favour of international criminal justice and, in particular, the ICC. As I have already stated, fifteen years ago there was no such thing as international criminal justice. Today it is a topic of daily concern and media interest in many countries. The Rome Statute has attracted the ratification of many important states, especially in Europe and Africa. My concern is the absence of support from four large nations: the U.S., China, India, and Russia.

I have referred to the indispensible role played by the U.S. in the establishment and successes of the ad hoc UN tribunals. It is a matter for optimism that the second administration of President George W. Bush considerably softened its opposition to the ICC. This change of policy began with the decision to allow the Security Council to refer the Darfur situation to the ICC. Not long before the U.S. decided to withhold its veto, its UN representatives made statements to the effect that it would not allow a reference as it would be calculated to confer credibility on the court. That was indeed correct. Since then, John Bellinger, the legal advisor to the United States Department of State, made it public that his office had offered assistance to the prosecutor of the ICC in cases consistent with the foreign policy of the U.S.[58] Furthermore, President Barack Obama has stated it to be his policy to assist the ICC in a way that is consistent with the interests of the United States and in consultation with the Pentagon.[59] We will wait to see what effect such a policy will have upon the bilateral agreements entered into with ratifying states, and upon legislation aiming to inhibit ICC prosecutions of U.S. nationals.

58 John Dellinger, (Statement made at the annual meeting of the American Society of International Law, Washington, D.C., 10 April 2008)[unpublished].

59 See Bob Egelko, "Presidential candidates diverge on U.S. joining war crimes court" *San Francisco Chronicle* (2 January 2008) online: SF Gate <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/01/02/MNLUU4LBH.DTL>; and Josh Rovenger, "Analysis: Obama v McCain on the ICC" *Citizens for Global Solutions* (1 July 2008) online: CGS <http://www.globalsolutions.org/in_the_news/analysis_obama_vs_mccain_icc>.

It is now important that additional ratifications of the Rome Statute should be made by countries that have thus far failed to do so. Likewise, it is important for those countries that have ratified the treaty to have in place domestic legislation that will empower their governments to carry out their obligations under the treaty. Without arrests there cannot be trials and without trials the ICC will fail in its mission.

It is important to avoid a vicious circle. On the one side some supporters of international justice, especially in the U.S., are waiting to see whether the ICC operates efficiently and without political bias. On the other side, without the active assistance of the leaders of those countries, the court might well founder. It is thus imperative for all supporters of international criminal justice to encourage governments to muster the political will to ensure the success of the court. It is important that the U.S. should change from being an active opponent of the ICC to becoming its leading champion. It can do that without early ratification of the Rome Statute and in a manner consistent with its foreign policy.

In conclusion, international criminal justice has come a long way since the establishment of the ICTY. The adoption of the Rome Statute has been a turning point and the ICC is now a reality. It has increasingly become an active participant in international affairs and in the domestic policies of a number of countries. Much will depend upon the independence of the ICC and its judges. Their record thus far has been positive and the court has shown consistent regard for the fairness of its proceedings without diminishing its concern for the interests of victims.

I would suggest that when the court has attracted truly universal support it can provide not only a source of acknowledgement for victims, but also a deterrent effect. When would-be war criminals realize that they have nowhere to hide, some of them might think twice before embarking on a criminal path that will inevitably result in huge numbers of civilian suffering. This is an endeavour worthy of the support of all decent people on every continent.