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An Assessment of the ICC Statute

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Abstract

The large number of signature States together with the current speed of ratification from various regions of the world seems to indicate the general acceptance of the treaty; many of the problems first identified have since been clarified and resolved. It seems reasonable to expect the Rome Statute to come into operation as early as next summer. While it is necessary to ensure effective criminal investigation and prosecution to counter serious human rights violations, we need also to develop additional ways and means for addressing the root causes that led to violations and impunity. Justice is important but justice alone cannot bring peace. We need both justice and peace.

Criminal prosecution through courts and tribunals will not and cannot suit all situations, bring justice to all, or, still less, end all conflicts. Accountability and criminal responsibility are important and necessary. But the tribunals cannot deal adequately when massive cases are involved. Massive trials require large resources and are time-consuming, particularly when there are large numbers of defendants. In recent years, various measures of accountability have been employed for managing situations involving past serious violations of human rights. These measures include acknowledging and publicizing responsibility through truth commissions, dismissing or suspending officials connected with the abuses of the previous regimes, seizure of property and assets of the perpetrators, blocking financial sources of rogue organizations, and compensation for victims and their families. All these are intended to demonstrate that a sense of sanctions has been applied to misdeeds, though such sanctions may not be sufficient in all cases. The parties concerned must work out by themselves the best solution to suit their need.

AN ASSESSMENT OF THE ICC STATUTE

Roy S. Lee*

INTRODUCTION

When the International Criminal Court (“ICC”) Statute¹ was adopted at Rome in July 1998, seven States voted against it and some twenty States abstained. Barely twenty-two months later, the two implementing instruments—the Elements of Crimes and the Rules of Procedure and Evidence—were adopted enthusiastically with full consensus. No vote was necessary, in spite of numerous conflicting proposals and difficult negotiations.² This signifies not only the acceptability of the instruments themselves, but also the good will and general support which have since emerged after Rome both at the national and international level. States had more time to study the Statute and to digest its full implications. The large number of signature States together with the current speed of ratification from various regions of the world seems to indicate the general acceptance of the treaty; many of the problems first identified have since been clarified and resolved. It seems reasonable to expect the Rome Statute to come into operation as early as next summer.

While the elapsed time is still short, it is not premature to assess what the Rome Statute has so far achieved.

I. HALF A CENTURY'S EFFORT

The creation of an international criminal court is about enforcement of law and punishment of criminals. Both subjects are carefully guarded national prerogatives. States have inher-

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1. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9* (1998), available at <http://www.un.org/law/icc/statute/contents.htm> [hereinafter Rome Statute].

2. For the legislative and negotiating history of the Statute and the two companion instruments, see respectively, *THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS RESULTS* 657 (Roy S. Lee ed., 1999) [hereinafter *INTERNATIONAL CRIMINAL COURT*], and *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 857 (Roy S. Lee ed., 2001) [hereinafter *ELEMENTS AND RULES*].

ent rights to punish anyone who has committed a crime within their territory and most constitutions also claim exclusive jurisdiction over their own nationals, regardless of where the crime was committed. For the longest time, it was generally believed that an international tribunal would require national courts to give up some of their jurisdiction and States would have to concede a part of their sovereignty and to allow their nationals to be judged and sentenced by foreigners. It was therefore not surprising that for nearly fifty years, States had resisted the idea of having an international criminal court.

While it was possible in late 1948 for the General Assembly of the United Nations to adopt the Convention for the Prevention and Prohibition of the Crime of Genocide³ ("Genocide Convention") and the Universal Declaration on Human Rights,⁴ the draft instrument for an international criminal court was postponed for further study. It was then shelved, in spite of renewed interest and numerous attempts to create such a court.

The 1998 Rome Conference succeeded in creating an international criminal justice system without directly infringing upon national sovereignty.⁵ The angle taken was that international jurisdiction might be justified when a State was *unwilling or unable* to exercise its jurisdiction. In the former case, the decision whether or not to exercise jurisdiction would continue to remain with the State concerned. In such a case, the new court would serve primarily to encourage national courts to exercise jurisdiction. In the latter case involving a failed State, the question of

3. Convention for the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III), (1948) U.N. GAOR, U.N. Doc. A/810 (1948), 78 U.N.T.S. 277 (entered into force Jan. 12, 1951), available at http://www.unhchr.ch/html/menu3/b/p_genoci.htm.

4. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/180, (1948), available at <http://www.un.org/overview.rights.html>.

5. It may also be recalled that in the late 1980s, there was an urgent need to find ways to combat illicit trafficking of narcotic drugs across national frontiers. The issue was referred to the International Law Commission ("ILC") for study in the context of the draft Code of Crimes against the Peace and Security of Mankind, which the ILC had been studying since 1947. Some opponents to international jurisdiction had harbored the thought that the matter might be consumed under the study of the draft Code. In 1994, the ILC, which is an expert body of jurists, proposed in its draft statute that the international criminal court was intended "to be complementary to national criminal justice systems in cases where such trial procedures may not be available or ineffective." Draft article 35 then set out the grounds for the admissibility of cases before the court. This paved a way in the Preparatory Committee a year later to further develop the idea and to build the system around this concept.

sovereignty would hardly be an issue; the new court would be there to fill an important vacuum. Many States found this angle acceptable and attractive since their courts and tribunals would continue to enjoy priority over the international court.⁶

To find this angle is by no means easy. To create the international justice system as embodied in the Rome Statute entailed complex and delicate negotiations involving the entire community of States. Delegates know their own criminal system best and all anxiously wanted to inject their own system into the world system as much as possible. The construction of the world system became a necessary fusion of the very different concepts and approaches. The conference leadership provided the required leadership and great negotiation skills in merging the principal features from all the major systems. In spite of relentless effort to harmonize the differences, inconsistencies and gaps do exist, which is perhaps inevitable in building an international system. Thanks to the subsequent elaboration of the Elements of the Crimes and the Rules of Procedure and Evidence, many of the defects have been repaired.⁷

Under the leadership of Mr. Kofi Annan, the United Nations Secretariat worked closely with the Bureau and delegates of the Conference, which contributed to the far-sighted, efficient work program that paved the way for a successful conference. The heart-warming support and tireless efforts of the coalition of over one thousand non-governmental organizations contribute to the making of the Statute and its subsequent development.

6. The Preparatory Committee that was subsequently created to work on the court's draft statute on the basis of the ILC text, used the principle of complementarity to describe this newly proposed role for an international criminal court. While an acceptable approach seemed to have emerged, it was a difficult task to precisely define the conditions and circumstances under which the international court be allowed to exercise jurisdiction. The negotiation on the establishment of the new court was greatly facilitated once the court's role was clarified. For legislative and negotiating history on this issue, see John Holmes, *The Principle of Complementarity*, in *INTERNATIONAL CRIMINAL COURT*, *supra* note 2, at 41-78. For subsequent negotiating history on the relevant rules, see John Holmes, *Jurisdiction and Admissibility*, in *ELEMENTS AND RULES*, *supra* note 2, at 321-48.

7. See Silvia A. Fernández de Gurmendi, *Elaboration of the Rules of Procedure and Evidence*, in *ELEMENTS AND RULES*, *supra* note 2, at 235-57; Darryl Robinson & Herman von Hebel, *Reflections on the Elements of Crimes*, in *ELEMENTS AND RULES*, *supra* note 2, at 215-334.

II. ENFORCING THE LAW AND BRINGING PERPETRATORS TO JUSTICE

The coming into existence of the Rome Statute in 1998 not only materialized a dream that had long been desired; it more importantly brought enforcement to international criminal law and international humanitarian law. While we have numerous rules and laws protecting civilians, regulating the treatment of prisoners and prohibiting the use of certain weapons and instruments, they have rarely been enforced and violators have hardly been punished. As injuries remain un-redressed, wounds fester and conflicts continue to erupt. A cycle of violence thus persists. Retribution against an entire ethnic, religious, or political group provides no solution, and often produces further cycles of violence. Criminal prosecution serves the important purpose of holding individuals accountable for their acts. Decisions from an impartial court holding the individuals responsible provide a public, judicial confirmation of the facts, and give victims and society in general a sense that grievances have been addressed. The manifest interest in recent years in the creation of international criminal courts and tribunals recognizes and underscores this need.

Many of the customary rules and laws are now embodied in the Rome Statute and will become enforceable when the new court comes into operation.

For the first time in history, crimes involving sexual and gender violence have been recognized and codified under the Rome Statute as self-standing crimes. Specially formulated rules regarding evidence, witness protection, testimony, and trial have also been developed to reflect the characteristics of such crimes and to provide efficient application without in any way infringing upon the rights of the accused. There will also be institutional support to victims through the Victims and Witnesses Unit. In all, the area of victim protection and participation has been greatly expanded and developed.

Also for the first time in history, there will be an independent international Prosecutor to conduct investigations and prosecutions. Concomitantly, there are also built-in checks and balances to make sure that this independent right will be neither misused nor unused. A Pre-Trial Chamber consisting of three judges is entrusted with the task of supervision. The Prosecutor

must first seek the confirmation of the Pre-Trial Chamber before proceeding to an investigation of an alleged crime. An accused or a suspect, or the State concerned, has a right to challenge the jurisdiction of the Court or the admissibility of a case.

The 1998 Rome Statute together with its two companion instruments—the Elements of Crimes and the Rules of Procedure and Evidence—constitute the most comprehensive modern international criminal justice system to date. This system is built on legal traditions from around the world, and contains time-honored values and concepts derived from national systems of many countries. It belongs to no particular system of law, and yet it is drawn from all and for all.

The two companion instruments will bring consistency, clarification, and precision to the interpretation and application of each of the crimes under the jurisdiction of the court. Outworn formulations inherited from treaties of the nineteenth century have also been given current meaning and up-to-date expression.⁸ Legal certainty will further enhance the Court's independent role, yet curb its latitude to act or not to act inconsistently with the Statute. The Rules of Procedure and Evidence, which underpin the statutory provisions, harmonize inconsistencies, fill procedural gaps in the Statute, and clarify the inter-relationships of all the parties involved in the proceedings before the Court, will thus ensure the proper and effective functioning of the Court. Current case law established by the other international criminal tribunals has also been taken into account. All these important attributes should enhance the Court's efficient functioning and its acceptance on a universal basis.

How effective a role that the Court may play will depend on the attitude of the States Parties, the Security Council, and the Prosecutor, as they have the exclusive power to trigger the process of an investigation and prosecution before the Court. It appears that States Parties and the Security Council would weigh various political factors before making a decision. While the Prosecutor would have independent power of investigation, his decision would be subject to the approval of a three-judge panel.

8. Among the outstanding examples of such qualities attained may be mentioned the elements specified respectively for the crimes of enforced disappearance, other inhumane acts, sexual violence, enforced sterilization, persecution, and transfer of civilian population. See Robinson & Hebel, *supra* note 7, at 224-26.

The trend of creating courts and tribunals seems to have spurred popular developments at the national level discernible in various parts of the world. Shortly after the adoption of the Rome Statute, a Spanish court indicted General Augusto Pinochet for human rights violations committed in Chile in the 1970s and demanded that the United Kingdom extradite him while he was there seeking medical treatment.⁹ Although the House of Lords eventually refused extradition and General Pinochet was allowed to return home, he has since been under house arrest and is now being prosecuted in Chile.¹⁰

A Belgian law of 1993 now asserts universal jurisdiction over such serious crimes as genocide and crimes against humanity and allows the nation's courts to hear cases of past atrocities that happened anywhere, without any connection to Belgium. Four Rwandan Hutu were tried in Belgium under this law on charges of complicity in the 1994 State-organized genocide which claimed the lives of more than half a million ethnic Tutsi in Rwanda.¹¹ This is the first time civilians of one country are being asked to judge persons accused of war crimes committed in another country and against people of another country. Cases of massacres, torture, and other horrors have also poured in from Africa, Asia, and the Middle East charging against more than a dozen present or past leaders of Cuba, Iraq, Israel, Ivory Coast, Rwanda, Cambodia, Chad, Iran, and Guatemala. While proponents of universal jurisdiction welcome this development, many are concerned that this could overload the Belgian system and even bring political and diplomatic embarrassment to the government.

In addition, mechanisms for criminal prosecution are also under way in Cambodia, East Timor, and Sierra Leone. Indeed, the search for some form of accountability of the past in the former Yugoslavia, and the initiation of criminal investigation of past events in the Philippines, Indonesia, Peru, and other countries, may well illustrate this point. The existence of the ICC regime is therefore likely to encourage national courts to investi-

9. See Warren Hoge, *After 16 Months of House Arrest, Pinochet Quits England*, N.Y. TIMES, Mar. 3, 2000, at A6.

10. See Clifford Krauss, *Freed Britain, Pinochet is Facing a Battle at Home*, N.Y. TIMES, Mar. 3, 2000, at A1.

11. See *Four Rwandans Suspected in 1994 Rwandan Genocide to Stand Trial in Brussels*, AGENCE-FRANCE PRESSE, Feb. 13, 2001.

gate and prosecute heinous crimes committed by their nationals or within their territory.

For all these reasons, the ICC is therefore a great achievement of the twentieth century.

III. *SEPTEMBER 11 TERRORIST ACTS CONSTITUTING CRIMES AGAINST HUMANITY*

International terrorism was not considered as a core crime by the majority of the participating States at the Rome Conference and was therefore not embodied in the Rome Statute. The Conference recommended that it should be included upon further consideration.¹² Be that as it may, this does not mean that terrorist acts could not come under the jurisdiction of the ICC, provided that such acts would meet the required elements of the specific crime under the Statute.

It seems that the September 11 terrorist acts could constitute a crime against humanity of murder within the meaning of article 7(1)(a) of the Rome Statute.¹³ This submission is based on the facts as reported in the news media and on the required elements specified for that crime: (i) over three thousand persons were killed as a result of the acts of September 11; (ii) the conduct involving the multiple commission of acts appears to be committed as part of a wide or systematic attack directed against a civilian population in the Twin Towers; (iii) the perpetrators seemed to know that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against such civilian population; (iv) the requirement of "attack directed against a civilian population" does not have to be a military at-

12. India, Sri Lanka, Algeria, and Turkey proposed at the Conference to include the act of terrorism in the definition of the crimes against humanity, but the proposal did not attract sufficient support. The Conference adopted a resolution recommending that a future review conference consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court. The principal reasons advanced for exclusion included that there was no agreed definition to these crimes which in any event were of a character distinct from those of war crimes and genocide; the danger of overburdening the court in the absence of an agreed definition; and that they were effectively dealt with under existing international cooperation. For further details, see Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT*, *supra* note 2, at 79-81, 85-87.

13. Rome Statute, *supra* note 1, art. 7(1)(a).

tack;¹⁴ and (v) the multiple commission of acts seemed to be pursuant to or in furtherance of an organizational policy to commit such attack.¹⁵ How to bring this crime before the new court would involve complex political and legal issues, including the question of non-retroactivity.¹⁶

IV. NOT AN ARBITRARY SYSTEM

The new system is carefully and precisely defined to avoid arbitrary arrest and prosecution of national officials and military personnel. A fully articulated system was constructed through a combination of measures. First, the new court's jurisdiction is limited to the most egregious crimes—genocide, crimes against humanity, war crimes, and crimes of aggression, leaving most other crimes under the jurisdiction of national courts. Such crimes are subject to high thresholds: only crimes of extensive scale committed under specially defined circumstances may come before the Court. But even in such limited cases, if national courts choose to exercise jurisdiction, they will continue to have priority over these crimes, as the principle of complementary will apply. The ICC cannot step in. Second, each of the prosecutable crimes is defined in precise and concrete terms. Specific material, mental, and contextual elements have also been painstakingly developed for each of the crimes, creating a closely-knit system making it difficult for anyone to go beyond the intended scope. Third, eleven specific general criminal law principles and some seventy procedural provisions have been included in the Statute to guide future application. More detailed rules of procedures and evidence were subsequently developed to further supplement the statutory provisions. All these were intended to provide a clearly defined system and to prevent the Court from going beyond the regime prescribed for it.

Numerous safeguards were also incorporated into the Court's Statute and Rules to limit the Prosecutor's power, to defeat any false charges, and to prevent political maneuvering.

14. *Id.* art. 7(1); see also, Darryl Robinson, *The Context of Crimes Against Humanity, in ELEMENTS AND RULES*, *supra* note 2, at 74.

15. See *Report of the Preparatory Commission for the International Criminal Court, Finalized draft text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000), art. 7, introduction, para. 3. For further explanation, see Robinson, *supra* note 14, at 61-80.

16. See *infra* Part VII.

States would also be able to protect their national security interests by invoking a special process for handling sensitive information or documents. Events occurring before the entry into force of the treaty are thus excluded from the Court's jurisdiction. The possibility of abuse of power has therefore been reduced to the very minimum. The fact that 139 States signed the Statute within a short period testifies that one of their chief concerns had been met.

This approach of a fully articulated regime departs from the practice established under the Nuremberg Tribunal and the Tribunals for the Former Yugoslavia and Rwanda where only skeletal definitions of crimes were included in the respective statutes and the tribunals were entrusted with the power to develop the necessary elements of crimes and to implement rules and regulations. But this time, since the Court's jurisdiction will apply in the States parties themselves, they chose to build by themselves a fully articulated regime leaving little or no room for arbitrary decisions.

This rather specific and limited regime created for the new Court may be a disappointment to those who favored a supranational system to override national systems. But the reality is that States still want to preserve their traditional jurisdiction as much as possible. Many of them would have rejected the Rome Statute had the role of the Court been made broader than it is. The Rome Statute strikes the optimum acceptable to States in the present circumstances.

V. *HIGHEST INTERNATIONAL STANDARDS OF CRIMINAL JUSTICE*

When the creation of an international criminal court was first conceived, the focus was to build an effective prosecution and punishment regime. The Rome Statute and its companion instruments ended with the highest international standards of justice and guarantees of due process and fair trial to *all* persons before it, regardless of their nationality or legal status. The principle that the world community established is that even perpetrators of the most heinous crimes should be entitled to all the guarantees of fair trial and human rights. It is also important that justice must not only be done but also be seen to be done. Besides, full trials also serve to condemn the crime and admon-

ish future commission. The established standards mirror and often exceed the rights and protection contained in many national constitutions. In addition, the punishment regime so created is fully consistent with current requirements of human rights and embraces restorative and compensatory measures—features that are even new to many national systems.

In fact, persons under investigation or indictment will be entitled to more expansive human rights protection than those traditionally accorded under universal human rights instruments. Workable rules have also now been developed for the assignment, appointment, and qualification of legal assistance, thus enabling the accused to choose qualified counsel to protect his or her rights under the Statute. The accused will also be entitled to compensation for wrongful arrest or detention. This is the best international system for the defense that has been built so far, and is more transparent and advanced than many national justice systems.

The State of the accused has a right to challenge jurisdiction of the Court before an impartial chamber and to participate fully in the proceedings to assist the accused. Not only the States parties but also the non-party States are entitled to such rights of challenges and full participation on equal footing. This is a gift to non-party States and is rare in treaty making. States can claim such privileges without assuming the necessary corresponding obligations as parties to the treaty. The principle that the framers intended to establish was transparency and openness of the proceedings to all interested parties. It was believed that no assistance to the accused should be denied.

Any courts and tribunals with lesser standards would thus be a regression of what has so far been achieved. The White House's November order to try suspected terrorists in military tribunals with standards inconsistent with the ICC, the 1949 Geneva Conventions, and the 1977 Geneva Protocols must therefore be treated with serious apprehension and regrets.¹⁷

17. The November order included the following features: to operate largely in secret, a two-thirds majority of presiding officers sentencing defendants to death, decision being final with no appeal, and assigned legal assistance but not subject to the choice of the defendant. See Press Release, Office of the Press Secretary of the United States, President Issues Military Order (Nov. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

VI. AN ALTERNATIVE FORUM FOR THE PROTECTION OF PEACEKEEPERS

Many of the seventy or so countries actively participating in U.N. peacekeeping missions will have an added advantage to becoming a party to the ICC. It cannot be excluded that soldiers taking part in peacekeeping might fall into the hands of insurgent or rebel groups during such missions. How they can be better protected under such circumstance is therefore an important question.

These soldiers are protected by immunities in the host country of the mission on the basis of the U.N. status-of-forces agreements. The government that sent the troops legally retains criminal jurisdiction over their soldiers and they are subject to the jurisdiction of the host government. But the status-of-forces agreements are inoperative if they are captured by the opposing groups and, still worse, accused of war crimes, justified or not. It would be almost impossible to extradite them to the home country when they are beyond the reach of the host government. At best, they may be tried by a rebel court, where their civil and human rights may be ignored. The States concerned would be unable to assist the soldiers in the proceedings either. While it might be possible to have their soldiers extradited to a third country for trial, it is extremely difficult to negotiate such a deal, as the protracted *Lockerbie* case demonstrated. The ICC being an independent international tribunal might be an acceptable alternative to a third State and may serve as a way out for such groups in such situations.

Before the ICC, their soldiers would have, as already mentioned, legal protections as extensive as those provided in many of the constitutions and the government of the accused would have extensive rights to challenge the admissibility of the case and to assist the accused in the proceedings.

In addition, the final decision whether to proceed before the ICC ultimately rests with the government concerned. Should it decide to do so, it could request the host country to refer the case to the ICC. The host country could not make a referral to the ICC without the government's consent, because the ICC is prohibited from seeking the surrender of any servicemen from a U.N. or NATO mission unless the national govern-

ment has given its permission. It could also request that the Security Council make a referral to the ICC.

In sum, the coming into operation of the ICC would provide an alternative means of protection to peacekeepers, irrespective of their nationality and whether their government is a party to the ICC. The utilization of this alternative would be left to the government concerned to decide. They do not have to use it if they have other alternatives. It is nevertheless a reserve.

On the assumption that the ICC would arbitrarily arrest and prosecute American soldiers without U.S. consent, many senators and representatives in the U.S. Congress believed that measures should be taken to discourage other nations from joining the Rome treaty and that U.S. government agencies should be prevented from cooperating with the ICC. Draft bills to that effect were introduced and adopted. At the last minute, the joint conference agreed to a much watered-down version limiting its effect to one year. As pointed out above, in the unfortunate event that peacekeepers are captured by rebel groups, it is infinitely better for them to be transferred to the ICC than for them to be tried by an insurgent or rebel group. Since the United States participates in many peacekeeping missions around the world, it is only prudent that access to this alternative forum should be kept open. In prohibiting U.S. agencies from cooperating with the ICC, such access is therefore foreclosed. It therefore makes no sense for the government to cut off a recourse that the peacekeeping soldiers might need for their protection.

VII. A TOOL FOR THE SECURITY COUNCIL

The Security Council is one of the entities empowered to refer to the Court a "situation"¹⁸ in which one or more of the crimes under the Statute appears to have been committed. The intention was to remove the need for the creation of *ad hoc* tribunals in the future, as had been done in the case of both the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda

18. The word "situation" was chosen in stead of specific "case" or "matter" in order to preserve the court's independence in the exercise of its jurisdiction and to leave the bringing of individual prosecutions to the discretion of the Court based on investigations carried out pursuant to the referral. For legislative history of this issue, see Lionel Yee, *The International Criminal Court and the Security Council: Article 13(b) and 16*, in INTERNATIONAL CRIMINAL COURT, *supra* note 2, at 143-52.

("ICTR"). But since the referral is tied to the enforcement power of the Security Council under Chapter VII of the U.N. Charter which binds all members of the Organization, the Security Council can therefore use this right of referral as an instrument for managing crisis as it did for the former Yugoslavia and Rwanda.

Thus the Court can serve the functions of any future *ad hoc* tribunals that the Security Council may decide to establish, and the Court will be able to act immediately in such circumstances. In the case of the Former Yugoslavia and Rwanda, large expenditures and several years were needed to create the necessary institutional framework for those *ad hoc* tribunals. Once the ICC exists, the Security Council may simply refer the matter to the Court instead of creating an *ad hoc* tribunal. Not only will resources be saved, but the Security Council's decision can also be given immediate effect. For purposes of investigation and preserving evidence, such timing is extremely important.

Questions may be raised as to whether the non-retroactivity provisions of the Statute that limit the Court's jurisdiction to crimes committed after the entry into force of the Statute should also apply to referrals of the Security Council. The legislative history shows that such provisions were included for strong political reasons: *inter alia*, to avoid creating difficulties for many States that in the recent past "had to resort to amnesties or similar solutions to achieve national reconciliation."¹⁹ Criminal responsibility under the Statute might unravel the status quo already reached. Such States might therefore be reluctant to accept the Statute if the past would not be excluded. Recognizing that the court cannot have jurisdiction in cases submitted by the prosecutor or referred to it from a State party unless States are willing to become parties in the first place, the principle of non-retroactivity was therefore necessary.

The referral by the Security Council is however something very different. The Council would have to make decisions under Chapter VII of the U.N. Charter as an enforcement action for the maintenance of international peace and security. The creation of the ICTY and ICTR was based on this decision and the Appeals Chamber of the ICTY has confirmed that the Council is

19. Per Saland, *International Criminal Law Principles*, in *INTERNATIONAL CRIMINAL COURT*, *supra* note 2, at 196. For the negotiating history, see *id.* at 196-97.

empowered and competent to set up tribunals for such purposes.²⁰ The referral to the ICC in such cases would confer upon the Court the competence to act as an *ad hoc* tribunal. As such, the effect of the Security Council's decision would be binding on all member States, whether or not they are parties to the Statute. Consequently, the principle of non-retroactivity is irrelevant for the purpose of maintenance of international peace and security. It should therefore not apply.

This argument is supported by another provision in the Statute that allows the Security Council to request, under article 16, the court not to commence or proceed with an investigation or prosecution when the Council takes an affirmative decision in that regard. All these provisions are linked and intended to reflect the political functions of the Security Council. A strong argument can therefore be made that the non-retroactivity provisions should not apply in the case of a Security Council referral. Ultimately, the Court itself should decide how it should handle such a situation.

Thousands of prisoners with different nationalities have been captured both inside and outside Afghanistan by the U.S. led coalition against the Taliban and Al Qaeda group. Presumably, some of them might be charged with war crimes or crimes against humanity. In view of the "international characteristics" that would be involved, it would seem best for the ICC to exercise jurisdiction over such cases. Such trials by the ICC would demonstrate the spirit of coalition, give international legitimacy, and avoid criticism about below-the-standards military tribunals. It would also provide a dossier for the new court that is expected to come into operation soon. Legally speaking, any member of the coalition, including the United Kingdom, that are also parties to the Statute, or the Security Council could make a referral to the ICC. But for various political considerations, none of such options would seem to be possible. The hostile attitude of the U.S. Congress towards the ICC is likely to discourage the coalition members from doing so. A referral from the Security

20. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case confirmed the validity of the creation by the Security Council of the Tribunal pursuant to its powers under Chapter VII. For report of the case, see 35 I.L.M. 32 (1996), paras. 28-48 and 36 I.L.M. 908 (1997), paras. 1-12.

Council, which is subject to veto, might also be difficult in view of the likely U.S. position in the Council.

VIII. *A TOOL TO DEAL WITH WARLORDS AND REBELS*

The Rome Statute establishes a code of conduct for all, irrespective of the legal status of the actor, may it be the government in power, warlords, dictators, rebels, or any other military or paramilitary forces. Genocide and crimes against humanity would apply to any prohibited acts defined in the Statute, whether committed in peacetime or during armed conflict. Serious violations of the laws and customs of armed conflict would also apply to protracted fighting between governmental authorities and organized armed groups, or "*between such groups.*" Internal situations involving serious crimes committed by persons or groups not under a government's *de facto* control can thus also be referred to the Court by the State concerned. Such a referral would enable the ICC to investigate and prosecute, placing such persons or groups directly under the scrutiny and supervision of an international body that may exert pressure and impose sanctions. Thus, in certain circumstances and in the absence of alternatives, the government concerned may choose to rely on the ICC to handle an internal situation as a tool for crisis management. It could help the government to combat abuses and serious violations by warlords and military groups within the State itself. The fact is that most atrocities and abuses during recent decades have been internal amongst various warring factions and groups, and thus the ICC might be employed to play a role. As a powerful international instrument for investigation, prosecution, trial, and punishment, the Court can bring international pressure and condemnation to bear on would-be perpetrators and thus serve to constrain their behavior.

CONCLUSION

The creation of the International Criminal Tribunal for the former Yugoslavia by the U.N. Security Council has served a political goal to constrain the opposing parties forcing them to reconciliation. But that creation has inspired the setting up of a series of courts and tribunals and prompted the investigation and prosecution of criminal acts at both the national and international level. This trend should indeed be welcomed. The no-

tion of individual criminal responsibility is now well established and can also be enforced under specific conditions. No doubt this must be a landmark achievement in recent history.

Encouraging signs of universal jurisdiction are also emerging and should be welcomed.

Criminal prosecution through courts and tribunals will not and cannot suit all situations, bring justice to all, or, still less, end all conflicts. Accountability and criminal responsibility are important and necessary. But the tribunals cannot deal adequately when massive cases are involved. Massive trials require large resources and are time-consuming, particularly when there are large numbers of defendants. Rwanda is a chilling demonstration. Eight years after the genocide and six years after prosecutions at both national and international level, more than ninety-five percent of the prisoners are still waiting for trials in far overcrowded detention centers. At the current rate, it is likely to take a century to complete the trials.²¹ More prisoners have died in jail than are tried. Criminal management together with other measures to expedite the process seems to be desperately needed.

In recent years, various measures of accountability have been employed for managing situations involving past serious violations of human rights. These measures include acknowledging and publicizing responsibility through truth commissions, dismissing or suspending officials connected with the abuses of the previous regimes, seizure of property and assets of the perpetrators, blocking financial sources of rogue organizations, and compensation for victims and their families. All these are intended to demonstrate that a sense of sanctions has been applied to misdeeds, though such sanctions may not be sufficient in all cases. The parties concerned must work out by themselves the best solution to suit their need. The outsiders are however encouraged to suggest new methods to help them to take such a course.

While it is necessary to ensure effective criminal investigation and prosecution to counter serious human rights violations,

21. See Peter Uvin, *Difficult Choices in the New Post-Conflict Agenda: The International Community in Rwanda after the Genocide*, THIRD WORD QUARTERLY, Apr. 2001, at 177-89; Ian Martin, *Hard Choices after Genocide: Human Rights and Political Failures in Rwanda*, in JONATHAN MOORE, *HARD CHOICES, MORAL DILEMMAS IN HUMANITARIAN INTERVENTION* 157-76 (1998).

we need also to develop additional ways and means for addressing the root causes that led to violations and impunity. Justice is important but justice alone cannot bring peace. We need both justice and peace.