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*THE INTERNATIONAL CENTRE FOR CRIMINAL LAW
REFORM AND CRIMINAL JUSTICE POLICY*

The Changing Face of International Criminal Law

Selected Papers

June 2001



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March 2002

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The Changing Face of International Criminal Law: *Selected Papers*

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In addition to the authors who took time out of their busy schedules to write submissions for this book, we would like to acknowledge the assistance of the rapporteurs Ms. Nicola Mahaffey, Mr. Guy Gagnier and Prof. Mark Carter, as well as that of the conference's general rapporteur, Mr. David Winkler, who also kindly submitted notes as an *aide-mémoire* to some of the authors for this publication.

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PREFACE

Since 1991 the International Centre for Criminal Law Reform and Criminal Justice Policy has had a continuing commitment to promote the rule of law and respect for human rights in the reform of criminal law and criminal justice policy. As such, it has supported national, regional and international efforts to strengthen good governance in the administration of criminal justice. It supports these efforts through policy analysis, research, information exchange and the provision of technical assistance. In doing so, the *International Centre's* work is guided by international human rights standards and principles, Canadian foreign policy objectives and the United Nations Crime Prevention and Criminal Justice Programme priorities.

During the past decade the *International Centre* developed and launched several important programmes of work including: the China-Canada criminal law reform program, efforts to combat transnational financial crime and organized crime, corrections reform, a project on the rights of the child in Thailand, the China-Canada legal aid development project, assisting with an international firearms study, projects focusing on the elimination of violence against women and an ongoing project promoting the establishment of a permanent International Criminal Court. None of this would have been possible without the successful partnerships the *International Centre* has forged with the Department of Justice Canada, the Department of the Solicitor General Canada, the Correctional Service of Canada, the Department of Foreign Affairs and International Trade Canada, the Ministry of the Attorney General of British Columbia, the University of British Columbia, Simon Fraser University and the International Society for the Reform of Criminal Law.

The Centre recognizes, now more than ever, the importance of international cooperation to the success of any justice reform initiatives. Recognizing that we now live in a global community and that the impact of crime transcends all borders, the *International Centre* decided to mark its 10th anniversary with a conference in June 2001 focussing on "The Changing Face of International Criminal Law". The event was a great success. The Minister of Justice, the Honourable Anne McLellan, in her welcoming address, expressed Canada's continuing support for the *International Centre* and reinforced the importance of its role as an independent UN institute and its notable contribution to criminal law and criminal justice policy reform nationally and internationally over the past decade.

The conference plenary sessions focused on: Globalization, Human Security and the Role of International Criminal Law; The Emergence of the International Criminal Court, and Canada's Role in the Implementation of the Rome Statute. Workshops focused on: The United Nations Convention against Transnational Organized Crime and its Protocols; Combating Impunity; The Convention Against Torture; Substantive Issues in the Development of the Rome Statute, and Civil Society, NGO'S and the International Criminal Court.

What follows is the collection of papers presented at the conference. On behalf of the Board of Directors and all of the members of the *International Centre*, we would like to thank the presenters for their distinguished contributions and for so generously sharing their experience and insights with us.

Having achieved great success in its first ten years, the *International Centre*, through its ongoing collaborative work and partnerships, looks forward to an even more successful decade ahead.

INTRODUCTION

GOOD CRIMINAL JUSTICE: A GLOBAL COMMODITY

REMARKS OF THE RIGHT HONOURABLE BEVERLEY McLACHLIN, P.C.
CHIEF JUSTICE OF CANADA

I would like to share with you some thoughts on justice – as you might expect of a Chief Justice. However, my focus, like that of this conference, is trained on the world scene and on the criminal law. Hence my title, “Good Criminal Justice: A Global Commodity.”

My theme may be simply stated: Good justice systems, including good criminal justice, are essential to human, social and economic development everywhere in the world, and Canada has an important role to play in their enhancement.

My conversion to the cause of international justice came to me rather late. Certainly, I had participated in international legal conferences over my eighteen years on the bench before becoming Chief Justice. Certainly, I believed that justice everywhere was important and that we in Canada owe the world a duty to advance it. But not until last year, when as Chief Justice I found myself meeting with other Chief Justices here and abroad did I realize the full significance of justice as a global commodity and how much other nations look to Canada in their quest to achieve it. This is true for contract law, tort law and administrative law. But nowhere is it more true than for the criminal law.

Since becoming Chief Justice in January 2000 I have visited India, Morocco, China, Korea, Singapore and Israel. We have also welcomed to Ottawa the Chief Justices of Australia, India, New Zealand, South Africa, Hong Kong and France, and hosted study groups of judges from China, Russia, Croatia, Lithuania and India. Along the way jurists and lawyers from a host of countries around the world have visited our Court and other Canadian courts in order to learn more about our judicial system.

All these people stressed two things. First, they were determined to improve the legal and judicial systems in their own countries including their criminal law systems. Second, they admired the Canadian system of justice and looked to us for ideas and assistance. Permit me to comment briefly on each of these points. First, why is the world so interested in improving the law in general, and criminal law in particular? Second, what are the hallmarks of good criminal justice and how can we help achieve it?

To begin, why are countries around the world more and more interested in improving their legal systems including their criminal law?

The answers can be grouped under a single proposition: Clichéd as it may sound, the world is simply more conscious of the need for justice today than ever before in human history. This is not to say that the world is more *just* than ever before; the dawn of the 21st century has more than its fair share of corrupt regimes, persecuting majorities, and injustices at the hands of those who wield arbitrary power. It is only to say that throughout the world, more than in previous times, one finds a preoccupation with the gulf between the reality of injustice and ideal of justice.

The reasons for this are varied. One is the realization, in the aftermath of World War II and the Holocaust, that democracy must be grounded in a profound respect for human rights and justice. The holocaust taught us many lessons. The most basic and most intractable is that each human being possesses an innate, inviolable human dignity that must not be violated. We express this human dignity in legal language – the language of rights – human rights. Proclaimed in 1950 in the Universal Declaration of Human Rights, this new legal order has taken root around the world in the ensuing half century.

The most basic human rights are those guaranteed by the criminal law – the right to life; to liberty; to freedom from arbitrary detention, abuse and torture; the right not to be detained without just cause; and the right, upon being detained, to due process. Rights, that had they been in place and in force, would have made impossible the atrocities of the holocaust.

These basic human rights depend on the law -above all the criminal law. We should not therefore be surprised that as the law embraces these rights, it becomes increasingly concerned with the criminal law.

A second factor in the growing global legal culture is perhaps less noble, but equally important. Scholars, bankers and governments have discovered that good justice is good business. Economists have turned their minds to the pre-conditions of economic growth and found that one of the key factors is good justice.

Harvard economist Robert Borro argues that the key contributions a government can make to economic growth are: providing and encouraging secondary and post-secondary education; providing and encouraging effective health care; promoting birth control; avoiding non-productive government expenditures; keeping inflation below 10% per annum; and last but not least, enforcing the rule of law.

The rule of law and an effective justice system are necessary to determine commercial responsibility and resolve disputes. But more fundamentally, they are essential to a safe, orderly society, in which people are free to create and produce. This applies to the criminal law as much as to commercial law. Chaos is

the enemy of economic prosperity; the rule of law its friend. So countries seeking economic prosperity increasingly seek to establish just systems of law.

A third factor in the current global interest in the law is that international aggression and security are increasingly seen in legal terms. Resolving wars and their tragic aftermaths are no longer only the business of the powers directly implicated. Increasingly we recognize that any war inflicts a global wound, and that we can profitably employ the processes of the law, which have for centuries worked domestically, to heal that wound. So we see developments hitherto unthought of – the war crimes tribunals of the Hague and Rwanda; the Pinochet extradition proceedings; the international criminal court.

In summary, I think the case can be made that the world, if still unjust, is more concerned with improving justice – including criminal justice – than ever before. This is so for three reasons, reasons that are likely to remain catalytic: a conception of democracy founded not only on majority rule but on human rights; the recognition that the law is tied to economic progress; and the recognition that world peace is best attained and preserved through the law.

This brings me to my second query – what are the building blocks of effective justice systems? What do the countries that lack good justice systems need to do to achieve them? What do we need to do on the international level to make global justice a reality? The answer it seems to me is that they must focus on two simple things – good laws and good procedures.

Good laws respect equality, freedom and basic human rights. They promote opportunity – not just for a few but for all. They discourage discrimination. They enable people to realize their full potential. This produces individual, social and economic benefits. In addition to these content-related attributes, good laws possess certain formal attributes. They are clear. They are accessible. They strike a healthy balance between stability and change to meet new needs. In these ways good laws allow people to plan and invest in their own and their nation's potential.

Good procedures are as important as good laws. Good procedures are concerned not with the content of the law, but with the process of the law – in short with the rule of law. No matter how good the content of laws, unless there is a transparent means of enforcing them independent of influence of private powers and government, they will be undermined. The law will no longer govern; individual fiat and arbitrary power will take its place. The rule of law is more than rules; it requires an independent legal profession to bring violations and disputes to court and independent judges to try the cases they bring forward.

The task of achieving good procedures may be even more difficult than that of enacting good law. People from emerging democracies may find it difficult to understand what judicial independence means, much less how to put it in place. The concept of judges deciding cases against the ruling party strikes many as

impossible. The idea that a judge would not at least consult the minister involved on a serious state matter may seem even stranger. Those in power equally may have difficulty understanding why they should not demote a judge who rules against the government or send him or her to some remote backwater, or why they should not issue policy directives to the courts.

While we have lived with the concept of judicial independence as the bedrock of the rule of law for a very long time, the same is not true for much of the world, where people have a hard time understanding judicial independence, much less implementing it.

Old habits of corruption may prove hard to break and confidence in judicial impartiality hard to instill in a doubting population. A country may set up a judicial system that on paper seems independent. It may tell people that they can trust the judges. Yet the people, after filing their writs at the front door of the courthouse, may still slip round to the back door for a private word, or a gift, for the judge. These countries find themselves caught in a vicious circle. Without confidence in the judicial system, more transparent legal processes have difficulty getting off the ground. And without transparent legal processes, how can they hope to build confidence in the judicial system? The western observer is struck anew by the importance of what we take for granted – public confidence in the legal process. Only when it is absent does one realize how vital it is to the rule of law and how difficult it is to achieve.

Another problem is to establish an educated, legally trained judiciary. Consider the situation of China. Three years ago China amended its constitution to expressly endorse the rule of law. During the last decade, China has embarked on an ever-accelerating program to revamp its courts and improve the quality of its judges. Thousands have come to North America and Europe to study western legal practices. Yet in a country of 1.3 billion people, the effort inevitably falls far short of what is required. On our visit to China last June, Premier Zhu Rongji asked me what cities we were visiting. “Beijing, Shanghai, Senzhen and Hong Kong,” I replied. “Ah,” he said, “You will see the best.” In the countryside, he went on, things were very different. “We have 180,000 judges in China, and only 10% of the them are legally trained,” he advised. “Judicial training is a number one priority.”

Everywhere in the world, people are recognizing that the rule of law and justice is impossible without legally trained judges. Consequently, training judges has become something of an international industry in which Canada plays an important part. Private governments and international organizations like the World Bank are funding programs to train judges in Europe, Asia and Africa. Through these programs public agencies, law firms and judges themselves are at work in a global effort to upgrade the qualifications of judges.

Finally, we must face the task of putting in place new international rules and tribunals of justice. Permit me to commend the International Centre for Criminal Law Reform and Justice Policy for the work it is doing to further these objectives. In the course of the conference, you will be discussing the emergence of the international criminal court, the United Nations Convention against Transnational Organized Crime, the U.N. Convention against Torture and the Rome Statute.

You will also be discussing how the criminal law can function to make the world of the 21st century more peaceful and prosperous. The challenge is daunting. But do not let that deter you. Injustice does persist. But as never before, the world sees that injustice, and having seen it, confronts it and resolves to remedy it. Your deliberations are an important part of that process. Through them, you will indeed be contributing to the development of a new order of international criminal law.

Bonne chance.

**GLOBALIZATION, HUMAN
SECURITY, AND THE ROLE OF
INTERNATIONAL CRIMINAL LAW**

GLOBALIZATION, HUMAN SECURITY, AND THE ROLE OF INTERNATIONAL CRIMINAL LAW

IRWIN COTLER, O.C., M.P.*

I am delighted to be here today and to participate in the common cause which brings us together – the struggle for human rights and human security – and the role of international humanitarian law in underpinning that struggle in an increasingly globalizing universe; and where this struggle for human rights and human security has been, in the most profound existential sense of the word, the struggle for ourselves; because in what we say – or more importantly in what we do – we make a statement about ourselves as a people, we make a statement about ourselves as people.

For we meet at a critical historical juncture in this struggle for human rights and human security – a moment of remembrance and reminder – of witness and of warning. For we meet on the eve of the 55th anniversary of the Nuremburg judgments and the Nuremburg principles, which have emerged as metaphor and message – source and inspiration – of what has come to be known as international humanitarian law in general, and international criminal law in particular; for the Nuremburg judgments enunciated, *inter alia*, the grundnorm Nuremburg principle that individuals, and not just abstract entities like states, are personally and criminally liable for the commission of international crimes – that these crimes are crimes against humankind itself. Those who commit them are *hostis humanis generis* – the enemies of humankind; and the rights they violated are each and all of the rights guaranteed in the *Universal Declaration of Human Rights*.

This conference is also remembrance and reminder, witness and warning of another Nuremburg – the *double entendre* of Nuremburg – the Nuremburg of “jack boots” as well as “judgements;” in a word, the Nuremburg of racism rather than of law – or of racism institutionalized as law. This Nuremburg of *Zieg Heil* – of hate – came full circle recently when my young son, knowing of my interest in “Nuremburg” – and reading from Carol Matas’ children’s book on the Holocaust

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titled “Daniel’s Story” – pointed to the first reference in the book to Nuremburg: “Look Daddy,” he said, “it mentions Nuremburg.” Yes, it mentioned Nuremburg – but it was the Nuremburg “Race Laws” – the Nuremburg of *Zieg Heil* – not of the Nuremburg Principles.

As it happens, this “*double entendre*” of Nuremburg – of jackboots and judgments – of Nuremburg Race Laws and the Nuremburg Principles – finds parallel expression in the contemporary dialectics of the human rights revolution and counter-revolution; in the dialectics of international human rights law and the criminal violations of human rights; and in the present Dickensian moment of “the best of times and the worst of times.” Where, on the one hand, we are witnessing a literal explosion of human rights, where human rights has emerged as the new secular religion of our time – as the “common language of humanity,” as the *Vienna Declaration of Human Rights* put it; where human security has emerged as the organizing idiom of Canadian foreign policy, and international humanitarian and criminal law has emerged as a central motif in the protection of human security; where criminal violations of human rights constitute a standing assault on international peace and security, and where the protection of peace and security is anchored in international humanitarian law; and where things thought impossible just ten years ago when this International Centre for Criminal Law Reform and Criminal Justice Policy was founded – the withering away of the Soviet Union (if I can use a Marxist metaphor), the dismantling of apartheid, the march of democracy from Central Asia to Central America – have not only happened but have already been forgotten – or are in danger of being forgotten.

Moreover, this revolution of human rights has itself been anchored in, and inspired by, the revolution in international law in general, and the revolution in international humanitarian and criminal law in particular, including: the internationalization of human rights and the humanization of international law; the protection of civilians in armed conflict and the criminalization of atrocities against civilians; and the emergence of the individual as subject and not object of human rights law.

Indeed, more has happened in this revolution in international human rights and humanitarian law in the last five years, than happened in the previous fifty, including the dramatic jurisprudence of the International Criminal Tribunals in the Former Yugoslavia and Rwanda; where, as in the *Akayesu* case, for example, the *Genocide Convention* was invoked for the first time in fifty years by an International Tribunal to sanction racist gender violence in Rwanda; where, for the first time in fifty years, the Nuremburg Principle of non-immunity for international crimes committed by Heads of State was invoked and applied in the *Pinochet* case; where for the first time in fifty years, the first post-Nuremburg indictment of a former Head of State was issued in the *Milosevic* case; where for the first time in fifty years the U.N. Security Council adopted “human security”

resolutions protective of women and children in armed conflict; where the first ever optional protocol for the protection of children in armed conflict has been adopted; and where – in the most dramatic initiative in international criminal law in the last fifty years – an International Diplomatic Conference in Rome adopted a Statute for the establishment of an International Criminal Court.

I would hope that within 18 months we will witness one of the more compelling and dramatic human rights developments in the post-World War II era – namely, the coming into effect of the *Treaty to Establish an International Criminal Court* so as to bring the enemies of humankind – *hostes humanis generis* – to justice.

Nor should it be forgotten that this revolution in international human rights and humanitarian law has been anchored in, and inspired by a revolution in trans-national civil society – in the non-governmental organizations who have underpinned this human rights movement; and by a global Internet which has not only revolutionized the access to information, but has revolutionized the mobilization of information – and thereby the “mobilization of shame against the human rights violators,” as John Humphrey put it.

But I suspect that as I have been giving you this snapshot of human rights – of the human rights revolution – of the revolution in human rights law – many, if not most amongst you, those who are the bearers of the seismographs of history, may have been asking yourselves, “Where does this guy come from? Is this what they teach in the ivory towers of academe? Has he begun to imbibe the platitudes of politicians? Does he not know what is happening to real people – on the ground? Does he not know what is happening to threatened communities, to vilified minorities, to refugees, to the victims of racism and the like?”

Indeed, the homeless of America and Europe, the refugees of humanity, the hungry of Africa, the imprisoned of Asia and the Middle East, the women of the world – victims of a global gender apartheid – the brutalized child – each and every one of them can be forgiven if they think that this human rights revolution has somehow passed them by. While the ethnic cleansing in the Balkans, the displaced people of East Timor, the horror of the Democratic Republic of the Congo, the agony of Rwanda, the assaulted children of Sierra Leone, the killing fields of Sudan – one can go on – are message and metaphor of the abandonment of, if not the assault upon, human rights in our time.

It is not surprising then that this criminal assault on human rights invites the not uncynical rejoinder that international humanitarian and criminal law is -to paraphrase Jeremy Bentham – so much “nonsense on stilts” – of rights without writs, of rhetoric without remedy, of semantics without sanctions. Moreover, this Human Rights Revolution and Counter-Revolution – this struggle for human security amidst human insecurity – is taking place against a backdrop of revolutionary dynamics that impact upon – and must be factored into – a Human

Security Foreign Policy in general, and the role of International Humanitarian and Criminal Law and the protection of human security in particular.

First, there is the changing nature of armed conflict characterized by a growing proportion of wars within rather than between states, so that 90% of wars are now matters of internal rather than international armed conflict.

Second, is the targeting of civilians in armed conflict so that 80% of the victims in armed conflict are now civilian as contrasted with World War I where 5% of casualties were civilian.

Third, is the advent of globalization – of the globalization of media and markets, of justice and injustice, of technology and trade – including an international flow of trade, capital, information and people that has delivered unprecedented wealth and opportunity and created millions of jobs. But the transnational underside of globalization has also triggered a network of *threats* to human security including transnational terrorism; transnational networking in Hate – such as Hate on Internet; Organized Crime, money laundering and the global financing of international criminality; trafficking in people, weapons and narcotics; the transnational digital divide and the growing gap between rich and poor; transnational corruption and bribery; corporate complicity in international atrocities; and, the transnational displacements of people and the assault on the integrity of aboriginal peoples. Human Security in this context means, in a word, freedom from fear – freedom from these pervasive threats to people’s *rights, safety, or lives*.

Fourth, is the transformation of International Human Rights Law in general – and International Humanitarian and Criminal Law in particular – from a State-oriented to a People-oriented dimension – having regard to both the *Struggle Against Impunity* respecting the perpetrators – and the *Duty to Protect* respecting the victims.

And so, on the eve of the 55th anniversary of the Nuremberg principles – of the inspiration for, and the founding of, international criminal law, we must ask ourselves two questions: “What have we learned?” and “What can we do?”

Accordingly, may I now, in the second part of my remarks, summarize the existential lessons of the *double entendre* of Nuremberg Racism and Nuremberg Principles – of the agony and the hope of the *Genocide Convention* and the *Universal Declaration of Human Rights* – of criminal assaults on human rights, and the protective capacity of international criminal law – the lessons to be learned and the action to be taken. For as Kierkegaard put it, “Life must be lived forwards, but it can only be understood backwards.” Herewith some of the existential lessons, the understanding of history, “Nuremberg” and its legacy fifty years later.

LESSON I: THE DANGERS OF ASSAULTIVE SPEECH – THE TEACHING OF CONTEMPT AND THE DEMONIZING OF THE OTHER

One of the enduring lessons of Nazism – the ultimate metaphor for radical evil – is that Nazism almost succeeded not only because of the industry of death and technology of terror, but because of the ideology – the pathology – of hate. Indeed, it is this teaching of contempt, this demonizing of the other, this standing assault on human security, this is where it all begins.

As the Supreme Court of Canada put it so well in validating and upholding the constitutionality of anti-hate legislation in Canada, “the Holocaust did not begin in the gas chambers. It began with words.” These, as the Court put it, “are the chilling facts of history -the catastrophic effects of racism.”

Fifty years later, these lessons not only remain unlearned, but the tragedy is being repeated. For we have become increasingly witness of late – from Central Asia to Central America – to a growing trafficking in hate – to a murderous teaching of contempt – to a demonizing of “the other,” – and which in Burundi, Bosnia and Rwanda included state-orchestrated incitement to ethnic cleansing and genocide.

What is needed, therefore, is a culture of respect in place of a culture of contempt – a culture of human rights in place of a culture of hate – inspired by, and anchored in, a set of foundational principles as set forth in comparative and international human rights jurisprudence in general, and domesticated in decisions of the Supreme Court of Canada in particular, including:

- Respect for the inherent dignity and worth of the human person;
- Respect for the equal dignity and worth of all persons;
- Respect for the underlying values of a free and democratic society targeted by “assaultive” speech;
- Respect for the right of minorities to protection against group vilifying speech;
- Recognition of the substantial harm – as the Supreme Court put it – caused to the individual and group targets of hate speech, as well as to society as a whole;
- Fidelity to our international treaties – such as the *International Convention on Elimination of All Forms of Racial Discrimination* – which have removed racist hate speech from the ambit of protected speech;
- Respect for our multicultural heritage and the fragility of our multicultural democracy; and,
- The need for an ethic and ethos of tolerance and diversity that respects the vision and voice of “the other.”

LESSON 2: CRIMES OF INDIFFERENCE, CONSPIRACIES OF SILENCE – THE DUTY TO PROTECT

The Armenian killings fields, the Holocaust of European Jewry, and the genocides from Cambodia to Rwanda, succeeded not only because of the culture of hate and machinery of death, but because of crimes of indifference – because of conspiracies of silence. Indeed, we have been witness to an appalling indifference in our day – in the 1990s – to the unthinkable – ethnic cleansing – and the unspeakable – genocide; and worst of all, to the preventable genocide in Rwanda. No one can say that we did not know.

It is our responsibility, then, to break down the walls of indifference, to shatter the conspiracies of silence wherever they may be. As Nobel Peace laureate, Elie Wiesel put it “neutrality always means coming down on the side of the victimizer – never on the side of the victim;” and as Professor Yehuda Bauer reminded us in last year’s Stockholm International Forum on the Holocaust: “Never be a perpetrator. Never allow there to be victims. And never, never allow yourself to be a bystander – to be indifferent.”

In brief, and we must adhere to this ourselves if we are to convey this to others: neutrality in the face of evil – whether of individuals or states – is acquiescence in, if not complicity with, evil itself. It is not only abandonment of the victim; it is encouraging the victimizer. As Albert Camus put it: “If you keep on excusing, you eventually give your blessing to the slave camp, to cowardly force, to organizing executions, to the cynicism of great political masters; you eventually had over your brothers.”

And so as the killing fields in the Congo continue unabated; as the scorched earth policy in the Sudan triggers a Genocide warning from the Committee of Conscience; as more trade union workers are killed in Colombia than any other place in the world; as we witness the most persistent and pervasive assault on human rights in China since Tiennamen Square; as Mideast violence escalates amidst a cacophony of hatred and terrorism – what is needed – as a matter of principle and policy is a political leadership – a political will – that is prepared to stand up and be counted – to give expression and effect to the principles and policies of human security –including, a people-centred, rather than state-centred foreign policy; a calibrated sanctions policy targeting the human rights violators and not innocent civilians; the protection of civilians in armed conflict; the enforcement of international criminal law; and the provision of humanitarian assistance.

Indeed, I was struck in the last week alone of the *cri de coeur* from the witness testimony before our Commons Sub-Committee on Human Rights and International Trade where representatives of the Invisible People’s Movement of Colombia critiqued what they regarded as a policy of neutrality in the face of the killing in Colombia; where NGOs indicted crimes of indifference and corporate

complicity in the face of the genocide in Sudan; where human rights activists lamented increased Canadian trade while violations of human rights in China intensified; and so on. The words of Edmund Burke resound hauntingly, “the surest way to ensure that evil will triumph in the world is for enough good people to do nothing.”

LESSON 3: THE VULNERABILITY OF THE POWERLESS, THE POWERLESSNESS OF THE VULNERABLE – THE RIGHTS OF MINORITIES.

The third lesson is that the ethnic cleansing and genocides of the twentieth century succeeded not only because of the vulnerability of the powerless, but because of the powerlessness of the vulnerable. Indeed, this vulnerability of the powerless is not unrelated to the powerlessness – and persecution – of the vulnerable on the grounds of their “identity” – or the nullification or exclusion of their rights on the basis of some prohibited form of discrimination, be it race, religion, ethnicity, national origin, or the like.

It is not surprising, that the triage of Nazi racial hygiene -, the Sterilization laws, the Nuremberg laws, the Euthanasia laws – targeted those “whose lives were not worth living;” and it is not unrevealing, as Professor Henry Friedlander reminds us in his recent work on “The Origins of Genocide,” that the first group targeted for killing were the Jewish disabled, the whole anchored in the science of death, the medicalization of ethnic cleansing, the sanitizing even of the vocabulary of discrimination and destruction.

And so it is our responsibility as political leaders, as NGOs, as experts, as *citoyens du monde*, to give voice to the voiceless as we seek to empower the powerless – be they the disabled, the poor, the gay and lesbian, the refugee, the targets of racism – whoever they may be; while we seek to combat, if not eliminate, disparities in access to economic and social rights, so as to combat if not eliminate these root causes of prejudice and discrimination.

And if in confronting injustice, you ask: “Where are we to begin? Against what injustice? On behalf of what cause, on behalf of what victim? How does one rank human suffering?” I want to suggest to you that the problem is not which cause of human rights we are serving, but whether we are serving the cause of human rights at all; not which victim we are defending, but whether we are indifferent to the plight of the victim, whoever he or she may be; not whether a claim is being asserted by a particular minority, but why must that minority always stand alone. Why is it always “their” problem, and not “our” responsibility?

For if I have learned anything from my work with human rights monitors and political prisoners, it is this: We are each wherever we are, the guarantors of each other’s destiny; and it made no difference whether I was with political pris-

oners in Moscow, or dissidents in Syria, or Ethiopian Jews in Ethiopia, or blacks in South Africa, or Aboriginal peoples, or victims of discrimination, in Canada. Everywhere the code words were the same.

LESSON 4: PROTECTING HUMAN SECURITY: CONFLICT PREVENTION, CONFLICT RESOLUTION AND PEACEBUILDING

It is as trite as it is profound that the best form of peace building – the best protection for human security – is the prevention of conflict to begin with. Yet, as the Carnegie Commission of Nine Case Studies of War-Affected Countries showed, the international community spent eight times more dealing with the aftermath of war than it invested in the prevention of conflict. That is not only not cost-effective in economic terms, but in human terms – in terms of lives lost and communities destroyed – the human cost is incalculable.

May I identify some of the lessons learned from the assaults on civilians in armed conflict – from Central Asia to Central America – as developed by the *Canadian Peacebuilding Initiative* and reflecting also my own involvement in “peace work” over the years:

- the best form of peace building is conflict prevention to begin with.
- democracy does not guarantee peace and stability but it seems to be a pre-condition for it; indeed it is the absence of democracy – whether in the Balkans or East Timor – or any other area of armed conflict – that often serves as a standing invitation to the criminal violations of human rights; while, as Spencer Weart, affirms in his book *Never at War, Why Democracies will not Fight One Another*, it is an empirical law of international relations (resulting from his analysis of every recorded instance of conflict among democracies) that democratic republics have never gone to war against one another.
- conflict prevention must address root causes of conflict. For example, it was a Black Apartheid in Burundi – left unaddressed – that exploded in the selected genocides there in 1972; and it was the ethnic apartheid in Bosnia and Kosovo in the eighties that exploded in the killing fields in the Balkans in the nineties.
- timing is crucial – pre-emptive action is critical.
- there is a need for an early warning system and a commensurate early response – a need for a human insecurity index of systemic assaults on human security such as systemic discrimination or systemic incitement to hatred and violence; these correspondingly invite early redress of the systemic discrimination or early electronic peace keeping of the hate propaganda.

- Evidence of massive human rights violations indicate a standing and incipient threat to national and international peace and security which, if all other remedies have been exhausted, may warrant internationally authorized humanitarian intervention.
- A culture of impunity will only licence, if not reward, the commission of atrocities; a culture of accountability – of bringing perpetrators of human rights violations to justice – may serve to deter the violence and safeguard the peace.
- the connections are clear between development, peace, and security. Regrettably, Canada’s official development assistance in 2000 was equivalent to 0.29% of Canada’s gross national product, which places us 12th among 22 DAC countries, behind Finland, Ireland and Belgium.
- Imposing conditions does not usually lead to sustainable peace: and imposing peace is rarely successful – a mutual commitment to peace among the warring parties is critical.
- Indeed, promoting peace, in effect, is a long term commitment – peace is a process of mutual respect and acknowledgement, rather than “a condition.”
- Electoral models from donor countries are not always appropriate for ethnically or religiously divided communities; but coordination of donors is essential to make peace incentives work and explicit regional strategies are required.
- A strategy of cross commitment – involving diplomatic, juridical, economic, communication, and peace keeping dimensions is crucial.

Regrettably, in the interrelationship between human security and development, we are seeing development budgets receding, while violent conflicts are increasing. How then, as Susan Brown, the Chief of CIDA’s Peace Building Unit has put it, “can we galvanize the political will and the developmental will – both here in Canada and internationally – to take preventive measures? What do we have to do with our development program to address the root causes of conflict? What are the trigger points in a community that move it from a non-violent situation into resorting to armed violence in order to resolve its problems? Unless we deal with the root causes of the failure of good governance, then we are not doing sustainable development and we haven’t built sustainable peace.”

LESSON 5: BRINGING WAR CRIMINALS TO JUSTICE – THE
CYCLE OF IMPUNITY, THE IMPERATIVE OF ACCOUNTABILITY
– NUREMBERG AND ITS LEGACY

It is somewhat anomalous – and disconcerting – that while there are Nuremberg principles to bring war criminals to justice for the perpetration of war crimes, crimes against humanity and genocide, there is no Nuremberg principle for combating the racist hate crimes which took us down the road to Nuremberg crimes to begin with. As my colleague David Matas asserts in his just published work titled *Bloody Words*:

Of all of the lessons to be learned from the Holocaust there is none more important than the need to ban hate speech, because the banning of hate speech, if effective, prevents atrocities from occurring. Punishing mass murderers, protecting refugees, protesting massive violations, all come too late for many victims. Effective banning of hate speech means that there will be no victims.

Accordingly, the struggle against impunity requires that we not only punish international atrocities after the fact – that we bring war criminals to justice – but that we seek to prevent atrocities to begin with; and more, that we seek a culture of accountability to combat racism, xenophobia, anti-semitism and all forms of intolerance, rather than acquiesce in a culture of impunity that licenses such intolerance. In the words of the European Commission Against Racism and Intolerance, we must “ensure that criminal prosecution of offences of a racist or xenophobic nature is given a high priority and is actively and consistently undertaken.”

Regrettably, the struggle against impunity has not only failed to sufficiently factor in the importance of combating racism to begin with – of legislating a culture of prevention – but it has failed even in the bringing of war criminals to justice after the fact – the ultimate in a culture of impunity. If there is one enduring lesson from the Holocaust to Cambodia, from Bosnia to Rwanda, it is, tragically enough, the cycle of impunity – the betrayal of Nuremberg.

Indeed, the presence of war criminals amongst the world’s democracies – including Canada – fifty years after the Nuremberg principles – is a moral and juridical obscenity, an affront to conscience, a betrayal of everything that people fought for and died for. In effect, the word “war criminal” is itself somewhat of a misnomer. For we are not only talking about the killing of combatants in the course of the prosecution of a war, but the murder of innocents in the course of the persecution of a race.

Fifty years after Nuremberg, the lessons of the past not only remain unlearned, but the tragedy is being repeated. Instead of diminishing over time, the “Never Again” assaults continue – not against Jews, but against Cambodians, Bosnians, Hutus, Tutsis, Sudanese – and the list goes on. Regrettably, this international criminality has been accompanied by a culture of impunity, which has only encouraged others to commit greater violations. If human security is to be safeguarded, this culture of impunity must be replaced by a culture of accountability.

Establishing accountability is not only a moral and juridical imperative, but it is also a practical imperative, if not a self-interested one. For, with globalization and porous borders, crimes against humanity are crimes without borders. These massive atrocities create population displacements, assault innocents, and jeopardize regional and international stability. We can no longer afford to wait for disaster before acting. Accountability means bringing human rights violators to justice, deterring future violations, protecting potential victims, and safeguarding international peace and security. The adoption of the *Statute of the International Criminal Court* in 1998 – and the establishment of International Criminal Tribunals for the former Yugoslavia and Rwanda – were a watershed in the fight against impunity – and a break in the culture of impunity.

Accordingly, the struggle against impunity – particularly for a country like Canada, which is at the forefront of this struggle – requires that:

- We recognize that states – as part of a culture of prevention – must sanction hate crimes to begin with; and we develop, invoke, and apply, international law respecting the prohibition of racist hate propaganda;
- We recognize that states have an obligation to prosecute or extradite the perpetrators of the most serious international crimes;
- We invoke the full panoply of remedies at our disposal -internationally and nationally – to bring those responsible for war crimes and crimes against humanity to justice, including:
 - ◆ Extradition
 - ◆ Transfer to international tribunals
 - ◆ Domestic criminal prosecution
 - ◆ Revocation of citizenship or denaturalisation proceedings
 - ◆ Deportation
 - ◆ Exclusion or denial of access to Canada for inadmissibles
 - ◆ Preclusion from access to the Refugee Protection process to ineligible including war criminals
 - ◆ Exploration of civil remedies

- We continue to lead a campaign for the necessary ratifications to bring the International Criminal Court into being;
- we support the principle of non-immunity for former or existing heads of state who have committed international crimes;
- we protect the right to asylum, and at the same time, ensure that refugee law is not abused to provide base and sanctuary to international criminals;
- we develop enforcement mechanisms – as former Canadian Foreign Minister Lloyd Axworthy proposed under the rubric of “human security” – for the protection of civilians in armed conflict, for the protection of refugee camp security, and the integration of human rights into peace keeping missions to protect against intolerance by peacekeepers themselves.
- we take the lead in “engendering justice,” both at the International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as with respect to the International Criminal Court;
- we seek to develop and insitutionalize – domestically and internationally – the revolutionary jurisprudential developments in the struggle against impunity, particularly those which have emerged from the International Criminal Tribunals for Former Yugoslavia and Rwanda such as the *Akayesu* or *Tadic* cases; the case law from national jurisdictions, such as the *Pinochet* case in the U.K. or the Belgian jurisprudence; or our own Canadian case law. Indeed, Canada is the only country to have invoked and applied each and all of the panoply of remedies at our disposal.
- we invoke model criminal law legislation organized around the principle of universal jurisdiction to bring war criminals to justice.

Above all, what is needed is the political will to speak out against racism, racial discrimination, xenophobia, and all forms of related intolerance – at the local level, at the regional level, at the national level and at the international level – and to anchor our advocacy in the fulcrum of international human rights norms.

Social history describes the expansion of the sense of community, from family to tribe, from tribe to village, from village to city, from city to nation. The question which will determine whether this progression will result in a culture of tolerance and respect for diversity – or a culture of hate and the teaching of contempt – is whether these loyalties built around the tribe and the nation-state can be transferred upwards and linked to the level of international human rights principles – and the prohibition of discrimination as a foundational principle of international customary and treaty law.

LESSON 6: THE INTERNATIONAL CRIMINAL COURT – CORNERSTONE OF HUMAN SECURITY

The struggle against impunity must be seen also as part of a culture or strategy of conflict prevention, conflict resolution and peacebuilding – of establishing a system of global justice – of serving as a cornerstone for the protection of human security. In that sense, the Treaty for an International Criminal Court is one of the most dramatic developments in the struggle against impunity – in the development of international criminal law – in a culture of prevention – since the end of the World War II. Indeed, the 20th Century might well have been labelled the Century of Atrocity – where we witnessed some of the worst atrocities in the history of humankind; but it might also have been called the Age of Impunity, as few perpetrators were ever brought to justice.

Initially, the Nuremberg/Tokyo Tribunals inspired the hope that a Permanent International Tribunal with global jurisdiction would be established – and indeed an ICC was first proposed some 55 years ago; however, it took the globalized horror of the killing fields of the nineties – the horror of Bosnia; the agony of Rwanda; the brutalized women and children of Sierra Leone and Sudan; and the emergence of the unthinkable, ethnic cleansing, and the unspeakable genocide – as paradigmatic forms of armed conflict in the nineties – to give the idea of an international criminal court the moral compellability and sense of urgency that it warrants.

The establishment of an International Criminal Court is an idea whose time has come, indeed, is long overdue. What distinguishes the international criminal court from the *ad hoc* tribunals is that the ICC is the first permanent international tribunal with a global jurisdiction to try individuals for criminal violations of international humanitarian law.

Accordingly, unlike the International Court of Justice, whose contentious jurisdiction is restricted to states, the ICC will have juridical authority to indict individuals from any global killing field; and unlike the *ad hoc* character of the Yugoslavian and Rwandan war crimes tribunals, the jurisdiction of the ICC will not be chronologically or geographically limited.

Canada was amongst the first countries to enact comprehensive – indeed – historic, domestic legislation to implement the ICC Statute and to provide the legislative foundation to bring war criminals to justice. As of December 30th, 2000, 139 states had signed the ICC Treaty – and as of today 38 countries, including Canada, have ratified it.

The ICC Treaty and the implementing Canadian legislation will serve to institutionalize and internationalize the Nuremberg Legacy; work to end the culture of impunity; help deter international crimes while protecting international peace and security; counter the failure of national systems to bring war criminals

to justice; provide enforcement mechanisms and thereby overcome one of the main failings of international law; underpin state responsibility to prosecute, or to extradite for purposes of prosecution, any individuals in their territory who are accused of international crimes of genocide, war crimes, or crimes against humanity; and will help protect the most vulnerable of persons in armed conflict – women, children, refugees and the like.

The ICC Treaty is a wake-up call and a warning to criminal human rights violators everywhere: there will be no safe havens, no base or sanctuary for the enemies of humankind. As well, our domestic legislation will place Canada at the forefront of the international criminal justice movement and give juridical validation to the anguished pleas of victims and survivors from the second World War, to the killing fields of today, of “Never Again.”

In that connection, I am pleased to announce that the Human Security Program of the Department of Foreign Affairs and International Trade will be contributing \$65,000 to the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR) for its project on the International Criminal Court. The ICCLR will produce materials to supplement the popular ICC Ratification and Implementation Manual, which provides a checklist for ICC State obligations. In addition, ICCLR will be undertaking country-specific work to assist states in implementing the ICC Statute into their domestic laws.

The ICCLR has contributed greatly to Canada’s ongoing ICC campaign. In workshops from the South Pacific to Southern Africa, the professional skills of the organization have been of immense benefit, not only to our efforts to promote ratification and implementation of the ICC, but also to the participants at these events.

LESSON 7: INTERNATIONAL TERRORISM AND HUMAN SECURITY

The International Criminal Court has permanent global jurisdiction over the most serious of international crimes – genocide, war crimes and crimes against humanity; and it will have jurisdiction over the crime of aggression as soon as there is international agreement on the definition of that international crime. However, there is no jurisdiction in the ICC Treaty for an emergent and compelling existential threat – the transnational terrorism of the super-terrorist suicide bomber.

Admittedly, some terrorist activity can be prosecuted under the ordinary criminal law; including the recently enacted *War Crimes and Crimes against Humanity Law*. As well, some of it may be subsumed under the subject matter jurisdiction of the treaty for an International Criminal Court. Nevertheless, there is a need for an express counter terrorism law and policy organized around foundational principles that underpin the struggle for human security as follows:

- First, the struggle against terrorism must be seen as a priority of the larger struggle for human rights and human dignity, for the protection of democracy, for the peace and security of humankind. It should not be configured and conceptualized as national security versus civil liberties, but should be a cornerstone of our human security policy – mobilizing parliaments as well as governments, and civil society as well as security forces.
- Second, a clear and principled policy requires clear and principled thinking. We must jettison the notion that “one person’s terrorist is another person’s freedom fighter” – the moral and juridical shibboleth that blurs the moral and juridical, divides and blunts effective policy; rather the principle must be that “one democracy’s terrorist is another democracy’s terrorist,” and that terrorism, from whatever quarter, for whatever purpose, is unacceptable.
- Third, the struggle against terrorism must involve a multi-layered strategy of diplomatic, political, legal, financial, informational, protective and related strategic initiatives short of a military response. In a word, we must explore and exhaust the non-military remedies.
- Fourth, any military response must comport with principles of international humanitarian law, including a UN Security Council determination that such international terrorism is a threat to international peace and security; that any use of force be anchored in the doctrines of necessity and proportionality; and that the principle of the protection of civilians in armed conflict is respected and secured.
- Fifth, any counter-terrorism law and policy must factor into its consideration that we are confronted by the new transnational super-terrorist suicide-bomber, who benefits from the most modern of communications, transportation, and technology; has global sources of funding; is trained and anchored in transnational networks; enjoys base and sanctuary in rogue or pariah states; is knowledgeable about modern explosives; and is more difficult to track down and apprehend than members of the old established groups or those sponsored by state terrorism; and whose potential recourse to weapons of mass destruction poses an unprecedented threat requiring a sophisticated and strategic response.
- Sixth, a counter terrorism law and policy must be anchored in foundational principles of international law, including that terrorism must be seen not only as a violent criminal act, which it is, but also as a Nuremberg crime – akin to a crime against humanity; and that just as terrorism must be seen as an international crime – a Nuremberg crime – terrorists must be seen for what they are – *hostis humanis generis* – the enemies of humankind. Terrorists, then, are akin to the pirates and slave-traders of old

– those who were put beyond the pale, in legal terms, because they were the enemies of humanity. This principle – and related conceptualization – requires that democracies – indeed member states of the international community- have not only the right but the duty to enforce international law against those who are committing those Nuremberg crimes against the innocents of humankind.

- Seventh, the international legal response must be underpinned by the principle of universal jurisdiction – that every state has a responsibility to enforce its criminal law against terrorists found in their jurisdiction – regardless of where the terrorist crime was committed, by whom or against whom. In a word, the operative principle is that of “extradite or prosecute”: namely, that states have a responsibility to prosecute the terrorists in the country in which they are apprehended, or to extradite them to the jurisdiction that seeks their surrender so that they may stand trial for their crimes.
- Eighth, there must be a national and international commitment to deny base and sanctuary to terrorism and terrorists anywhere, including measures to penalize the state sponsors that give terrorist movements any aid or comfort whatever – be it a safe haven, explosives, money or moral and diplomatic support. Regrettably, the policy and practice of even Western democracies has been to indulge, appease and even give exculpatory immunity to terrorists.
- Ninth, there must be a national and international commitment to starve all terrorist organizations of all financial support and access to arms, these being the linchpin of international terrorism. Indeed, as the 1996 G7 Paris Conference on Terrorism recognized, financial support and access to arms are the linchpin of international terrorism, particularly in the Middle East.
- Finally, if not also most importantly, the underlying principle must be that if the new transnational super terrorism is a global phenomenon, it requires a concerted global response. No country alone can fight terrorism, nor should it. International cooperation – and the protection of human security – is not only a desirable component of a global counter-terrorism law and policy, it is a necessary one.

LESSON 8: THE RIGHTS OF CHILDREN AND THE PROTECTION OF CHILDREN IN ARMED CONFLICT: THE LINCHPIN OF HUMAN SECURITY

If there is an atrocity that belies understanding, it is the wilful exploitation, maiming, and killing of a child – the most vulnerable of the vulnerable. The

protection of children, then, must be a priority on our national and international agenda as a matter of both principle and policy. As my daughter Gila put it, at 15 years of age: “Daddy, if you want to know what the test of human rights is, always ask yourself at any time, in any situation, in any part of the world, is it good for children? Is what is happening good for children?”

Indeed, nowhere is the *double entendre* of the human rights revolution – and counter revolution – more dramatized than in the protection of children’s rights, particularly as regarding the protection of children in armed conflict.

On the one hand, more countries have ratified the *International Convention on Children’s Rights* more quickly than any other treaty; indeed, more have ratified it than any other treaty. Yet many of the 190 states that have ratified the treaty continue to violate the rights of children in a massive way. As a result, millions of children – the statistics are simply numbing – find themselves in alarming situations where they are as much hostages as they are victims. Witness the following:

- 14 million children under the age of five die every year as victims of hunger, sickness, war, or the inhuman treatment of adults;
- five million children have been injured or disabled by war;
- children make up more than half of the world’s 19 million refugees;
- 200 million children under the age of 13 are forced to work with untold millions sold into slavery;
- 20,000 children die of preventable diseases every day.

What is true regarding the violations of children’s rights generally, is even more compelling as regards the violations of the rights of children in armed conflicts in particular. For example, it is estimated that in the decade between 1986 and 1996, two million children were killed, six million were injured, over 10 million were traumatized, and more than one million were orphaned.

Admittedly, since the groundbreaking report by Graça Machel to the U.N. General Assembly on the *Impact of Armed Conflict on Children*, there has been a range of protective initiatives including:

- the creation by the General Assembly in 1997 of the Office of a Special Representative to the Secretary General on Children in Armed Conflict;
- an increased advocacy and awareness, with the issue of children affected by armed conflict becoming a priority on the international political agenda, while major regional organizations have adopted this issue as part of their own agendas;

- the adoption by the U.N. Security Council of the landmark Resolution 1261 affirming the protection of children in armed conflict as “a peace and security concern”;
- the strengthening of international standards, for example, the adoption of the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* – and the classification of war crimes against children in the ICC Treaty – are particularly significant;
- the integration of children’s concerns into U.N. peace operations.

Yet, in this same four year period – notwithstanding these initiatives – armed conflict killed close to a million children; injured some three million more; traumatized even millions more; and left hundreds of thousands of children orphaned.

The plight of war-affected children is clearly one of the most devastating tragedies of our time. The statistics of the millions of children caught up and scarred by the brutality of war and conflict, not only numb the pain; they also obscure the tragedy. We are speaking about children who have lost their parents, their homes, their schools, their neighbourhoods – all the components of human security.

The statistics also include an estimated 300,000 children who have served fighting factions – whether as soldiers, sexual slaves, or water carriers. Still others have witnessed inhuman acts against their families and carry horrific memories with them. The human security agenda, then, challenges us to examine the issue of war-affected children from the perspective of those children. The problem is multi-faceted and so should be the solutions, including:

- the implementation of existing international standards, including the ratification and implementation of the *Optional Protocol Respecting the Protection of Children in Armed Conflict*, and the *Optional Protocol to the ILO Convention No. 182*, which defines the use of children in armed conflict as one of the worst forms of child labour;
- calibrated and selectively targeted sanctions respecting regimes that violate the rights of children in armed conflict, including the recruitment and deployment of child soldiers;
- the prioritization of education in humanitarian assistance;
- the placing of children at the centre of the peacebuilding and reconstruction process;
- the effective engagement of youth in policy processes;
- commitment to the protection of internally displaced children
- increased monitoring and reporting of child rights abuses;

- the end of a culture of impunity: those responsible for war crimes against children should be brought to justice;
- the training of peacekeepers in child rights and child protection;
- working to suffocate the supply of small arms, to release abducted children and to protect children from HIV/AIDS;
- ratification and implementation of the *Land Mines Treaty* through effective national legislation;
- human rights treaty bodies should enhance their focus on children's rights and conflict situations in reviewing government reports;
- the establishment of a peace and security agenda based on the concept of children as "zones of peace." For example, ceasefires have been negotiated for "days of tranquillity" and "corridors of peace" to bring food and vaccines to children trapped in wars, ground-breaking efforts that have saved millions of children from malnutrition;

Bilateral development cooperation agencies have also undertaken programming to address the immediate humanitarian needs of war-affected children, such as rehabilitation, reintegration and working with local communities to provide for the educational, health and psychological needs of children in war zones. Most importantly, there is recognition of the need to incorporate children's needs and rights systematically into development assistance programming and evaluation in a way analogous to the integration of gender equality and sustainable development.

In September 2000, the Canadian International Development Agency (CIDA) launched its Social Development Agenda, which will ensure a greater focus in 4 key areas: health, education, HIV/AIDS, and child protection. War-affected children is one of the two main issues covered under child protection, for which CIDA has a five-year budget of over \$100 million.

As the 1996 Machel report documented, war puts at risk every right of the child – the foundational core of human security – including: the right to life; the right to a family environment; the right to essential care and assistance; the right to health, to food, and to education. How we respond to the human security of children will define who we are as a people.

LESSON 9: INTERNATIONAL WOMEN'S RIGHTS AND GENDER SECURITY

The genocide of World War II and the genocides and ethnic cleansing since – as in the Balkans and Rwanda – have included horrific crimes against women. Moreover, these crimes not only attended the genocide or been in consequences of it, but have in fact been in pursuit of it.

Regrettably, the lessons of violence against women in armed conflict – indeed, of systemic discrimination against women – remain to be learned – and acted upon. The notion that women’s rights are human rights – that there are no human rights without women’s rights – must be not only a statement of principle, but an instrument of policy. As UNICEF recently reported, “discrimination against women is an injustice greater than South Africa’s Apartheid.” Charlotte Bunch dramatically summed up the *raison d’être* for women’s rights as a priority on the International Human Rights agenda as follows: “significant numbers of the world’s population are routinely subject to torture, starvation, terrorism, humiliation, mutilation and even murder simply because they are female.”

I recently sought to frame the urgent instances of systemic discrimination and violence against women that must be addressed – and redressed – around an eight-point human *insecurity* index for women, including the following:

1. exclusion or under representation of women in the political and economic decision making processes;
2. discrimination against – or denial of – the social and economic rights of women as a matter of law and/or policy;
3. institutionalized violence against women – in the family, custodial institutions, or community;
4. violence against women in armed conflict, including, in particular, horrific acts of sexual violence;
5. the discrimination against, or denial of, women’s rights to bodily integrity and reproductive rights;
6. the discrimination against, or denial of, the rights of the most vulnerable of women – aboriginal, visible minorities, disabled, lesbian, and refugee women;
7. exclusion of or discrimination against women in peace operations;
8. the differential and discriminatory incidence of poverty amongst women.

Therefore, advocates for women’s human rights must call upon governments and intergovernmental bodies to do the following:

1. Implement fully international humanitarian and human rights law that protects the rights of women during armed conflict;
2. Implement the landmark Security Council Resolution 1325 respecting women and gender security, particularly as respecting the security of women in armed conflict;

3. Implement the Beijing Declaration and Platform for action including the recommendation to fully integrate the human rights of women throughout all policies and programmes;
4. Work towards ratification and implementation of the *Declaration on the Rights of Human Rights Defenders* (officially called the *Draft Declaration on the Rights of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*);
5. Outlaw all forms of discrimination against women by ensuring ratification and implementation of the *Convention on the Elimination of All Forms of Discrimination Against Women* (the *Women's Convention*) immediately. This should also include the removal of reservations to the Women's Convention; the bringing of national laws and policies into compliance with the Convention; and the implementation of the *Optional Protocol to the Women's Convention* establishing a right to petition.
6. Ensure women's right to live free from violence by:
 - taking concerted and systematic action to end violence against women in the home and family through all necessary means.
 - recognizing that gender-based violence and discrimination, and the reprisals women experience when they resist such oppression, can constitute persecution; and that such persecution should therefore be considered as grounds for a "well-founded fear of persecution" in refugee and asylum claims.
 - eliminating gender-based persecution in situations of war and armed conflict, while providing justice and reparations to victims of such persecution.
 - Institutionalizing a gender perspective in the application and enforcement of the Treaty for an International Criminal Court.
7. Take steps to realize women's health, including their reproductive and sexual rights by:
 - Ensuring the realization of women's right to the highest attainable standard of physical and mental health.
 - Securing women's access to reproductive and sexual health and rights.
8. Securing women's economic, social and cultural rights. This should include, *inter alia*:
 - Guaranteeing women's right to development, by providing women with equal access to economic resources, and protecting their rights

in law, policy, and practice to own property, to equal inheritance, and to land tenure, credit and training.

- Securing literacy for every woman and girl by ensuring equal access to education, including human rights education and legal literacy.
- Enforcing women workers' rights on the basis of equality, non-discrimination and due process, including the right to organize, to bargain collectively, to health and safety protection and to a living wage.

May I close this point with some reference to the important initiatives that Canada has been engaged in to eliminate violence against women during armed conflict. For example, at the 57th session of the Commission on Human Rights, the Canadian-led resolution on the *Elimination of violence against women* contained important, new elements on integrating a gender perspective in all future efforts to eliminate impunity; integrating a gender perspective into commissions of inquiry and commissions for achieving truth and reconciliation, and inviting the Special Rapporteur to report on these mechanisms; urging all relevant actors, including the International Committee of the Red Cross, to ensure that a gender perspective is integrated into international humanitarian law awareness programs.

DFAIT is also co-developing the Joint Canada-UK Gender Training Initiative for Civilian and Military Participants in Peace Operations. The training curriculum aims to enhance awareness of the gender dimensions of peace operations, and provide participants with the ability to employ gender analysis when in the field. Promoting and protecting the human rights of women and eliminating violence against women are two key objectives of this curriculum.

Canada was instrumental in ensuring the successful inclusion of a detailed list of gender-based crimes in the ICC Statute, including not only rape, but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and persecution on the basis of gender. In addition, Canada worked hard to ensure that staff and judges with expertise in violence against women will be included in the Court and that women will be fairly represented amongst the judiciary and staff. Canada also worked to ensure that the ICC will provide protection for those who are willing to testify before the Court. Experience from the Yugoslav and Rwandan ad hoc tribunals has shown that women will not come forward to give evidence unless they feel safe. To this end, Canada pressed for the establishment of an effective Victims and Witnesses Unit, to provide for the protection, security and counselling of victims and witnesses. This Unit will include staff experienced in trauma related to crimes of sexual violence.

LESSON 10: INDIGENOUS PEOPLES AND HUMAN SECURITY

If the *Genocide Convention* is a reminder and warning of “Never again” – and the *Universal Declaration* is an expression and example of the human rights revolution – then the plight of indigenous peoples is a historic and continuing assault on our human rights sensibilities – a case that has yet to be significantly touched by the human rights revolution. Indeed, year after year, the Canadian Human Rights Commission, in its annual report, has singled out the plight of the Aboriginal Peoples as the single most important human rights issue confronting Canada today; and year after year it has had to report that the condition of Aboriginal Peoples is a “national disgrace” – a continuing assault on their human security.

Accordingly, what is needed here is a new cultural sensibility, a respect for difference, a politics and policy of inclusion. What is required is a recognition of the aboriginal peoples’ right to self-government and self-determination; a recognition of their unique status by reason of their historic presence as First Nations; a generous rather than a grudging or recriminatory respect for their Aboriginal Treaty Rights and Land Rights; a radical improvement of economic and social conditions on reserves; a reform of the Canadian justice system to accommodate the distinctiveness and sensibility of Aboriginal cultures; and the adoption of the Draft U.N. Declaration on the Rights of the Indigenous People together with the implementation of the Program for the Permanent Indigenous Forums. As Dr. Ted Moses, Ambassador of the Cree to the United Nations, put it in his 1993 Address to the World Conference on Human Rights in Vienna,

Mr. President, the indigenous peoples of North America have asked me to convey to this World Conference a most fair, modest, and reasonable request: The indigenous peoples ask to be accorded the same rights which the United Nations accords to the other peoples of the world. We ask for no more and no less than this.

We ask simply that the United Nations respect its own instruments, its own standards, and its own principles. We ask that it apply these standards universally and indivisibly, that it accord all peoples the same universally recognized rights, that it act without prejudice, and without discrimination based on race, religion, or colour.

“All rights belong to all peoples,” he concluded, presaging the celebrated indigenous protest against the failure of the World Conference – Canada included – to refer to the World’s indigenous peoples as peoples with an “s.”

LESSON II: HUMAN RIGHTS DEFENDERS AND HUMAN SECURITY

The promotion and protection of human rights defenders underpins the human security agenda. For human rights defenders are one of the most effective means of holding a government accountable for its human rights record, and protecting the rights of the most vulnerable of people. However, taking up the issues of victims has proved to be a very risky business for human rights defenders in several regions of the world, as many face obstacles in obtaining legal recognition for their organizations and exercising their right to assemble. They are also at times the target of harassment from state authorities, victims of arbitrary detention and torture, and even extra judicial killings.

Canada and Norway spearheaded efforts to recognize the work and the sometimes precarious situation of human rights defenders through a 13 year campaign to encourage the UN General Assembly to adopt a Defenders Declaration. Finally, in 1998, the declaration on Human Rights Defenders was unanimously adopted.

Canada will contribute \$15,000 to Red Nacional 'Todos Jos Derechos para Todos' [National Network of Human Rights organizations 'All Rights for All'] to support regional consultation between human rights defenders from Latin America and the Caribbean and the United Nations Special Representative on Human Rights Defenders, Hina Jilani. [to be held June 13-15, 2001 in Mexico].

LESSON I2: ARMS CONTROL, HUMAN SECURITY, AND THE OTTAWA LANDMINES CONVENTION

The widespread historical use of anti-personnel (AP) mines in armed conflicts throughout the world has created a major humanitarian crisis. In particular, by their nature, AP mines are indiscriminate (unable to distinguish between an enemy or a civilian) and inhumane (inflicting injuries that cause enormous pain and long-term suffering for victims).

Indeed, millions of AP mines lay hidden in the ground of more than 70 countries, adversely affecting the daily lives of civilian populations. AP mines also hinder economic development and poison otherwise fertile soil by making land inaccessible to farmers and crop growers. As well, they make post-war reconstruction particularly difficult, as they remain hidden in the ground long after the wars for which they were originally planted have ended.

As it happened, members of humanitarian aid and relief organizations, working alongside people in mine-infested areas, were the first to turn the world's attention to the crisis caused by AP mines, while NGOs were the first to call for a ban. In 1996, then Canadian Foreign Minister Lloyd Axworthy challenged the international community to negotiate and sign a treaty banning anti-personnel mines by December 1997, initiating what became known as the "Ottawa Process"

– a state-civil society partnership of like-minded governments, pro-ban NGOs and international organizations that would combine efforts under the banner of “fast-track diplomacy” to respond to the landmines crisis.

After a year of intensive negotiations, the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction* (the Ottawa Convention) was opened for signature in Ottawa in December 1997. During the period when it was open for signature, 133 states signed the Convention, signaling their intention to adhere formally to the Convention at a later date and, under international law, accepting that they must not do anything that undermines the object and purpose of the Convention. On March 1, 1999 the Convention entered into force. This is believed to be the fastest entry-into-force of any arms control agreement in history.

In brief, the Ottawa Convention is a unique instrument of international law in that it sets out first, a comprehensive ban on a weapon that has been in common use for generations; and second, a set of steps that must be undertaken to address the human suffering that the weapon causes. In particular, states that agree to be bound by the Convention commit themselves to:

- immediately end the use, production and transfer of anti-personnel mines;
- destroy existing stockpiles of AP mines within four years;
- clear mined land within 10 years;
- provide assistance for the care and rehabilitation of mine victims; and
- cooperate to ensure full compliance with the Convention.

Support for the Convention continues to grow and, as of 1 June, 2001, 116 states had formally accepted the terms of the Convention through ratification or accession. Their commitment to the Convention, and the advances made in the battle against landmines that flow from this Convention, is evidence of the establishment of an emerging norm within international society: anti-personnel mines can no longer be viewed as legitimate weapons of war.

As a result of the Convention and mine action initiatives undertaken by Canada and our partners, the global trade in anti-personnel mines has all but halted; production of new mines has been significantly reduced; we have witnessed a steady decline in the number of new mine victims in some of the world’s most mine-affected countries; millions of AP mines held in stockpiles have been destroyed; and mine clearance operations have made a real difference in returning land to safe and productive use. Today, demining is taking place in no less than 65 mine-affected countries or areas around the world.

In conclusion, on this point, Canada remains committed to the full implementation and universalization of the Ottawa Convention and will continue to support the international landmine action community to ensure that the terror posed by these weapons can be eliminated in a matter of years – not decades.

LESSON 13: THE INTERRELATIONSHIP BETWEEN ‘HUMAN SECURITY’ AND ‘HUMAN DEVELOPMENT’: THE PROBLEM OF SMALL ARMS AND LIGHT WEAPONS AS A CASE STUDY

‘Human Security’ places a focus on the security of people, and refers to “freedom from pervasive threats to people’s rights, safety or lives.” ‘Human development’ refers to attempts at addressing the root causes of conflict by strengthening governance structures and providing humanitarian assistance. Respectively, they address the twin objectives of freedom from fear and freedom from want, and are therefore regarded as mutually reinforcing concerns. At its core, the protection of human security provides an enabling environment for human development; indeed, it is almost a condition of human development. For where violence or the threat of violence makes meaningful progress towards development impractical, enhancing safety for people is a prerequisite.

Accordingly, the proliferation of small arms and light weapons, not only prejudice human security, but also undermine the capacity for human development. In brief, today’s weapons of mass destruction, as Gracia Machel has put it, are not nuclear or biological; they are the estimated 1.5 billion small arms and light weapons that fuel conflicts around the world – one for every twelve people. And these lethal small arms used in conflicts cause an estimated 700,000 deaths worldwide, per year. Roughly 560,000 of these are murders, perpetrated against innocent civilians (mainly women and children), using small arms and light weapons.

The widespread availability of small arms and light weapons is having an increasingly negative impact on human security in conflict and conflict-prone countries, causing the deaths of innocent non-combatants; destroying livelihoods; and shattering communities; but they also set back, or even reverse, hard won development gains, which severely undermine the process of human development.

Indeed, small arms not only intensify and prolong conflict – they also undermine development work years after conflict has ended. Development projects have been slowed or even cancelled because of violence fueled by the widespread availability of small arms and light weapons. Moreover, in many places in the world, aid distribution has been blocked or controlled by those wielding these arms, while international aid workers are themselves directly endangered, and increasingly, killed. Precautions on their behalf frequently limit the effectiveness of the aid distribution.

The prejudicial effect of small arms on both human security and development also finds expression in the diversion of limited national resources in developing countries. Moreover, in countries experiencing conflict, wealth accrued from both state sanctioned and illicit trade in natural resources – which is subsequently spent on small arms and light weapons – often allows for the deliberate illegal targeting and terrorizing of civilians. With eighty to ninety percent of the casualties in modern conflicts being inflicted against civilians using small arms and light weapons, this is at best a wasted human development opportunity and at worst a crime against humanity. All parties to these conflicts must be held accountable, including those countries which participate in the sale of small arms and light weapons (amongst other types of weapons systems), as well as those parties that engage in the illicit purchase of those natural resources which paid for these weapons.

Regrettably, regions of the world have also become economically dependent on conflict using small arms. Indeed, trade in small arms and in drugs are often linked – both are profitable, largely illicit and likely to follow the same routes – with large arsenals available to the drug lords to combat authorities and expand cartels.

Small arms proliferation, therefore, must be addressed comprehensively – through a strategy of cross commitment – as the issue has many interconnected facets, including:

- the dynamics of supply and demand;
- the relationship to criminal activity;
- the linkages to every stage of conflict; and,
- the manifestation in lost development opportunities.

As a result, options for intervention in the small arms proliferation cycle must incorporate a range of instruments and a variety of policy options drawn from developmental, political, economic, military, police, judicial and civil spheres. As Graça Machel has put it, “arms embargoes should be imposed, monitored, and enforced in situations where civilians are targeted, where widespread and systematic violations of humanitarian and human rights law are committed, and where children are recruited as soldiers. Embargo violations should be criminalized and prosecuted.”

But the essential approach must be one of “human security first”; for if individuals perceive that the environment remains dangerous to their well-being and security, and if there is no progress in socio-economic development, there will be little incentive to give up weapons.

LESSON 14: RAOUL WALLENBERG AND THE PROTECTION OF HUMAN SECURITY

This week saw the establishment of Raoul Wallenberg Day to recognize this lost hero of the Holocaust, this Saint-Just of the nations, whom the UN characterized as the greatest humanitarian of the 20th century for having saved more people in the second World War than almost any government.

It is an historic initiative that will have enduring resonance. We will be recognizing, teaching and inspiring Canadians about the unparalleled and unprecedented heroism of Canada's only honorary citizen who, in his singular protection of civilians in armed conflict, signified the best of international humanitarian law; who, in his singular organization of humanitarian relief, exemplified the best of humanitarian intervention; who, in his warning to Nazi generals that they would be held accountable for their crimes, foreshadowed the Nuremberg principles; who, in saving 100,000 Jews, personified the Talmudic idiom that if a person saves a single life it is as if he saved an entire universe; and who, in having the courage to care and the commitment to act, showed that one person can make a difference, that one person can confront radical evil, prevail and transform history. And so each one of us has an indispensable role to play in the indivisible struggle for human rights and human dignity. Each one can and does make a difference.

CONCLUSION

Human rights begin with each of us – in our homes, in our workplace, in our human relations, in our daily capacity for acts of care and compassion – in our daily capacity to make life better for some victims of discrimination or disability. And if we ever get tired or fatigued – burnt out to use the popular metaphor – then let us remember that a Swedish non-Jew named Raoul Wallenberg saved more Jews in the Second World War than any other government; that one Andrei Sakharov, stood up against the whole Soviet system and prevailed; that one individual, Nelson Mandela, 27 years in a South African prison, nurtured the dream, and emerged to bring about the dismantling of apartheid and become President of South Africa; that one movement – the women's rights movement – energized, mobilized, and ignited the whole of the human rights movement.

This, then, must be our task: to speak on behalf of those who cannot be heard; to bear witness on behalf of those who cannot testify; to act on behalf of those who put not only their livelihood – but their lives – on the line. This is what the protection of human security is all about.



**EMERGENCE OF THE
INTERNATIONAL CRIMINAL
COURT**

THE CONTRIBUTION OF THE ICTY TO THE EMERGENCE OF THE ICC: PROCEDURAL AND EVIDENTIARY ASPECTS FROM A PRACTITIONER'S PERSPECTIVE

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INTRODUCTION

After years of intermittent debate on the need for a permanent institution to prosecute those most responsible for the commission of serious international crimes, the Rome Statute of the International Criminal Court was signed in July 1998.¹ Pursuant to Article 126 of the ICC Statute, the ICC will be established on the 60th day after the 60th ratification of the ICC Statute.² The ICC will have jurisdiction over the core crimes of genocide, crimes against humanity, war crimes and the crime of aggression.³

The procedural jurisprudence of the International Criminal Tribunal for the former Yugoslavia (hereinafter “the ICTY” or “the Tribunal”) since its inception

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Both counsel prosecuted the Foca case (*Prosecutor v. Kunarac, Kovač and Vuković*), are presently prosecuting the Keraterm Camp case (*Prosecutor v. Sikirica, Došen and Kolundžija*), and are also counsel responsible for the prosecution of the Milošević Kosovo indictment. The views expressed herein are those of the authors and do not necessarily reflect the views of the ICTY or the United Nations. This paper was completed in June 2001.

¹ *Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9**, corrected in UN Doc. PCNICC/1999/INF/3*, reprinted at 37 ILM 999 (1998) [hereinafter *ICC Statute*].

² As of June 1, 2001, 32 States had ratified the ICC Statute.

³ The crime of aggression has yet to be defined. Pursuant to Article 5(2) of the ICC Statute, the court will not exercise jurisdiction over this offence until the ICC Statute has been amended. Such an amendment

continued

in 1993 has made a significant contribution to the development of an emerging system of international criminal procedure.⁴ This contribution may be seen in the procedural components of the ICC Statute and are likely to be reflected in the Rules of Procedure and Evidence for the International Criminal Court (hereinafter “ICC Rules”).⁵ This essay will discuss, from the common law practitioner’s perspective, some of the ways in which the experiences of Judges and practitioners alike during pre-trial, trial and appellate stages at the ICTY have provided valuable lessons to those responsible for drafting the ICC Rules. In order to fully comprehend the *sui generis* nature of the emerging international criminal justice system, it is important to understand both the evolution and application of the Tribunal’s Rules of Procedure and Evidence (hereinafter “RPE” or “ICTY Rules”).⁶

THE ADOPTION AND DEVELOPMENT OF THE ICTY RULES

When the Security Council established the ICTY, the Judges were charged with adopting the Rules of Procedure and Evidence. Article 15 of the ICTY Statute and Article 14 of the ICTR Statute were unprecedented in that legislative

must be consistent with the relevant provisions of the United Nations Charter. The International Law Commission was directed by the General Assembly in 1946 to formulate the principles regarding the offence of crimes against peace. (U.N. G.A. Res. 177[II]). Several drafts were then produced, most recently in 1991. See “Draft Code of Crimes Against the Peace and Security of Mankind, 30 *I.L.M.* 1584 (1991). The General Assembly passed a resolution defining aggression in 1975. See Resolution on the Definition of Aggression, UN Doc. G.A. Res. 3314 (December 14, 1975). The Security Council has yet to define this offence, which has also been referred to as a “crime against peace.” Consequently, it is unlikely that the ICC, once established, will exercise jurisdiction over this offence in the foreseeable future. See also, Yoram Dinstein, “Distinctions Between War Crimes and Crimes Against Peace,” in *War Crimes in International Law*, Yoram Dinstein and Mala Tabory, (eds.), The Hague: Martinus Nijhoff Publishers, 1996, pp. 1-18, and L.C. Green, “Crimes Under the I.L.C. Draft Code,” in *ibid.*, pp. 19-40.

⁴ The International Criminal Tribunal for the former Yugoslavia was established in 1993 by the Security Council pursuant to Resolution 827. S/RES/827 (3 May 1993). Attached to Resolution 827 was the Report of the Secretary General concerning the establishment of the ICTY (hereinafter, “Secretary General’s Report”). See also S/RES/808 (22 February 1993). The International Criminal Tribunal for Rwanda (hereinafter, “the Rwanda Tribunal” or “ICTR”) was established in 1994 by the Security Council pursuant to Resolution 955. S/RES/955 (8 November 1994). Both the ICTY and ICTR are composed of three Trial Chambers of three Judges each and share a common Appeals Chamber. The Statute of the ICTY was set forth as an annex to Resolution 827, while the ICTR Statute was attached to Resolution 955.

⁵ Similarly, the substantive jurisprudence of both the ICTY and the ICTR have made contributions to the definitions of the offences, as reflected in the elements for these crimes, for which the ICC will have jurisdiction. This subject is beyond the scope of the current article.

⁶ Both the current version of the Rules and some of the previous versions are available on the ICTY website, with the current version at: <http://www.un.org/icty/basic/rpe/IT32_rev20con.htm> and selected older versions at: <<http://www.un.org/icty/basicl-e.htm>>.

authority was vested in the Judges to draft the Rules, which they would later be responsible for interpreting and applying.⁷ The overriding goal in drafting the Rules was to provide for a fair and expeditious trial.

The original 11 ICTY Judges were elected by the General Assembly in September 1993 and took office on 17 November 1993. The Judges commenced debating and drafting the Rules immediately.⁸ Because of the unique nature of the Tribunal, and because the Judges represented every region and major legal system in the world,⁹ the Judges determined that the Rules had to reflect “concepts that are generally recognised as being fair and just in the international arena.”¹⁰

According to Gabrielle Kirk McDonald, one of the original Judges and the ICTY’s second President:

Three overriding principles guided the drafting of the Rules. First, there would be no needless repetition between the Rules and the Statute. Second, the applicable substantive law was not to be introduced into the Rules. Third, the Rules were to be precise, but not intricately detailed. It was essential to capture the international character of the Tribunal and to strike a balance between strictly constructionist and teleological approaches. There was a very limited body of precedent to guide us in this process, although numerous reports, proposals, drafts and reference documents were submitted by the UN Office of Legal Affairs, States and non-governmental organisations (NGOs).¹¹

⁷ Article 14 of the ICTR Statute requires the ICTR Judges to adopt the ICTY RPE, “with such changes as they deem necessary.”

⁸ For an excellent discussion of the development of the ICTY Rules, see Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, NY: Transnational, 1995). Volume 2 of this set contains the basic ICTY documents. See also M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, NY: Transnational, 1996). The ICTR Rules are analysed in Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for Rwanda* (Irvington-on-Hudson, NY: Transnational, 1995). This two-volume set also includes all the ICTR basic documents.

⁹ The Judges who drafted and promulgated the rules were: Antonio Cassese (Italy), President; Elizabeth Odio Benito (Costa Rica), Vice President; Georges Abi-Saab (Egypt), Jules Deschênes (Canada); Claude Jorda (France); Adolphus Karibi-Whyte (Nigeria); Gabrielle Kirk McDonald (United States of America); Haopei Li (China); Rustam Sibidhwa (Pakistan); Sir Ninian Stephen (Australia); and Datuk Lal Chand Vohrah (Malaysia).

¹⁰ ICTY 1994 Annual Report, Annex, paras. 52-54.

¹¹ Gabrielle Kirk McDonald, “Trial Procedures and Practice,” in Olivia Swaak-Goldman and Gabrielle Kirk McDonald (eds.), *Substantive and Procedural Aspects of International Criminal Law* (The Hague: Kluwer, 2000) (hereinafter “McDonald”).

The RPE, which were initially adopted on 11 February 1994, contained but 10 Rules of Evidence.¹² Although the Judges attempted to merge general principles of both common law and civil law procedure, the RPE are truly unique and are not simply a hybrid of the civil and common law systems. For example, most civil law systems require an Investigating Judge (or Magistrate) to gather evidence and prepare the dossier unrestrained by formal rules, while most common law systems are characterised by highly technical rules of evidence which are considered necessary to shield juries from prejudicial or tainted evidence. The RPE provide for neither an Investigating Judge nor do they contain highly technical evidentiary rules.¹³

Several examples will suffice to demonstrate how this hybrid system differs from a common law approach. First, while the parties play a major role in the presentation of evidence at trial before the ICTY, the Judges also play an important role. For example, the Judges may order the production of evidence and may summon witnesses *proprio motu*.¹⁴ Moreover, the current trend is moving towards an increased role for the Judges with respect to the control of the case.¹⁵ Thus, at plenaries held in November and December 2000 and mid-April 2001, the ICTY judges adopted several rules to reduce the length of trials.

For example, Rule 92bis, entitled "Proof of Facts other than by Oral Evidence," permits a trial chamber to admit the evidence of a witness in the form of a statement in lieu of *viva voce* testimony if the witness' testimony goes to the proof of a matter other than acts and conduct of the accused.¹⁶ Rule 92bis also sets forth both factors in favor of admitting such evidence and factors against admitting such evidence.¹⁷ This rule also sets forth certain technical requirements that must be met in order for the written statement to be admissible.¹⁸ It is also

¹² As the result of amendments made during subsequent plenaries, there are now 13 Rules of Evidence.

¹³ Although common law practitioners often express bewilderment at the ICTY RPE, lawyers, jurists and even accused from civil law countries have no difficulty with the legal concept because in their system evidence is presented by way of a dossier to the investigating judge. The investigating judge then reviews the file and asks most of the questions of the witnesses in court. In essence, the investigating judge acts like the prosecutor. Witnesses are permitted to give hearsay evidence and the accused invariably gives a statement. Cross-examination by counsel in an adversarial sense is practically unheard of.

¹⁴ Rule 98.

¹⁵ The primary motivation behind this development is to reduce the length of trials reducing the period that the accused remain in pre-trial detention.

¹⁶ Rule 92bis(A).

¹⁷ Rule 92bis(A)(i) and (ii).

¹⁸ Rule 92bis(B) and (C).

permissible under Rule 92bis(D) for the trial chamber to admit a transcript of the previous ICTY testimony of a witness. If the trial chamber does so, it is within the discretion of the trial chamber to require the proponent of such evidence to produce the witness for cross-examination.¹⁹ The first use of this rule was in the Keraterm Camp case (*Prosecutor v. Sikirica, Došen and Kolundžija*). In that case, the Prosecution sought to admit transcripts of the prior ICTY testimony of six witnesses. The Defence requested to cross-examine these witnesses and during a hearing on the motion, Judge May explained to the defence that the purpose of the new Rule is:

[T]o try and cut down the lengths of these trials. It is a matter of concern to the international community that these trials have been taking up six months and more each. A large amount of time in this Tribunal has been taken up with pointless and repetitive cross-examination, and this Rule is aimed at dealing with it.²⁰

Regarding witnesses, Rule 73bis (with respect to the Prosecution) and Rule 73ter (with respect to the Defence) were amended to empower the Trial Chamber to set both the number of witnesses which the parties may call²¹ and the length of time available to the parties to conduct their case.²²

With respect to appeals, the Judges have determined that interlocutory appeals have consumed an inordinate amount of time. Consequently, in order to eliminate time spent adjudicating interlocutory appeals, Rule 73(B) was amended to severely restrict the rights of the parties to file interlocutory appeals from “decisions rendered during the course of trial on motions involving evidence and procedure,”²³ unless the trial chamber certifies that an interlocutory appeal is “appropriate for the continuation of the trial.”²⁴

¹⁹ Rule 92bis(E).

²⁰ *Prosecutor v. Sikirica and Others*, Case IT-95-8-T, Trial Transcript, p. 244I, April 24, 2001.

²¹ Rule 73bis(C); Rule 73ter(C). Moreover, pursuant to Rule 90(G), “The Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses compiled pursuant to Rules 73bis(C) and 73ter(C).”

²² Rule 73bis(E); Rule 73ter(E). Additional time may be granted to either party during trial, “if this is in the interests of justice.” Rule 73bis(F); Rule 73ter(F).

²³ Rule 73(B). Such decisions may be assigned as grounds for appeal from the final judgement. *Ibid.*

²⁴ Rule 73(C). If the trial chamber so certifies a party may appeal to the appeals chamber without leave. *Ibid.* Rule 73(D) provides that decisions on all other motions are without interlocutory appeal unless a bench of three appeals chambers judges grants leave to appeal on one of two grounds (“if the decision impugned would cause such prejudice to the case of the party seeking leave as could

continued

The second main area distinguishing international criminal law practice is the evidentiary rules. As a general rule, all relevant evidence, which has probative value, is admissible.²⁵ However, the Chamber may later exclude such evidence if its probative value is substantially outweighed by the need to ensure a fair trial.²⁶ Rule 95, the other major exclusionary rule, precludes the admission of evidence if such evidence is “obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”²⁷

Thus, one of the major practical issues facing a common law practitioner is the fact that at the ICTY, hearsay evidence is admissible. Witnesses regularly give hearsay evidence both for the Prosecution as well as the Defence that in most common law jurisdictions would be totally inadmissible. At the Tribunal, the evidence is admitted but is accorded the appropriate weight depending on its reliability, which must be determined by the triers of fact in light of all the relevant circumstances. It may seem that such evidentiary rules would be advantageous to counsel, however, in fact it is very difficult to assess the strength of one’s case during the course of the trial. It may be that various witnesses have testified to certain issues in the Indictment, but one does not have any indication as to the weight that the Court will attach to that evidence. Although it may be argued that in most common law jurisdictions the weight attached to certain evidence is always for the trier of fact to determine, nevertheless, the fact that it was earlier deemed to be admissible evidence is very helpful.

Another major departure from the practice in most common law jurisdictions is the fact that evidence relating to sentencing is admissible during the course of the trial. There is no determination of guilt prior to sentencing submissions being heard. At the ICTY the submissions on sentence are made during the Final Trial Brief or during oral closing submissions at the close of the case prior to verdict. Therefore, evidence that would normally be called in most common law jurisdictions during the sentencing phase only, is called at the Tribunal during the course of trial since that is the only opportunity to call that evidence.

The fact that most lawyers from civil law countries are unfamiliar with the concept of cross-examination in an adversarial sense is yet another major factor to which a lawyer trained in a common law jurisdiction must adjust. Effective

not be cured by the final disposition of the trial including post-judgment appeal” [Rule 73(D)(i)]; or “if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally” [Rule 73(D)(ii)].)

²⁵ Rule 89(C).

²⁶ Rule 89(D).

²⁷ Rule 95.

cross-examination is an art that eludes many counsel even from common law jurisdictions, however counsel from civil law jurisdictions simply have little or no familiarity with the concept at all. Often, their idea of cross-examination is to merely point out differences or discrepancies between what a witness said in his or her statement and their *viva voce* evidence in chief. Frequently, if a witness said something damaging in their statement, but failed to mention it in chief, Defence counsel will raise the issue with the witness for the sole purpose of showing that the witness in court today said something different than they had said on a previous occasion or in their statement(s). The purpose of raising the discrepancy presumably is to point out to the Trial Chamber that the witness is therefore inconsistent and their evidence ought to be given less weight.

Finally, although the procedure has not been used since 1996, the RPE permit an evidentiary hearing to be held, in the absence of the accused, for purposes of issuing an international arrest warrant. Under this rule, a two-stage procedure exists if an arrest warrant has not been executed and the Indictment has not been served.²⁸ First, the Prosecutor must satisfy a Judge that all reasonable steps have been taken to serve the accused, including an attempt to inform him through publication. If the Judge is satisfied, an order is issued and the Prosecutor presents the Indictment and any supporting evidence to a Trial Chamber which examines the evidence to determine if a *prima facie* case exists as to one or more of the charges set forth in the Indictment. If the Trial Chamber finds that the evidence supports such a finding, the Prosecutor is requested to read the relevant parts of the Indictment in open court and to reiterate the attempts made to serve the accused. The Trial Chamber then issues an international arrest warrant. If the Chamber finds that a State has failed or refused to co-operate with the Tribunal, the Chamber so certifies and the President notifies the Security Council.²⁹

²⁸ For a good discussion of the investigation and indictment stages, see Morris and Scharf, pp. 185-221.

²⁹ The Tribunal has conducted five Rule 61 proceedings, in the *Nikolić* (IT-94-2-R61), *Martić* (IT-95-11-R61), *Vukovar* (IT-95-13-R61), *Rajić* (IT-95-12-R61), and *Karadžić and Mladić* (IT-95-5-R61 and IT-95-18-R61) cases. On four occasions, President Cassese reported non-compliance to the Security Council. On 31 October 1995, he notified the Security Council concerning Bosnia-Herzegovina non-compliance in the *Nikolić* case. See S/1995/910. On 24 April 1996, he informed the Security Council concerning F.R.Y. non-compliance regarding Mile Mrksić, Miroslav Radić, and Veselin Sljvančanin. On 11 July 1996, he informed the Security Council about F.R.Y. non-compliance relating to Radovan Karadžić and Ratko Mladić. On 16 September 1996, he informed the Council about Croatian non-compliance concerning Ivica Rajić (and mentioning others). See S/1996/763. President McDonald reminded the Security Council of continuing non-compliance by the Federal Republic of Yugoslavia concerning its failure to arrest and transfer Mile Mrksić, Miroslav Radić, and Veselin Sljvančanin and addressed the Council regarding this matter. See ICTY Press Release, CC/PIU/349-E, dated 2 October 1998.

Although this procedure seems innocuous, it had its genesis in a concept that is anathema to most common lawyers: trials *in absentia*. As former President McDonald has written:

One of the most contentious issues that the ICTY Judges considered while drafting the Rules was whether trials *in absentia* should be allowed. The issue was debated by the Judges in the context of a proposal submitted by President Antonio Cassese. This proposal would have permitted trials in the absence of the accused and a finding of guilt or innocence. However, if the accused came into the custody of the Tribunal, he would have been entitled to a retrial on the merits.

In response to this submission, I proposed a procedure that would have allowed for the preservation of evidence should the accused fail to appear. This proposal provided that when the relevant national authorities have failed to execute in good faith the order to appear issued by a Judge of the Tribunal and when this order provides that the hearing may be held if the accused fails to comply with the order to appear, the Trial Chamber, or a Judge of the Trial Chamber may, upon motion by the Prosecutor, initiate proceedings to preserve evidence. This proposal also provided that all evidence admitted during such a proceeding would be made public and the accused would be entitled to have Counsel appointed on his behalf during such a proceeding.

The Judges resolved this dispute by the adoption of Rule 6r. ... Clearly, this procedure is not a trial *in absentia*.³⁰

These are but a few of the myriad of differences between the practice of criminal law in one's home jurisdiction and practising international criminal law at the Tribunal. The major lesson to be learned from these anecdotal examples is the important fact that the practice of international criminal law both at the ICTY and prospectively at the ICC will be a blend or composite of both legal systems. It is exactly for that reason that the lessons or "growing pains" experienced by the Tribunals at both The Hague and Arusha will be of significant assistance to the Judges and practitioners at the ICC when it begins to hear international criminal law cases.

CONTRIBUTIONS TO THE ICC STATUTE

One of the primary and far-reaching examples is the fact the ICC statute proposes to follow the ICTY example of adopting a common-law derived adversarial

³⁰ McDonald, pp. 554-555 (footnotes excluded).

procedure with an independent Prosecutor. Given the international make-up of the member states who are signatories to the ICC Statute, this fact is a significant one because had the choice been to adopt a civil law judicial system, the Rules of Procedure and Evidence for the ICC would by necessity have had to be entirely different.

Yet another example of the ICC drawing upon the ICTY experience is seen with regard to the exercise of jurisdiction. Although Article 12 of the ICC Statute relies on state acceptance of the ICC's jurisdiction, nevertheless Article 13(b) drawing on the ICTY's experience, closed a potential loophole to escape prosecution at the international level. Under that provision, the Security Council may decide to refer a situation to the Prosecutor, in which case state acceptance of the Court's jurisdiction is not required.³¹

Another example of the ICTY's experiences benefiting the ICC concerns the disclosure of national security information. There often are tensions between the various states and the Court concerning the disclosure of information affecting national security. The fight between the parties whereby States demanded absolute state control over the invocation of the national security exception, and others preferred the court to be the ultimate arbiter of such disputes appears to have been influenced by the ICTY's Blaskic Judgment. That Appellate Judgment does not envisage any exception to the obligation of States to comply with requests and orders of a Trial Chamber, thus leaving the Tribunal as the ultimate arbiter in cases of dispute. That same approach has been incorporated into Article 72 of the ICC Statute which in essence requires States to disclose as much as possible the information it wishes to withhold, and allows the Court to order disclosure if it determines it to be appropriate in the circumstances.³²

Issues arising from case management are another example of how the ICC may be seen to have borrowed from the experience of the ICTY.³³ The fact that the ICTY Judges have managed to carefully craft the RPE to expedite trials – while simultaneously preserving the rights of the accused to a fair trial – should prove invaluable to the ICC Assembly of States Parties when they go about the difficult task of drafting the Rules for the ICC.

The ICTY experience in handling guilty pleas will also prove invaluable to the drafters of the ICC Rules. Article 65 of the ICC Statute which sets out the pro-

³¹ See Ken Roberts, Essays on in May, Tolbert, Hocking, Roberts, Jia, Mundis and Oosthuizen (eds.), *Essays on ICTY Procedure and Evidence In Honour of Gabrielle Kirk McDonald*, The Hague: Kluwer, 2001, pp. 559-572, at p. 563 (hereinafter, "Roberts").

³² *Ibid.*, pp. 563-568.

³³ Gideon Boas, "Comparing the ICTY and the ICC: Some Procedural and Substantive Issues," 47 *Netherlands International Law Review* 4 (2000), pp. 267-292, at pp. 277-279 (hereinafter, "Boas").

cedure where an accused makes an admission of guilt. The ICC Statute appears to be a compromise between the differing approaches to the issue of admission of guilt under the common law and civil law legal systems. The ICC Statute appears to permit the Trial Chamber to exercise its discretion to accept an admission of guilt and to dispense with the need for a trial (the common law approach) or to reject such an admission and continue with trial proceedings (the civil law approach). Here in Canada it can be argued that the ICC approach closely mirrors the Canadian experience, because in our system if a Judge is not persuaded that the guilty plea is an informed one, the plea will be struck and the trial will continue, with the burden of proof remaining on the Prosecution.

In so doing, the drafters of the ICC Statute took into account the ICTY experience with the case of Erdemović.³⁴ Originally, the ICTY Statute did not provide for the eventuality of guilty pleas being entered without a subsequent full trial (the civil law approach). In the Erdemović guilty plea, it became clear that the accused may not have appreciated the distinction between a crime against humanity and a war crime, which concern was bolstered by the fact that the defence arguments demonstrated a similar lack of understanding. The accused had pleaded guilty to the more serious of the two charges, a crime against humanity. The Appeals Chamber concluded that the plea was not a fully informed plea and remitted the matter to the Trial Chamber for a fresh plea. Subsequently, at the 14th plenary session of the ICTY Rule 62bis was adopted establishing a specific procedure for proceedings following a guilty plea. This rule was then in place at the time of the Rome Conference and was of assistance in the drafting of Article 65 of the ICC Statute.

Not only have the positive experiences of the ICTY been of assistance to the drafters of the ICC Statute and the imminent emergence of the ICC, but also the perceived negative experiences and lacunae in the ICTY Rules and procedures have been taken into consideration. For whatever reason, the ICC Statute has not followed the ICTY example of allowing the Judges to establish the Rules pursuant to which the Tribunal functions. Instead, the ICC Rules must be adopted by a two-thirds majority of the member states. This difference may well cause uncomfortable delays in amendment of the rules. It can be argued that the Judges themselves are best informed concerning what Rule changes are necessary to ensure the proper and expeditious administration of justice. Fortunately, there is a provision in the ICC rules that in urgent cases where the ICC rules do not provide for a specific situation, then the judges, by a two-thirds majority, may create

³⁴ *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996; *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgement, 7 October 1997; and *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, Sentencing Judgement, 5 March 1998.

provisional rules which must subsequently be adopted, amended or rejected at the next session of the Assembly of State Parties.³⁵

Perhaps because the ICTY is an *ad hoc* Tribunal, with a limited jurisdiction and an indefinite lifespan, the sense of urgency in completing the trials facing the Tribunal is heightened. Accordingly, the Judges in Plenary Sessions have made many Rule changes which are designed to speed up the proceedings before the Tribunal.

That sense of urgency is heightened even further by the fact that the international community is anxious to see the work of the ICTY brought to a close. With the number of accused still in custody awaiting trial; the speed (or lack of it) thus far with which trials have been concluded, added to the number of outstanding indictments and ongoing investigations, it appears that the ICTY will be busy for years to come.

CONCLUSIONS

Given the mix of Judges and lawyers from both civil law and common law jurisdictions, and the fact that the Judges are responsible for the development of the rules and procedures to be adopted at the Tribunal, it is only natural and logical that the Rules of Procedure and Evidence have become an amalgam of both legal systems. These Rules are amended on a regular basis and circumstances require. The Rules presently in force at the Tribunal were adopted subsequent to Amendments passed on 17 April 2001, superceding the previous Rules adopted on 19 January 2001. There is not another Plenary session scheduled to discuss Rule changes until 11 July 2001. One definitely needs a loose-leaf version of the Rules of Procedure and Evidence. Accordingly, legal opinions and precedents also have a very short shelf-life. It is, in our opinion, this constant development and refining of the Rules of Procedure and Evidence that will be of invaluable assistance to the ICC. To a certain degree the ICC has already benefited from the ICTY experience in that the drafters of the ICC Statute have directly incorporated procedures used at the ICTY.

³⁵ ICC Statute Article 51(3)

THE CORE CRIMES IN THE ROME STATUTE ON THE INTERNATIONAL CRIMINAL COURT

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There is broad consensus that an independent, just and effective international criminal court (ICC) is an imperative for the twenty-first century. The ICC will have jurisdiction over some of the most serious international crimes, namely genocide, crimes against humanity, war crimes and aggression once a definition has been agreed upon. Its value is not only in prosecuting and punishing perpetrators of these crimes, but also in its deterrence capability. An impartial ICC with an independent Prosecutor's office will hopefully discourage those who seek to instigate and carry out barbarous atrocities in violation of international law. The major challenge for the international community is to make it truly effective and not merely symbolic, by global ratification, implementation domestically and fulfilment of obligations in good faith.

The First World War was said to be the war to end all wars, but this was not to be the case. The real threat of indictment and prosecution for the most heinous international crimes backed by enforcement capability was sadly lacking. Impunity reigned over accountability. Would an international criminal court have changed the course of history? Adolf Hitler in a speech in 1936 addressed the perceived ineptitude on the part of states collectively to take international action against governments and individuals for committing international crimes. In referring to the Armenian holocaust, where Turkish officials allegedly killed over one and a half Armenians during World War I, he asked rhetorically: "Who after all today is speaking about the destruction of the Armenians?"¹ A dangerous signal was sent to Hitler and subsequent ruthless leaders when the Allied Powers failed to bring to justice those allegedly responsible in Turkey. Had strong, united, international cooperation existed and a permanent ICC been in place, perhaps Adolf Hitler, Idi Amin, Pol Pot, Saddam Hussein, Augusto Pinochet, Slobodan Milosevic, Jean Kambanda, Hissene Habré, Foday Sankoh and Osama Bin Laden,

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¹ J.F. Willis, *Prologue to Nuremberg* (1982), 173.

to name a few, may have been deterred from perpetrating the widespread and systematic atrocities that the world has so unfortunately witnessed.

The world must be prepared to act and should deterrence fail, it must be willing to bring those allegedly responsible to trial. Such conduct cannot go unchallenged. It is not a case of high-minded revenge, of victory over vanquished, but rather a deep-rooted imperative to advance the rule of law and to enhance the quality of human behaviour at the national and international levels.

Even though the pressing necessity posed by the situations in former Yugoslavia² and Rwanda³ necessitated the action by the United Nations Security Council (UNSC), acting under Chapter VII of the United Nations Charter, such *ad hoc* tribunals do not address the long term global problem. A permanent institution that is fair, credible and effective is essential; a court that is not dependent on the selective political consent of the UNSC and potentially subjected to non-creation, because of the veto by one of the five Permanent Members; a court, as well, that is not limited by time and geography.

The philosophical and practical underpinnings of the court may be seen as deterrence, prosecution, justice for victims, and promotion of peace and stability and reconciliation. The goal is to replace impunity with accountability and protect the fundamentals of human dignity.

The history of the evolution of the ICC Statute and the negotiations leading to its adoption in Rome at the United Nations Diplomatic Conference on the Establishment of an International Criminal Court⁴ on July 17, 1998 by 120 votes in favour to 7 against with 21 abstentions will be dealt with in other papers in this volume.⁵ Suffice to say that earlier efforts were not successful, either under the League of Nations or under the auspices of the International Law Commission (ILC). The ILC was mandated by the newly established United Nations following World War II to codify the Nuremberg Principles, draft a code of offences (later called crimes) against the peace and security of mankind and a statute for an ICC. Clearly, in the “cold war” period the political will was lacking and the United Nations General Assembly (UNGA) did not accept the 1953 ILC Draft Statute, because of the failure to define aggression in the Draft Code of Crimes. Even though the UNGA adopted by consensus a definition of aggression in 1974⁶ it

² U.N.S.C. Res. 827, U.N. Doc. S/25626 (1993).

³ U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 1994, Sp. Supp., U.N. Doc. S/RES/955.

⁴ UN Doc. A/CONF.1 83/9.

⁵ For details of the early attempts to establish an ICC see B. Ferencz, *An International Criminal Court: A Step towards World Peace* (1980).

⁶ U.N.G.A. Res. 3314, UN GAOR, 29th Sess., Supp. No.31, UN. Doc. A/9631 (1974).

would not be until 1982 that the ILC would return to the subject.⁷ In 1989 Trinidad and Tobago proposed a crime specific tribunal for illicit traffic in drugs⁸ but it was not acceptable in a special session of the General Assembly in 1990. The only result was that the ILC was mandated to carry on with its work.

Why has it taken so long for the international community to agree on the need to establish an ICC? Amongst the apparent obstacles were a reluctance to yield up any element of sovereignty to an international court, nationalistic pride in the superiority of domestic law, reticence to participate in establishing another international institution, problems on obtaining consensus on subject matter jurisdiction, applicable substantive and procedural rules, lastly, the cost.

Following the establishment by the Security Council in 1993 and 1994 of the ICTY and ICTR important examples were brought to bear of how an ICC could work in practice. The *Ad Hoc* Committee set up in 1994 by the General Assembly to review fundamental issues arising out of the ILC's work and later the Preparatory Committee that met several times up until three months before the Rome Conference and prepared the final negotiating text, were milestones on the road to the final accomplishment in Rome. The Rome Statute's adoption was based on a major push by states and by civil society as represented by the many NGOs that considered *ad hoc* selective justice insufficient.

The negotiations on the crimes listed in Article 5 were among some of the most delicate issues at the Rome Conference. One of the major guiding principles was that the crimes be reflective of customary international law and be limited to the most serious crimes of concern to the international community as a whole. This latter provision appearing in the Preamble and Article 5 meant that the crimes had to be universally recognised. This was viewed as crucial as it meant that when a state ratified the Statute, it would not be contingent on the acceptance or ratification of other international conventions. At first blush this task might not seem to have been too daunting. However, there were complications.

Article 5 lists genocide, crimes against humanity, war crimes and aggression. It should also be noted that the crimes listed in article 5 and defined in articles 6, 7, 8 are intimately connected with the article 12 on preconditions to the exercise of jurisdiction by the court, article 13 on exercise of jurisdiction, and article 17 on complementarity. According to article 11 the ICC has jurisdiction only over crimes committed after the entry into force of the Statute.⁹ Thus, whereas, the

⁷ S.A. Williams, "The Rome Statute on The International Criminal Court: From 1947-2000 and Beyond" (2000), 38 Osgoode Hall Law Journal 297, 302.

⁸ U.N. G.A. Res. 44/39, 44 U.N. GAOR, Supp. No. 49, 1 U.N. Doc. A/44/49 (1989).

⁹ See also article 22 dealing with *nullem crimen sine lege* and article 24 dealing with non-retroactivity *ratione personae*.

International Military Tribunals at Nuremberg and Tokyo had and the ICTY and the ICTR have retrospective jurisdiction over crimes proscribed by international law at the time when they were allegedly committed, even though this occurred before the establishment of those tribunals the ICC is not so endowed. Even though the principle of legality, as contained in the *nullem crimen sine lege* rule would be complied with when conduct is not retroactively being criminalized but it is simply an exercise of jurisdiction taken retrospectively this temporal restriction was necessary to gain the wide support of states.¹⁰

The conference achieved the impossible in many ways, given the approximately 1,300 square brackets in the negotiating text indicating bones of contention some of which were fundamental. The final text adopted in Rome is indicative of what was possible at the time. It is true that there are weaknesses but there are also real successes. The Statute is a compromise and endeavours to satisfy many of the interests that were in operation in the Rome Conference and before and to make it acceptable to the majority of states.

The Statute containing 127 articles is an intricately woven package-deal. The core crimes cannot be looked at without note being taken of the vital importance to a credible and effective court of impartial investigations and an independent prosecutor who may initiate them *proprio motu* with certain inbuilt checks and balances.¹¹ Thus, the prosecutorial scheme does not depend solely on the initiation of investigations and consequent prosecutions by states parties¹² and the United Nations Security Council.¹³ As well, there are provisions for the due process of the accused¹⁴ and victims rights.¹⁵ There is no statute of limitations¹⁶ and no reservations are allowed.¹⁷

On the other hand, it would be naïve to suggest that there are not weaknesses in the Statute. There clearly are. Certain states and most NGOs pressed for the ICC to have universal jurisdiction or a variant thereof, over the listed crimes. In other words the ICC would have jurisdiction over a core crime as long as one or more of four directly involved states had consented by being a state party, that is

¹⁰ S.A. Williams, "Jurisdiction *ratione temporis*" in O. Triffterer (ed.), *Commentary on The Rome Statute of the International Criminal Court (1999)*, 323-328.

¹¹ Article 15.

¹² Article 14.

¹³ Article 13(b).

¹⁴ Articles 66-67.

¹⁵ Article 68.

¹⁶ Article 29.

¹⁷ Article 120.

the territorial state, the states of nationality of the perpetrator or the victim and the custodial state. However, at the end of the conference the result was restrictive preconditions in the final text of article 12. It provides that for the ICC to exercise jurisdiction over the crimes listed in article 5 in cases where the situation is referred to the prosecutor by a state party or the prosecutor has initiated an investigation *proprio motu*, either the state where the alleged crime was committed or the state of nationality of the accused must be a party to the Statute or accept on an *ad hoc* basis. Until the final hours in Rome article 12 remained a make or break provision and still even today retains its notoriety.¹⁸ However, it must be understood that some states had pushed for tighter restrictions insisting on the necessity for the acceptance by the state of nationality of the accused or the even stricter requirement of acceptance conjunctively from a list of all involved states. Article 12 in its final form is the accommodation that was struck. There is also the transitional seven-year “opt out” provisional for war crimes¹⁹ and a renewable ability for the Security Council to block an investigation by the Prosecutor for twelve months, when it is acting under Chapter VII of the U.N. Charter.

The Preamble to the Statute and article 5 emphasize that the crimes within the jurisdiction of the ICC are those that are of “the most serious concern to the international community as a whole.” These crimes are crimes against the universal interest and at the national level would be subject to universal jurisdiction. The first three crimes that the Statute lists are genocide, crimes against humanity and war crimes. These are well recognized international crimes. They “fall within the meaning of *jus cogens*.”²⁰ Limitations of time and space do not permit an in depth discussion of articles 6, 7 and 8 which define these crimes, nor an analysis of the foundations and provisions of the Nuremberg and Tokyo Charters and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. What will be done is to highlight some of the important, key inclusions and controversial omissions. It is of crucial importance that the ICC has automatic jurisdiction over the core crimes in article 5. There is no second level of acceptance once a state has ratified or acceded to the Rome Treaty.

¹⁸ For the views of this author on the negotiations leading to the compromise on article 12 see S.A. Williams, “Article 12 Preconditions to the exercise of jurisdiction” in O. Triffterer (ed.), *Commentary on the Rome Statute on the International Criminal Court* (1999), 329-342 and S.A. Williams, “The Rome Statute on The International Criminal Court: From 1947-2000 and Beyond,” (2000), 38 *Osgoode Hall Law Journal* 297.

¹⁹ Article 124.

²⁰ M.C. Bassiouni, “Explanatory Note on the ICC Statute” in *International Criminal Court: Ratification and national Implementing Legislation* (2000), *Revue Internationale de Droit Penal* 1,10.

Article 6 defines genocide.²¹ This turned out to be the least problematic crime and is defined in accordance with article II of the 1948 Convention on the Prevention and Punishment of Genocide.²² It was quite apparent that states were reluctant to tinker with the definition that had been recognized by the International Court of Justice as reflecting customary international law,²³ or even *jus cogens*.²⁴

Article 7 on crimes against humanity is the “first comprehensive multilateral definition of crimes against humanity.”²⁵ It clearly goes far beyond what is contained in the Nuremberg, Tokyo, ICTY and ICTR definitions.²⁶ During the course of negotiations central issues revolved around firstly, whether the crimes should be limited to armed conflicts as was article 6(c) of the Nuremberg Charter, where the International Military Tribunal held that it could entertain only those crimes against humanity that were undertaken in connection with crimes against peace or war crimes,²⁷ or article 5 of the ICTY Statute which provides for the context of international or internal conflicts. Secondly, the question was what should be the threshold for such crimes. The final text of article 7, similar to genocide criminalizes the enumerated conduct in peacetime as well as in armed conflicts as the chapeau contains no restriction. The threshold set is that the conduct must be part of a “widespread or systematic attack directed against any civilian population.” There must also be knowledge of the attack. Discriminatory intent is only required as an element of the crime of persecution contained in article 7(i)(h). Little consensus existed before Rome on these matters.²⁸ The widespread “or” systematic requirement accords with customary international law and has been followed in the jurisprudence of the ICTY.²⁹ It ensures that isolated or random acts are not encompassed. It is recognized that crimes against humanity may be

²¹ See W.A. Schabas, *Genocide in International Law* (2000).

²² 78 U.N.T.S. 277.

²³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, [1951] I.C.J. Rep. 16,23.

²⁴ *Ibid.*, and *Barcelona Traction Case (Second Phase) (Belgium v. Spain)*, [1970] I.C.J. Rep. 3, 32.

²⁵ T. Meron, “Crimes Under the Jurisdiction of the International Criminal Court” in H.von Hebel, J. Lammers & J. Schukking (eds), *Reflections on the International Criminal Court* (1999), 47, 49.

²⁶ For a comparison of the different content of these formulations and that of the ICC see M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999), Chapter 7.

²⁷ Decision of the International Military Tribunal [1946], I.L.R. 203.

²⁸ For details of the negotiations before and during Rome see M. Boot, R. Dixon and C. Hall, “Article 7, Crimes Against Humanity” in O. Triffterer, *Commentary on The Rome Statute on The International Criminal Court* (1999), 117.

²⁹ *Ibid.*, 126. See *Prosecutor v. Tadic*, case No. IT-94-1-T, 7 May, 1997, para.646.

committed by not only states but by “[n]on-state actors, or private individuals, who exercise *de facto* power.”³⁰

Eleven offences are enumerated. These include not only those contained in the IMT Charters but also add the following: forcible transfer of population is added to deportation,³¹ imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law,³² torture,³³ rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,³⁴ enforced disappearance of persons,³⁵ and apartheid.³⁶ The express inclusion of crimes of sexual violence was a major accomplishment. It was understood that rape had been covered in the Nuremberg and Tokyo Charters by the reference to “other inhumane acts.” Following the lead taken in the ICTY and ICTR Statutes, the Rome Statute now explicitly provides for rape as well as the gender based crimes. It was an important mission to have these crimes defined as criminal acts and not subsumed under classifications such as those dealing with violations of honour and dignity and humiliating and degrading treatment. Forced pregnancy was acutely controversial as some delegations had feared that the aim was to impose on states an obligation to provide access to abortion to forcibly impregnated women. The consensus that was reached was based on language added to the definitional paragraph and now contained in article 7(2)(f).³⁷ Thus, for forced pregnancy there must be the unlawful confinement of a woman made pregnant forcibly. There must have been the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. In order to eliminate the concerns of Catholic and Arab states³⁸ a final sentence was added which states that “This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.” A similar provision is also found in article 8 on war crimes. It is provided that such crimes are also war crimes in international armed

³⁰ *Ibid.*, 159.

³¹ Article 7(1)(d).

³² Article 7(1)(e).

³³ Article 7(1)(f).

³⁴ Article 7(1)(g).

³⁵ Article 7(1)(i).

³⁶ Article 7(1)(j).

³⁷ C. Steains, “Gender Issues,” in R.S. Lee, *The International Criminal Court: The Making of The Rome Statute* (1999), Chapter 12, 367.

³⁸ *Ibid.*, 368.

conflict³⁹ and internal conflicts.⁴⁰ Persecution is a crime against humanity when it is committed in connection with any other crime against humanity or other crimes within the subject matter jurisdiction of the ICC.

Article 8 on war crimes does not follow the simple Nuremberg model. It is a complex article containing fifty crimes. Although the provision on grave breaches of the Geneva Conventions 1949⁴¹ parallels article 2 of the ICTY statute, the rest is more highly elaborate with its listing of other serious violations of the laws and customs applicable in international conflicts.⁴² The Statute applies not only to international armed conflicts, but also to internal conflicts.⁴³

Two of the main contentious issues were the inclusion of internal armed conflicts and nuclear weapons as prohibited weapons. A number of states were strongly opposed to internal conflicts finding their way into the Statute, whereas others viewed internal armed conflicts as a crucial part of the package. The compromise struck is to exclude situations that do not meet the threshold of being more than internal tensions, riots or acts of sporadic violence.⁴⁴ Nuclear weapons as prohibited weapons was extremely difficult to deal with. The majority of states supported its inclusion but it was strongly contested by some of the nuclear powers. On the other hand there seemed to be agreement that the use of biological and chemical weapons would amount to a war crime. However, in the run up to the end of the Rome Conference the agreement on biological and chemical weapons unravelled. It was absolutely clear that inclusion of nuclear weapons was not feasible. Some delegations from the non-aligned movement argued that nuclear weapons and biological and chemical weapons, the so-called poor states' weapons of mass destruction should be treated in the same way. Thus, neither found their way into the final Statute. Article 8(2)(b)(xvii)-(xx) therefore provides for the age-old accepted prohibited weapons such as poison and poisoned weapons, poisonous, asphyxiating or other gases or liquids and dum-dum bullets. However, new weapons may be included in the future if three requirements laid down in article 8(2)(b)(xx) are complied with. Firstly, such weapons must be of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate. Secondly, they must be the subject of a comprehensive prohibition. Thirdly, the weapons must be included in an annex to the Statute. For that to hap-

³⁹ Article 8(2)(b)(xxii).

⁴⁰ Article 8(2)(e)(vi).

⁴¹ Article 8(2)(a)(i)-(viii).

⁴² Article 8(2)(b)(i)-(xxvi).

⁴³ Article 8(2)(c)-(f).

⁴⁴ Article 8(2)(d) and (f).

pen there will have to be an amendment of the Statute in accordance with articles 121 and 123. This could not take place at the earliest until seven years after the entry into force of the Statute when a Review conference will be held. According to an understanding of article 121(5) should a new weapon be added then such an amendment would only be binding on states that have so accepted it.

The crime of aggression showed a major divide between states. Two issues came to the fore. In dispute were the definition of the crime and the role of the United Nations Security Council. On the one hand there were states that were adamant that aggression should be included, that the International Military Tribunals in Nuremberg and Tokyo had held that it constituted a crime against peace, that in fact it was the primary crime and that to leave it out would be a retrograde step for international justice and the rule of law. However, even amongst those supporting inclusion there was a marked lack of consensus on a suitable definition. On the role of the Security Council there were also two marked camps: those states that wanted a prior determination of aggression by the Security Council and those states that wanted to eliminate any role for the Security Council completely. Against this backdrop the compromise in Rome was that aggression should be included in article 5(2) but that the ICC shall not exercise jurisdiction over it until it has been defined by the Preparatory Commission set up after the Conference and adopted by the Assembly of States parties or a Review Conference in the same fashion as discussed above with regard to inclusion of new prohibited weapons. Any definition must be consistent with the United Nations Charter. The Preparatory Commission continues to work on aggression.

Turning to what was not included in the ICC Statute in the list of core crimes. The ILC Draft had indeed included so-called "treaty crimes" such as terrorism and drug trafficking. However, as time went on in the Preparatory Committee and later in Rome it became apparent that there was lessening support. The main arguments against inclusion were that the treaties on point were not codifications or otherwise reflective of customary international law and that some of the pertinent treaties had relatively speaking insufficient ratifications. As a practical matter it was also argued that the conventions dealing with the various aspects of international terrorism and drug trafficking are effective mechanisms for ensuring international cooperation and apply the principle of *aut dedere, aut judicare*, that a state party is obligated to either extradite an alleged offender or submit the case to its own competent authorities for the purposes of prosecution. Furthermore, there were concerns that no generally acceptable definition of terrorism exists and to include it would have politicized the fledgling ICC. The accommodation here can be found in Resolution E of the Final Act of the Conference. It recommends that the Review Conference which will take place seven years after the entry into force of the Statute reconsider the matter with a view to arriving at an

acceptable definition and inclusion in article 5 by amendment. The same applies to drug trafficking. Opposition to its inclusion had seemed to be based on the fact that though clearly an international crime that it was not in the same nature as the crimes listed in article 5. A spectre that drug trafficking cases could flood the court was viewed as real. The conclusion was that at least at this stage it is best left in the hands of national law enforcement authorities using the extradition process and other forms of mutual legal assistance in criminal matters.

With 52 states parties the Rome Statute should enter into force in 2002. Then will come the testing time of all aspects of the Treaty. Once up and running and based on state acceptance and Security Council referrals time will tell whether there will be the will to enlarge the scope of the core crimes. The early track record of the ICC will be of ultimate importance.



**THE UNITED NATIONS
CONVENTION AGAINST
TRANSNATIONAL ORGANIZED
CRIME AND PROTOCOLS**

THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND ITS PROTOCOLS: A NEW ERA IN INTERNATIONAL COOPERATION

DIMITRI VLASSIS*

INTRODUCTION

In December 1998, the United Nations General Assembly established¹ an Ad Hoc Committee for the elaboration of the United Nations Convention against Transnational Organized Crime and three additional Protocols addressing: trafficking in persons, especially women and children; illegal trafficking in and transporting of migrants; and illicit manufacturing of and trafficking in firearms, their parts and components and ammunition. In establishing this Committee, the Assembly took a giant step toward closing the gap that existed in international cooperation in an area generally regarded as one of the top priorities of the international community in the 21st century. The Assembly also lay to rest the uncertainty and uneasiness that surrounded the endeavor by manifesting the collective political will of all States to tackle conceptual and political problems and find commonly acceptable solutions. One year later, in December 1999, the General Assembly adopted another resolution,² by which it asked the Ad Hoc Committee to intensify its work in order to complete it by the end of 2000. The

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¹ See General Assembly resolution 53/111 of 9 December 1998. In resolution 53/114, also of 9 December 1998, the General Assembly asked the Ad Hoc Committee to devote sufficient time to the elaboration of the Convention and the three additional international legal instruments.

² See General Assembly resolution 54/126 of 17 December 1999.

Assembly thus formalized the deadline under which the Ad Hoc Committee had been working since its establishment. Apart from the symbolism involved, the deadline reflects the urgency of the needs faced by all States, developed and developing alike, for new tools to prevent and control transnational organized crime. It also reflects the need of sustaining and building on the momentum that made the original decision possible in order to foster consensus while not compromising the quality of the final product.

This paper will attempt to provide a historical background to the negotiations on the new Convention and its three Protocols. In so doing, the paper will track the evolution of the work of the United Nations on action against organized crime, thus attempting to put the issue in perspective. The author hopes that with this background knowledge, the reader will be in a better position to appreciate the difficulties involved and comprehend the approach, which governments took to several issues of interest. The paper will then proceed to give an overview of the new Convention and its three Protocols.

UNITED NATIONS EFFORTS TO STRENGTHEN INTERNATIONAL COOPERATION AGAINST ORGANIZED CRIME: THE EARLY YEARS

The work of the United Nations to strengthen international cooperation against organized crime dates back more than twenty-five years. The issue in its various aspects has been debated and analysed by successive congresses on the prevention of crime and the treatment of offenders, the quinquennial event organized by the United Nations Crime Prevention and Criminal Justice Programme since its establishment.³ This debate and its results reflect the changing perceptions and comprehension of the problem over several decades. It must also be viewed as a series of steps, as a sustained course in the direction of raising awareness among policy- and decision-makers and challenging the conventional thinking about crime prevention and criminal justice matters. The process must be viewed in perspective and in context. The United Nations is a global organization, with a steadily increasing membership, especially after the end of the Cold War. In this environment, there are various and multiple political concerns and differences in political and substantive approaches to problems. Dominant among the concerns remains safeguarding sovereignty, which is for many smaller developing countries and countries with economies in transition (or emerging democracies) the last bastion of national integrity and identity. Criminal justice matters are at the core of sovereignty concerns, being perceived as essentially domestic in nature, touching as they are on institutions ranging from national constitutions to legal regimes and systems.

³ The Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders was held in Vienna from 10 to 17 April 2000.

The Commission on Crime Prevention and Criminal Justice was established and held its first session in 1992. One of its first endeavours was to flesh out further the general guidelines established by the General Assembly regarding the priorities of the Programme. On its recommendation, the Economic and Social Council determined that one of the priority themes that should guide the work of the Commission and the United Nations Crime Prevention and Criminal Justice Programme would be: “national and transnational crime, organized crime, economic crime, including money laundering, and the role of criminal law in the protection of the environment.”⁴ The Council also took note of the recommendations of two Ad Hoc expert group meetings, which had been held in 1991, in Smolenice, Slovak Republic, and in Suzdal, Russian Federation, and requested the Secretary-General to continue the analysis of the impact of organized criminal activities upon society at large.⁵ The Commission, also at its first session, requested the Secretary-General to examine the possibility of coordinating efforts made at the multilateral level against the laundering of proceeds of crime, and to propose means for technical assistance to requesting Member States in drafting legislation and in training of law enforcement personnel, as well as in developing regional, subregional and bilateral cooperation.⁶

THE ROAD TO THE CONVENTION

The direct governmental involvement in setting the agenda for the United Nations Crime Prevention and Criminal Justice Programme, assured through the establishment of the Commission, helped give new impetus to the importance of international action against organized crime. In its first couple of sessions, the Commission engaged in intense work, reviewing and assessing the activities of the Programme until that time and paving the road for the future. International concerted action had been identified as a key component of success against organized crime, which was sorely missing at the time. This was one of the conclusions which one of the prominent figures of the fight against organized crime, Judge Giovanni Falcone, had derived from all his efforts against the Mafia. Judge Giovanni Falcone is known for sweeping successes against organized crime in Italy through meticulous work, expansion of his investigations into fields previously beyond the scope of traditional prosecutorial work, and through cooperation with the authorities of other countries. What is perhaps less well known is that about two months before his tragic death, Judge Falcone led his country’s delegation to the inaugural session of the Commission. In what

⁴ See Economic and Social Council resolution 1992/22.

⁵ See Economic and Social Council resolution 1992/23.

⁶ See Commission on Crime Prevention and Criminal Justice resolution 1/2.

probably was his last public address at an international forum, he called for more meaningful action at the international level against organized crime, in order to address the problem of national authorities trying to cope with a phenomenon that was no longer national. In explaining why he thought more international cooperation was a must, Judge Falcone launched the idea of a world conference at a sufficiently high political level to lay the foundations for such cooperation.

The Commission took up the idea of a major world conference on organized crime the year after Judge Falcone's death. In doing so, it built on the efforts of the United Nations and the awareness and interest displayed by the international community through the significant work at the policy-making level that it had accomplished in its short existence. The result was the organization of one of the most significant events in the history of the United Nations Crime Prevention and Criminal Justice Programme. The World Ministerial Conference on Organized Transnational Crime, held in Naples, from 21 to 23 November 1994 was also one of the best attended events ever, with over 2000 participants and delegations from 142 States (86 of them at the Ministerial level, while others were represented by their Heads of State or Government). The Conference unanimously adopted the Naples Political Declaration and Global Action Plan against Organized Transnational Crime,⁷ which was approved by the General Assembly one month later.⁸

The Naples Political Declaration and Global Action Plan emphasised the need for urgent global action against organized transnational crime, focussing on the structural characteristics of criminal organizations. The Naples Declaration stressed the need for the international community to arrive at a generally agreed concept of organized crime as a basis for more compatible national responses and more effective international cooperation. Particular attention was given to more effective bilateral and multilateral cooperation against organized transnational crime, asking the Commission on Crime Prevention and Criminal Justice to examine the possibility for a convention or conventions against organized transnational crime. Furthermore, the prevention and control of the laundering and use of the proceeds of crime were considered essential elements of any international effort.

The negotiations for the Naples Declaration were long and difficult. One issue of contention was whether the document would issue a clear mandate for the elaboration of a new convention against transnational organized crime. Most of the members of what is known in the United Nations as the Western European and Others Group (the regional group which includes all Western European countries as well as Australia, Canada, New Zealand and the United States) were

⁷ See United Nations document A/49/748.

⁸ General Assembly resolution 49/159 of 23 December 1994.

sceptical, if not openly negative to the idea of a convention. The reason was that they regarded the subject as too thorny to approach, especially since it involved a number of conceptual and legal difficulties, with definitions figuring prominently among them. These conceptual and legal problems, coupled with the inherent difficulty of negotiations with the full membership of the United Nations around the table, led these countries to conclude that the final product was likely to be the lowest common denominator. An instrument without “teeth” was something that was not desirable and perhaps not worth the time and effort for most developed countries. A further concern stemmed from the perception that the more or less quite well developed networks of regional and bilateral arrangements that developed countries had developed, especially in the field of international cooperation in criminal matters, was sufficiently operational and functional to deal with organized crime. These countries thought that a new convention might place those arrangements in jeopardy, especially regarding the presumably stronger provisions they contained.

At the other end of the spectrum stood the vast majority of developing countries that thought the idea of a new convention was a good one for several reasons. First, the prospect of a universal instrument held appeal for developing countries because of the nature of the problem they were beginning to witness crossing into their territories and affecting their efforts towards development. In this regard, many developing countries and countries with economies in transition were experiencing sentiments bordering on genuine shock because they had no way of accurately estimating the malicious potential of organized criminal groups. For many years, they were under the impression that organized crime was the problem of industrialised countries. Most of them were also under the impression that organized crime was synonymous to drug trafficking and that issue had been the object of numerous international and regional initiatives and instruments, which provided a certain degree of guidance and coordinated response. Second, the possibility of dealing with a problem in the context of a global forum, such as the United Nations, has always been favoured by developing countries because of the relative parity, which that forum affords them. Strengthening this conviction is the tendency of United Nations in most of its entities to favour decisions by consensus and to avoid, if at all possible, voting. Consensus decision-making allows more room for the concerns of smaller countries to be taken into consideration and reflected in the final outcome of the endeavour. Third, as any instrument against transnational organized crime would dwell at length on methods of international cooperation, developing countries saw a new convention as the way of addressing pressing needs in that area. Lacking the resources, both human and financial, as well as the negotiating power, developing countries and emerging democracies had quickly recognized their inability to embark upon the development of extensive networks of bilateral agreements or arrangements

in the field of international cooperation in criminal matters. An international convention offered the potential of making up for this inability and of filling the gaps these countries had identified in the cooperation they needed.

In view of all this, developing countries and countries with economies in transition, as a block, threw their support behind the idea of a convention in Naples and tried to use the Declaration as the vehicle for promoting its elaboration. The final language of the Declaration was a compromise solution, which was the result of the tireless efforts of the then Vice-President of Colombia (who was chairing the negotiating committee at the Conference) and the delegate of Italy in charge of these negotiations, Ambassador Luigi Lauriola (who served as the Chairman of the Ad Hoc Committee on the Elaboration of the Convention). It is important to keep this background in mind, when the elaboration of the Convention itself will be discussed, because over time and with changing circumstances and political agendas, there has been a considerable evolution of that position.

In 1995 and 1996, the issue of the convention was a topic of discussion and debate during the annual Commission sessions but also in other fora, both within and outside the United Nations. The doubts and hesitation that had resulted in the compromise language of the Naples Declaration persisted, even though the surveys carried out by the Secretariat showed that the majority of countries were favourably disposed to the convention. In numerous discussions, the issue that appeared to be the most difficult was how would the international community define organized crime in a way that would be acceptable to everyone, despite differences in concepts, perceptions and legal systems. But even within the group of countries which had been the most sceptical, there were signs of at least a change in thinking. The Group of Senior Experts, which was established by the Group of Seven Major Industrialised Countries and the Russian Federation (what was then known as G7/P8 and since 1998 is referred to as the G8) at Lyon, deserves much of the credit for this reversal of opinion. The Group's mandate was to explore ways and means to strengthen cooperation against transnational organized crime. Chaired by Ambassador Lauriola of Italy, the Group produced a set of forty recommendations, which set the stage for much of what has been done since in the field.

In September 1996, the President of Poland submitted to the General Assembly the draft of a framework convention against organized crime.⁹ Poland had been one of the most vocal proponents of the new convention since the Naples Conference. Its initiative was a component of its consistent policy of support for the new instrument, but also resulted from the Government's conviction that the issue was urgent and required commensurate action. The Government

⁹ See United Nations document A/C.3/51/7.

of Poland was of the view that the best way to allay the fears and dispel the doubts expressed by several countries about the difficulty of approaching the matter was to get them to focus on something in writing. Poland's methodological approach was sound. The question of the new convention until that time had been a largely abstract one. Every discussion revolved around whether the approach to international cooperation was more effective at the bilateral and regional level, or whether there was tangible benefit to be gained by elevating normative efforts to the global level. In the absence of a draft, which people could study and discuss at capitals with their criminal law and other experts, there was hardly any debate about what the contents of a new convention could be. Consequently, hardly anyone was visualising the possible benefits of a new international binding legal instrument. Poland tried to shift the focus of the discussion and stimulate national thinking along the lines of assessing potential benefits and coming to terms with the individual problems that would be associated with the process of obtaining those benefits. Poland also wanted to show that isolated manifestations of the type of criminality, which the new instrument would target, had already been the object of previous international negotiations. In order to achieve these goals, Poland included in its draft a list of offences, based on the terminology used in other previous international conventions.

Poland's objective about focusing the thinking and discussions on the possibility of the convention was achieved. The General Assembly adopted a resolution in December 1996,¹⁰ by which it took note of Poland's proposal and asked the Commission to devote priority attention to the question of the convention at its sixth session. Even if on the face of it that resolution did not give the green light for the beginning of the process towards the new convention, the discussions that preceded its final drafting were indicative of a change in attitude. This change ranged from acceptance of the merit of having a new convention to resignation to what appeared to be inevitable. This latter approach stemmed from the building and expanding momentum in favour of the convention, which began increasing the political cost of its rejection.

On the other hand, the inclusion of the list of offences in Poland's draft, and especially the inclusion of terrorism in that list, created two problems. First it was immediately picked up by a number of countries, which had serious problems with terrorism. For these countries, including terrorism into a list of offences usually committed by organized criminal groups, thus treating terrorism as just another form of organized crime, was the answer to their frustrations of many years about the lack of progress in concerted action against terrorism at the international level. This is an important feature of the development and evolution of the convention because it was resolved only at the very last moment in the nego-

¹⁰ General Assembly resolution 51/120 of 12 December 1996.

tiations. Second, including offences established or defined in other conventions created problems for those countries that were not Parties to these conventions.

In preparation for the sixth session of the Convention and in order to boost the chances of the convention, the Giovanni and Francesca Falcone Foundation (a foundation established in Palermo in the memory of Judge Giovanni Falcone and his wife, who was killed with him) organized from 6 to 8 April 1997 in Palermo an informal meeting. All members of the Commission were invited to discuss what issues a new convention should cover. The meeting in Palermo confirmed the attitude described earlier but also showed that whatever reservations remained were still to be reckoned with.

The key turning point for the fate of the new convention was the sixth session of the Commission.¹¹ During that session, the Commission established a working group to deal with the matter of the implementation of the Naples Declaration. The core mandate of the group, however, was to discuss the question of the convention. Even if, as mentioned earlier, attitudes had begun to change and even those still holding reservations about whether the new convention was truly feasible or desirable had begun to accept the inevitable, the group had to tread a fine line. The careful formulation of the group's report to the Commission is perhaps the best indication of how precarious the whole question remained. The group reported that:

... it was [its] sense that its contribution would be most useful to the Commission if it would canvass the scope and content of a convention, rather than engage in a drafting exercise, which would be outside the mandate given by the Council and the Assembly, and would require significantly more time than that available.... In determining the scope and content of a convention, the international community could draw on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, but should be able to come up with new and more innovative and creative responses. The Group recognized that it was desirable to develop a convention that would be as comprehensive as possible. In this connection, several States indicated that their remaining reservations on the effectiveness and usefulness of a convention were contingent upon a convention's scope of application and the measures for concerted action that such an instrument would include. Several States stressed the importance they attached to the nature of a convention as a framework instrument. One difficult issue was arriving at an acceptable definition of organized crime. It was indicated, however, that this issue was not insurmountable,

¹¹ Vienna, 28 April to 9 May 1997.

especially in the presence of a strong and sustained political will. Several States were of the view that a definition was not necessarily the most crucial element of a convention, and that the instrument could come into being without a definition of organized crime. In this connection, it was also suggested that the phenomenon of organized crime was evolving with such rapidity that a definition would limit the scope of application of a convention, by omitting activities which criminal groups may engage in. Other States felt that the absence of a definition would send the wrong signal regarding the political will and commitment of the international community. In addition, avoiding the issue would eventually create problems in the implementation of a convention. In view of all this, concerted efforts to arrive at a solution should be made.... The problem of definition could be solved by looking at each of its elements separately. It was suggested that a first step towards a definition might be to use the definitions of offences contained in other international instruments.... There was also discussion about whether in approaching the definition, the focus should be on the transnational aspects of organized crime or on organized crime in general. It was pointed out that the mandate of the Commission was related to transnational organized crime but that the issue required further serious consideration in the context of determining the overall scope of a convention.

In the context of the discussion on whether a convention should include a list of offences, some States expressed their support for the inclusion of terrorist acts in such a list. Most States were of a contrary view, recalling the initiatives currently under way in the United Nations and other forums on terrorism and the conclusions of the Commission at its fifth session.

The Group agreed that it would be useful to focus on widely accepted constituent elements of organized crime. In the discussion that ensued, the elements identified included some form of organization; continuity; the use of intimidation and violence; a hierarchical structure of groups, with division of labour; the pursuit of profit; and the purpose of exercising influence on the public, the media and political structures. The Group decided that the best way to proceed for the purpose of advancing the issue was to seek common ground, utilising as many previous contributions as possible, and building on the positive experience and valuable work done at other forums, such as the European Union and the Senior Experts Group on Transnational Organized Crime. The draft United Nations framework convention against organized transnational crime (A/C.3/51/7) was a useful point of departure and a good basis for further work. In this connection, the Group decided to discuss matters related to international cooperation

in criminal matters that would form an essential part of an international legally binding instrument. The overriding concern would be to equip the international community with an effective instrument to strengthen action against organized crime.

In spite of this careful language, it was evident that the tide had changed. In fact, several delegations began putting proposals on the table that went beyond a mere discussion of the desirability or feasibility of the convention. The issue became not whether there would be a new convention but what should the new convention contain and how soon it should be developed. It is interesting to note that some of these proposals were submitted in the form of “non-papers,” in order to afford their authors the possibility to keep the option of backing out open. The Group agreed that considerable work was required on the issue of the convention. For this purpose, it proposed that an open-ended intergovernmental group of experts should be established to consider all pending proposals related to the issue of conventions, as well as all elements thereof and appropriate cooperation modalities and mechanisms.

On the recommendation of the Commission at its sixth session, the General Assembly established¹² an intergovernmental group of experts, which met from 2 to 6 February 1998 in Warsaw. The group’s mandate was to elaborate a preliminary draft of a possible international convention against organized transnational crime, on the basis of the contributions and proposals that Governments had made at the sixth session of the Commission, or such documents as the forty recommendations of the G7/P8 Lyon Group.

The Warsaw meeting was the first occasion on which the question of the desirability or possibility of the new convention was laid to rest. The intergovernmental working group reported that “there was broad consensus on the desirability of a convention against organized transnational crime. There was much to be gained from this international legal instrument, which would not only build on, but also go beyond, other successful efforts to deal with pressing issues of national and international concern in a multilateral context.”

The Group then went on to develop a “list of options” for the convention, which amounted to a first draft containing several options for various provisions. The term “list of options” was deliberately used as a way of satisfying those few who were still reluctant to speak of a “preliminary draft,” considering this term as determining in an unequivocal manner the resolution of the issue of whether the negotiations for the new convention should be authorised. It is interesting to note that before embarking on the very loose drafting exercise, the Group put down a number of general principles, which it understood would guide “the efforts to elaborate a new international convention.”

¹² See General Assembly resolution 52/85 of 12 December 1997.

The proposals of the Warsaw Intergovernmental Group were submitted to the Commission at its seventh session.¹³ During that session, the traditional in-session working group on the implementation of the Naples Declaration began what in essence was a first reading of the draft prepared in Warsaw. That same working group also made recommendations to the Commission, which formed the basis for a draft resolution, for eventual consideration and adoption by the General Assembly, by which an Ad Hoc Committee would be established to elaborate the new instrument.¹⁴ One key element of the debate on that draft resolution was whether it would include a deadline for the work of the Ad Hoc Committee. Many delegations thought this would be premature and a deadline was not included in the text. However, everyone began speaking in terms of making every effort possible to complete the work by the end of 2000. The symbolism was certainly one motive for the choice of the unofficial deadline. Other motives included the desire of many countries to ensure that embarking on negotiations was not an open-ended endeavour, not wishing to see the issue embroiled in endless debate, as had been the case with other international conventions. Another, perhaps more powerful, reason was the prominent place on the international agenda that action against transnational organized crime had acquired. Linked with this was the realization that attempting to negotiate such a major international legal instrument was fraught with all kinds of conceptual and political difficulties, which had the potential to erode the political will that made the commencement of the negotiations possible.

The negotiations of the draft resolution that would give the green light for the elaboration of the new convention to begin were conditioned by an interesting development. Faced with pressing political priorities, or frustrated by other processes, some countries had begun identifying individual issues, which they thought merited attention at the international normative level.

Argentina had for quite some time favoured action, in the form of a new convention, against trafficking in minors. It had tried to push forward the initiative in the context of the work done in Geneva on additional protocols to the Convention on the Rights of the Child. However, progress there was frustratingly slow, mainly because of the fact that the proposed new protocol approached the issue from a purely human rights perspective. Therefore, Argentina decided to give the whole matter a new spin and see whether the international community was ready to deal with it in the context of criminal justice. At the seventh session of the Commission, Argentina proposed the drafting of a new convention against

¹³ Vienna, 21 to 30 April 1998.

¹⁴ General Assembly resolution 53/III.

trafficking in minors, citing the growing evidence of this becoming an activity in which organized criminal groups were engaged.

Austria was experiencing an increase in incidents of smuggling of migrants. Its efforts to cope with the problem led it to discover that it was not alone in having to deal with more and more cases of illegal entry of migrants, organized by criminal gangs from various regions of the world. As part of its consolidated effort to see the issue rising in the international agenda, and building on previous work on smuggling of migrants done by the Commission and the Secretariat, Austria presented to the Commission the draft of a convention against the illegal trafficking and transport of migrants. At about the same time, Italy was developing new policies in response to the influx of Albanian migrants who were being transported across the Adriatic by organized crime groups. Italy was also shocked by the sinking of a ship carrying illegal immigrants off its coast. Consequently, Italy undertook an initiative at the International Maritime Organization (IMO) aimed at the issuance of directives regarding trafficking of migrants by sea. When it found out about Austria's initiative at the Commission, Italy joined forces and presented a proposed protocol to deal with trafficking by sea, to be attached to the proposed Austrian convention.

The Crime Prevention and Criminal Justice Division had been mandated to carry out a study on firearms regulation. The study had been assigned to the Division on the initiative of Japan and had been carried out with voluntary funding provided by that country. The study (which was eventually published in 1998) was before the Commission at its seventh session. The Governments of Canada and Japan thought that, as a result of the conclusions of the study, the issue of action against the illicit manufacturing of and trafficking in firearms had sufficiently matured to merit attention at the normative level. They thus proposed a new instrument on that subject, which could draw upon and be inspired by the Organization of American States Convention on Firearms, which had recently been concluded.

The Commission was thus found in front of a major decision. Whereas it had been engaged in discussing whether the time was ripe to ask that the international community embark on the negotiations of a new convention, it was now faced with the prospect of authorizing negotiations for four such instruments. All of the proposed subjects deserved attention, having risen, in one way or another, to the top of the political agenda. However, there was also the question of limited resources, especially of the United Nations, in supporting, both substantively and organizationally, the negotiations. In addition, there was the political issue of whether authorization to commence negotiations on four separate conventions would not result in dispersing efforts and diluting the political commitment required for success. Then, there was the issue of which of these instruments would command priority. The question facing delegations was whether prioritising was

feasible and, if so, what would be the criteria for determining which of these proposed instruments would be elaborated first. The political decision reached at the end was to link the more recent initiatives to the proposed convention against transnational organized crime. The talk among delegations was along the lines of negotiating protocols to the convention on each of these subjects. Not everyone was happy with that solution, mainly because of the lower status of a protocol compared with a full-fledged convention. As a result, the draft resolution proposed by the Commission for adoption by the General Assembly did not speak of protocols but of additional instruments, leaving their status open for further consideration at a more opportune moment.

On the recommendation of the Commission, the General Assembly decided

to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration, as appropriate, of international instruments addressing trafficking in women and children, combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, and illegal trafficking in and transporting of migrants, including by sea.¹⁵

The Assembly also decided to accept the recommendation of the Commission to elect Luigi Lauriola of Italy as the Chairman of the Ad Hoc Committee.

As mentioned earlier, the discussions that led to the final version of this resolution revolved around establishing a deadline for the completion of the negotiations. Even if the draft did not include such a deadline, planning for the work of the Ad Hoc Committee had to be carried out taking into account the commonly shared understanding about the total time available to it to complete its tasks. At the seventh session of the Commission, the delegation of Argentina came forward with an invitation to host a meeting of the Ad Hoc Committee. However, the resolution remained a draft, as it was intended for adoption by the General Assembly. The annual sessions of the General Assembly begin in September and the Third Committee, which is the committee responsible for crime prevention and criminal justice matters, does not take up relevant recommendations before October. Legally speaking, the Ad Hoc Committee would not come into existence before the General Assembly had adopted the resolution establishing it. A paragraph was included in the resolution to deal with this institutional problem, while assuring that the time between May and October would be productively used. The General Assembly

¹⁵ General Assembly resolution 53/111 of 9 December 1998.

welcomed with appreciation the offer of the Government of Argentina to host an informal preparatory meeting of the inter-governmental ad hoc committee at Buenos Aires, so as to ensure the continuation without interruption of work on the elaboration of the convention.

In order to further advance the work, the Chairman invited interested countries to form an informal group of "Friends of the Chair," which would explore mainly procedural matters to pave the way for the Ad Hoc Committee.

The meeting in Buenos Aires was held from 28 August to 3 September 1998. It picked up where the Commission had left off in going through the Warsaw text by way of a first reading. Already at this early stage, delegations started beefing up the text with new proposals on most major issues that it was supposed to cover. Also at this early stage, one of the questions that was intensely debated was the list of offences and whether such a list would make reference to terrorism. Perhaps most importantly for the negotiation process, the Buenos Aires meeting marked the formation of a core group of delegates, who were experts in their fields and shared considerable experience from previous negotiations. One important feature of this core group was that it was highly participatory, in the sense that it included representatives from virtually all regions and all legal systems of the world. The formation of this core group brought with it a gradually increasing sense of ownership regarding the text, which is a key element of the success of the endeavour.

The Ad Hoc Committee was officially established in December 1998 and held its first session in Vienna in January 1999. It finalized the text of the Convention at its tenth session in July 2000 and the text of the Protocols against Trafficking in Persons, Especially Women and Children and against Smuggling of Migrants at its eleventh session in October 2000 and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition at its twelfth session in March 2001.

THE NEW CONVENTION: A NEW ERA IN INTERNATIONAL COOPERATION

The process leading up to the establishment of the Ad Hoc Committee may seem long and arduous. However, the reader is urged to keep in mind that only four years passed from the time that the idea of a convention first surfaced until the official commencement of the negotiation process. This compares extremely favourably with other similar initiatives, especially in areas that are as complex as that of criminal justice and the development of international criminal law. Further, the Ad Hoc Committee charged with conducting the negotiations oper-

ated from the beginning under a self-imposed short deadline,¹⁶ which is rather unusual in international negotiations of this sort, especially in the context of the United Nations. This deadline set a very vigorous pace for the negotiations, which often taxed heavily the capacity of smaller delegations. The reader should also keep in mind that the Ad Hoc Committee was essentially negotiating in parallel four international legally binding instruments. All this notwithstanding, the Convention was finalized in July, a few months ahead of schedule, and two of the Protocols were completed within the deadline, in spite of the numerous complexities and political concerns they might have entailed. Finally, the reader should always bear in mind that the United Nations is a global organization founded on the principle of equality. The concerns of all States, big or small, more or less powerful, deserve equal attention and should be taken into account in all of the activities in which the United Nations is engaged. The principal strength of international action, especially that of a normative nature, is its universality. In the case of an instrument intended to address an issue as complex as transnational organized crime, the active participation of both developing and developed countries from all regions is essential. The very nature of transnational organized crime, with the ability of criminal groups to seek the most favourable conditions for their operations, demands no weak links in the chain of joint action. The spirit guiding the negotiations has been one of constructive engagement and sensitivity to the concerns of everyone involved in the process. Everyone agrees that the objectives of the negotiations cannot be expediency but consensus, together with conscious and genuine commitment, which are the cornerstones of successful action. Consensus has often been equated with weakness and obscurity, especially when it comes to negotiated texts. It may be true that, at first glance, many documents that have been the results of prolonged negotiations may appear convoluted and inefficient. After all, very often one of the key elements of compromise is ambiguity. Having said this, however, it is also important to bear in mind that equally often the ideal is far removed from the feasible. An international legal instrument that upholds the highest standards of clarity and directness of language, and includes strong and straightforward obligations is desirable and commendable. It also deserves careful study at the academic level and is an essential component of any course in international law. However, if this instrument fails to come into force, or, if it does, is acceded to and implemented by a handful of countries, its practical utility becomes doubtful, to put it mildly, and is destined to languish in library books and soon forgotten.

The Ad Hoc Committee operated with these guiding principles from the time of its establishment. The negotiation process was highly participatory. Over

¹⁶ It should be noted that the General Assembly made this deadline official with resolution 54/126 of 17 December 1999.

125 countries participated in the sessions of the Ad Hoc Committee. With the generous help of Austria, Japan, Norway, Poland and the United States, on average 23 of the Least Developed Countries (a group of 49 countries from Africa, Asia and Latin America determined by the General Assembly each year) attended the sessions. Its members agreed early on that the quality of the final product was essential. Other existing Conventions, such as the 1988 Vienna Drug Convention and the Convention against Terrorist Bombings¹⁷ would provide inspiration, as they had often dealt with similar issues. However, the Ad Hoc Committee also agreed that every conscious effort would be made to improve upon the texts of these Conventions, to the extent possible, in order to meet the needs of the new Convention and to reflect new trends.

Before proceeding to giving an overview of the contents of the Convention, it is important to note a very interesting feature of the negotiation process. It will be recalled that, to a large extent, the driving force behind helping the idea of the convention mature was the enthusiasm of developing countries. Faced with the breakneck pace of the negotiations, several developing countries began complaining that the deadline was having an impact on their ability to study the text fully and prepare their positions. These countries felt that keeping the deadline should not have an adverse impact on the ability of developing countries to express their concerns and negotiate solutions they regarded as acceptable. In addition, as the text was gradually embellished and enriched with new proposals, several developing countries started to entertain fears that developed countries viewed the Convention as an opportunity to impose approaches and solutions on their less powerful counterparts, and this was the reason that the Convention had become highly desirable to them. Criminal justice is an integral component of a country's soul and, as such, one of the key attributes of sovereignty. In a rapidly developing and very demanding field as action against transnational crime, particularly organized crime, the tendency to expand jurisdiction at will, in order to respond to specific exigencies, has been noted and feared. Further, developing countries realized that the new Convention would impose a multitude of obligations, which would require the investment of considerable resources. With limited resources and competing priorities, especially at present when most efforts are directed towards addressing problems related to infrastructure and meeting the challenges of globalization, many of these countries foresaw the difficulty of meeting those obligations. This latter dimension of the thinking of those few countries was also a result of two perceptions. Firstly, all developing countries and countries with economies in transition had gradually become aware, in a more or less painful way, of the ramifications and potential of modern transnational organized crime.

¹⁷ Adopted by the General Assembly by resolution 52/164.

However, for several of them the problem had not caused dramatic crises domestically. Consequently, the new obligations were viewed as being out of proportion with their domestic experiences and their political agenda at home. Secondly, many policy-makers in some developing countries had geared their thinking towards the short-term, mainly as a result of pressing needs. Consequently, the implications of the expansion of transnational organized crime were not included as a parameter in the development of policies for the future. In addition, this short-term thinking could not capture the ramifications of concerted action against transnational organized crime, using the new Convention as the framework and main tool. In other words, the short-term thinking failed to assess the impact of the tendency of organized criminal groups to seek conditions of relative safety when governmental action increases the risk and cost of operations. It should be made very clear that the political commitment and the conviction about the need for the Convention and the desirability of concluding it remained totally undiminished. The negotiations, however, went through a phase of caution on the part of several developing countries and became, as a result, more intricate.

The new Convention can be divided into four main areas: criminalization, international cooperation, technical cooperation and implementation.

It will be recalled that one of the main reasons for the initial scepticism was whether the concept of transnational organized crime could be defined in an appropriate manner, from both the legal and political perspectives. The negotiators decided to use a two-pronged approach to the issue. First, it was agreed that it would be sounder to define the actors rather than the activities. The rationale behind this approach was that the international community was embarking on negotiating a binding international legal instrument for the future. Organized criminal groups are known to shift from activity to activity, from commodity to commodity and among geographical locations, often on the basis of what in the business world would be called a cost-benefit analysis. Given this known characteristic, it would be futile to try and capture in a negotiated legal text everything that these groups are known to engage in at present or might decide it makes good business sense to carry out in the future. In this context, the Convention defines an organized criminal group as being

a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established pursuant to [the] Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

Second, the new Convention should bring about a certain level of standardization in terms of offences as they are codified in national laws, as a prerequisite of international cooperation. Working on these premises, the Ad Hoc Committee

begun discussing the concept of serious crime. At the beginning, many countries expressed doubts as to whether the term would be appropriate, arguing that it signifies different things to different systems. It would be useful to bear in mind that this discussion was closely linked to the question of whether the Convention would include a list of offences. The Ad Hoc Committee asked the Secretariat to carry out an analytical study on serious crime and on if and how the concept was reflected in national laws. The study, which was based on the responses of over 50 States, showed that the concept of serious crime was well understood by all, even if the qualification might not necessarily be used in legislation. The doubts about, or objections to the use of the term gradually faded away. Serious crime is defined as “conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”

The Convention establishes four offences: (a) participation in an organized criminal group; (b) money laundering; (c) corruption; and (d) obstruction of justice. The provision establishing the offence of participation in an organized criminal group is a carefully crafted one, which balances the concept of conspiracy in the common law system with that of the various versions of participation as such versions have evolved in various continental jurisdictions. The aim was to promote international cooperation under the Convention by ensuring the compatibility of the two concepts, without attempting to fully harmonize them. The provision on criminalization of money laundering departs from a previous similar provision in the 1988 Vienna Drugs Convention, but goes beyond by expanding the scope of predicate offences covered. The provision on the establishment of the offence of corruption was the subject of considerable debate, mainly because it was deemed a limited effort against a much broader phenomenon. The approach finally selected was to include a provision in the Convention, in view of the fact that corruption is one of the methods used, and activities engaged in by organized criminal groups. This was done on the understanding that this Convention could not cover the issue of corruption in a comprehensive manner and a separate convention would be needed for that purpose. In fact, on the recommendation of the Ad Hoc Committee and the Commission, the General Assembly adopted a resolution¹⁸ on this matter. This resolution sets out the preparatory work, which would need to be carried out in 2001, for the elaboration of the terms of reference of the negotiation of a new separate convention against corruption. Following the completion of this work, a new Ad Hoc Committee will be established and asked to negotiate the text. Finally, the provision establishing the offence of obstruction of justice captures the use of force, intimidation or bribery to interfere with witnesses or experts offering testimony, as well as with the performance of the duties of justice or law enforcement officials.

¹⁸ General Assembly resolution 55/61.

In the area of international cooperation, the Convention includes articles on extradition, mutual legal assistance, transfer of proceedings and law enforcement cooperation. The provision on extradition adopts the approach of double criminality to this tool of international cooperation. The article provides that most of the particulars of extradition would be essentially left to national legislation or treaties that exist or will be concluded between States. It is for this reason that, with the exception of a safeguard clause on prosecution or punishment on account of sex, race, religion, nationality, ethnic origin or political opinions, the article does not contain grounds for refusal of extradition. There is an implicit recognition of nationality as a traditional ground for refusal of extradition, because this was identified as an area where the new Convention could not attempt to bring about change in national legislation, due to very strict traditions or constitutional impediments. The Convention, however, embodies the principle *aut dedere aut judicare* when extradition is refused on the ground of the nationality of the alleged offender. The article on extradition provides that the offences covered by the Convention would be deemed to be included as extraditable offences in any treaty existing between States Parties, or would be included in future treaties. States Parties can use the Convention for extradition purposes even if they make extradition conditional on a treaty. Those which do not make extradition conditional on a treaty will recognize the offences covered by the Convention as extraditable offences between themselves. Another important feature of the article is that it contains an obligation for States Parties to try and resolve differences by consultation before they refuse an extradition request. The article on mutual legal assistance is much more extensive, having been called by some a “treaty within a treaty.” In its 31 paragraphs, the article details every aspect of mutual assistance, including grounds for refusal. It is important to note that, while the article is largely based on similar provisions in other Conventions, it brings forth the considerable evolution of the concept of mutual legal assistance, as one of the primary tools of international cooperation against transnational crime. In this vein, the article speaks of the use of modern technology, such as electronic mail for the transmission of requests, or video link for the giving of testimony. The Convention also includes language regarding the spontaneous provision of information and assistance, without prior request. In the area of law enforcement cooperation, the Convention includes provisions on exchange of intelligence and other operational information and on the use of modern investigative methods, with the appropriate safeguards.

Prior to proceeding to the area of technical cooperation, it is important to mention that the Convention includes detailed provisions on the development of regulatory regimes to prevent and control money laundering and on confiscation, including provisions on the sharing of confiscated assets. The Convention also includes provisions for the protection of witnesses, a key component of any

successful action against organized crime. The relevant article includes a provision asking States to consider entering into agreements with other States for the relocation of witnesses. Further, and in the same vein, the Convention includes an article on the protection of and assistance to victims and another on measures to enhance cooperation with law enforcement authorities of persons involved in organized criminal groups (those who have been described in recent years using the Italian term *pentiti*).

As mentioned earlier, the involvement and participation of all countries in the joint effort against transnational organized crime lies at the core of the decision to negotiate a new international legal instrument. It also inspired the negotiations throughout the work of the Ad Hoc Committee. The new Convention will create numerous obligations for countries, which range from updating or adopting new legislation to upgrading the capacity of their law enforcement authorities and their criminal justice systems in general. Many of the activities required to meet these obligations are resource intensive and, as a consequence, will create a considerable burden for the limited capacities of developing countries. The spirit of the discussions around this subject has been very interesting. These discussions have been based on the understanding that the implementation of the Convention would be in the interest of all countries. Consequently, such implementation would be the responsibility of all countries, regardless of their level of development. Developing countries would gear their systems and bring their limited resources to bear in discharging this responsibility. However, everyone recognizes that, once this has been done, there will be many areas where developing countries and countries with economies in transition would require significant assistance until they are able to bring all their capacities up to a common standard. Following extensive discussion, the Convention includes two articles on technical cooperation, one intended to cover cooperation to develop specific training programmes and the other to deal with technical assistance in the more traditional sense of the term, i.e., involving financing of activities at the bilateral level or through international organizations, such as the United Nations. The latter provision foresees that States Parties will make concrete efforts to enhance their cooperation with developing countries with a view to strengthening the capacity of the latter to prevent and combat transnational organized crime. States Parties are also asked to enhance financial and material assistance to developing countries in order to support efforts to implement the Convention successfully. For the provision of technical assistance to developing countries and countries with economies in transition, the Convention foresees that States Parties would endeavour to make adequate and regular financial contributions to an account specifically designated for that purpose in a United Nations funding mechanism. The Ad Hoc Committee decided that this account will be operated for the time being within the Crime Prevention and Criminal Justice Fund, a mechanism set

up to receive voluntary contributions for the technical cooperation activities of the Centre for International Crime Prevention. In the resolution by which it adopted the Convention, the General Assembly established this special account under the Crime Prevention and Criminal Justice Fund. It is interesting to note that almost immediately, donor countries began making contributions to that account, demonstrating the seriousness with which they regard the matter of providing assistance to developing countries and countries with economies in transition, even at the pre-ratification stage.

On implementation, the Convention has taken a very interesting course. The Convention will establish a Conference of the Parties, which will have the dual task of improving the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of the Convention. The Conference of the Parties will accomplish these tasks by (a) facilitating the activities of States Parties foreseen under the articles on technical cooperation, including by mobilizing resources; (b) facilitating the exchange of information among States Parties on patterns and trends in transnational organized crime and on successful practices for combating it; (c) cooperating with relevant international and non-governmental organizations; (d) examining periodically the implementation of the Convention by States Parties; and (e) making recommendations to improve the Convention and its implementation. The relevant article goes on to say that the Conference of the Parties will acquire the necessary knowledge on the measures taken by the States Parties in implementing the Convention and on the difficulties encountered by them in doing so by the States Parties themselves, and through such supplemental review mechanisms as it may establish. The mechanism set up is a clear movement forward from previous practices in the field of implementation of international conventions, at least in the context of the United Nations. The provision establishes a dual form of review. On the one hand, it preserves the more traditional obligation, found in most other Conventions, for States Parties to file regular reports on the progress they have made in implementation. This is supplemented by additional review mechanisms, which the Conference may establish. This is an indirect reference to a system of "peer review," which has been developed in various forms in recent years in the context of regional instruments. Another important feature of the provision is that the Conference of the Parties will not only function as a review body. It will pay equal attention to serving as a forum for developing countries and countries with economies in transition to explain the difficulties they encounter with implementation and seek the assistance necessary to overcome such difficulties. This link between implementation and technical cooperation and assistance reinforces the collective will that guided the negotiations to take into account all concerns and needs and address them jointly in order to achieve the common goals embodied in the new Convention.

Another innovative feature of the new Convention is an article on prevention. The provision is designed not only to introduce formally the concept of prevention, which is relatively new in action against transnational organized crime, but also to include in the Convention some of the results of the latest thinking in this field. The language of the article is permissive, thus reflecting the novelty of the concept and the fact that it still needs to mature in order to be treated more as an obligation. However, given that States generally interpret even permissive provisions to merit the best possible efforts, the importance of the article is significant. The provision transfers to the global level efforts already discussed or undertaken at the regional level. It is designed to encourage countries to take appropriate legislative, administrative or other measures to shield their legal markets from the infiltration of organized criminal groups. Some of the measures foreseen are the promotion and development of standards and procedures designed to safeguard the integrity of public and private entities, as well as codes of conduct for relevant professions and the prevention of the misuse of legal persons by organized criminal groups.

Perhaps the most interesting feature of the Convention is its scope of application. Its analysis was left last because of the long debate its finalization required, but also because it conditions the entire text of the Convention. The Convention will apply

to the prevention, investigation and prosecution of (a) the offences established in accordance with [the Convention]; and (b) serious crime as defined [by the Convention], when the offence is transnational in nature and involves an organized criminal group.

However, the criminalization obligations that countries will undertake, regarding the offences they would have to establish in accordance with the Convention, would be “independent.” This means that States will legislate to establish as criminal offences the four types of conduct described in the Convention, regardless of whether they are transnational or involve an organized criminal group. The Convention also defines transnationality. An offence is transnational in nature if it is committed in more than one State; it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State. In addition, the provisions on extradition and mutual legal assistance contain specific and very carefully negotiated language to permit application of these articles in order to establish both the transnationality and the involvement of an organized criminal group. Solutions to these matters were based on the demonstrated political will of all countries

involved in the process to conclude a Convention that meets all their concerns. Such solutions were also based on the shared desire to reach agreement without diminishing the functionality and quality of the new instrument.

THE THREE PROTOCOLS

The Protocol Against Trafficking in Persons, Especially Women and Children

Initially, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children was intended to address only trafficking in women and children. Responding to ideas that emerged during the negotiations, the Ad Hoc Committee recommended, and the General Assembly approved¹⁹ the expansion of its scope to cover trafficking in all persons. Specific references to women and children were retained in recognition of the increased vulnerability of these groups and their special needs for protection and support.

The Protocol represents a new approach to the problem in several respects. It attempts to define “trafficking in persons,” a complex and multifaceted problem, especially with the involvement of transnational organized criminal groups, and it is the first attempt to address the problem in a comprehensive manner. It combines traditional crime control measures to investigate, prosecute and punish offenders with measures to protect trafficked persons. It is perhaps this balanced approach that assured progress in the development of an international legal instrument, whereas previous attempts to deal with the matter from one single perspective were not crowned with success.

Trafficking is defined as the

... recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

The provision goes on to say that “exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” Countries which ratify the Protocol are obliged to enact domestic laws making these activities criminal offences, if such laws are not already in place. In addition to the creation of new criminal offences, the Protocol also

¹⁹ See General Assembly resolution 54/126.

calls for other security-oriented measures, such as the development of new forms of passports and other travel documents which are difficult to forge or otherwise misuse for trafficking purposes.

Prevention efforts foreseen under the Protocol include the information and education of potential victims, as well as officials and the public. In many cases the desire of victims to migrate is exploited by offenders who misrepresent themselves and their activities. This makes educating potential victims about the reality of trafficking of particular importance. More generally, mass media campaigns and similar activities can be used to show the true face of trafficking, mobilising popular support for effective domestic and transnational measures against it. The Protocol seeks to inform and empower victims by requiring that they be informed about court and administrative proceedings. This combines support for victims with crime-control since protection and support are often essential if victims are to be convinced to assist investigators and provide evidence against offenders. There has also been widespread support in the negotiations for more general protection and support for trafficked persons. For example, the Protocol calls for training officials not only in methods of detecting and investigating trafficking, but also protecting the rights of victims, including protecting the victims from the traffickers. It also provides for “appropriate housing, economic assistance, psychological, medical and legal support” with an additional provision for the educational needs of children who have been trafficked.

There is general agreement that the problem of trafficking must be addressed at several levels, and that crime-control, crime-prevention, and victim-support measures must all be important parts of the solution. Countries have come a long way in negotiating these measures. The collective political commitment underpinning the new Protocol is evidenced perhaps more clearly by the agreement reached regarding the status of victims of trafficking in receiving States and the repatriation of victims of trafficking. The importance of these provisions becomes even greater if they are considered, as they should, as integral parts of the entire equilibrium of the Protocol. The first provision ensures that States Parties will, in appropriate cases, give consideration to the adoption of legislative or other measures that would permit victims of trafficking in persons to remain in their territories, either temporarily or permanently. In implementing this provision, States Parties shall give appropriate consideration to humanitarian and compassionate factors. The second provision is designed to ensure that repatriation of victims of trafficking is carried out in a way that takes into full account the safety of that person concerned and the status of any legal proceedings related to the fact that the person was a victim of trafficking.

The Protocol Against the Smuggling of Migrants

The Protocol is intended to combat smuggling of migrants by the prevention, investigation and prosecution of offences, and by promoting international cooperation among States Parties. It is also intended to protect the human rights and other interests of smuggled migrants by promoting international cooperation to that end. It is not intended to deal with activities that do not involve an “organised criminal group” as defined in the Convention itself. States Parties will be required to criminalize the smuggling of migrants, which includes the procurement of either illegal entry or illegal residence in order to obtain any direct or indirect financial or other benefit. States would also be required to criminalize the procurement, provision, possession, or production of a fraudulent travel or identity document where this was done for the purpose of smuggling migrants. The instrument is not intended to criminalize migration itself, however. It provides that migrants should not be liable to prosecution for a Protocol offence “... for the fact of having been smuggled,” but does not exclude liability for the smuggling of others or other offences, even where the accused is also a migrant. In recognition that smuggling is often dangerous, and to increase protection for migrants, States Parties would also be required to foresee as aggravating circumstances to the offences established by the Protocol the smuggling in conditions which endanger the migrants’ lives or safety, or which entail inhuman or degrading treatment.

The Protocol includes a chapter on smuggling of migrants by sea. The provisions in that chapter are designed to provide to States Parties that encounter ships, which are, or believed to be smuggling migrants, sufficient powers to take appropriate action. The text of these provisions draws heavily on the United Nations Convention on the Law of the Sea (1982), the 1988 Vienna Drugs Convention and interim measures drawn up by the International Maritime Organisation.

The Protocol encourages additional legal and administrative measures to combat smuggling, which involves commercial carriers. These include penalties where carriers found carrying smuggled migrants are complicit or negligent and requirements that carriers check basic travel documents before transporting persons across international borders.

States Parties are called upon to adopt general preventive measures. Based on the assumption that a key element of prevention is the dissemination of information about the true conditions during smuggling and after arrival to discourage potential migrants, the Protocol would require the creation or strengthening of programmes to gather such information, transmit it from one country to another, and ensure that it is made available to the general public and potential migrants. The Protocol also calls for the gathering and sharing of information needed by law enforcement or immigration officials to take action against smugglers, such

as information about the latest smuggling methods, routes and investigative or enforcement techniques.

The use of false or fraudulent passports and other travel documents is an important element of smuggling, and documents are often taken from migrants upon arrival so that they can be re-used by the smugglers over and over again. To address this part of the problem, the Protocol includes provisions designed to deal with document security. Subject to ongoing negotiations, States Parties would be required to develop basic document forms that cannot easily be used by a person other than the legitimate holder, and of such quality that they cannot easily be falsified, altered or replicated. To address the concerns of developing countries, this obligation is subject to the availability of the necessary means. Security precautions against theft of materials, blank documents, and issuance to fraudulent applicants may also be required. States Parties would also be required to establish that travel documents purported to have been issued by them are genuine and valid.

The Protocol Against Illicit Manufacturing of and Trafficking in Firearms

As mentioned earlier, the Ad Hoc Committee made every possible effort to overcome differences and obstacles in order to conclude in October all three Protocols entrusted to it. In spite of these efforts, and notwithstanding the good will of all delegations involved in the negotiations, it was not possible to reach agreement on certain key issues of the Protocol, such as its scope of application and, mainly, marking of firearms. The Ad Hoc Committee recommended, and the General Assembly decided that the negotiations should continue with a view to finalizing the Protocol in early 2001. The Ad Hoc Committee held its twelfth session in Vienna from 26 February to 2 March 2001 and finalized the Protocol by consensus, even though there were several delegations on both sides of core issues, which did not feel fully satisfied with the compromise solutions found. The General Assembly adopted the Protocol on 31 May 2001, also by consensus, pursuant to resolution 55/255.

The purpose of the Protocol is to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

The scope of application of the Protocol was the subject of intense negotiations until literally the very last minutes of the twelfth session of the Ad Hoc Committee. Following very careful consideration, and with a view to ensuring that the Protocol would not have unintended consequences but remain true to its stated purpose, it was decided that the Protocol would not apply to “state-to-state transactions or to state transfers in cases where the application of the Protocol

would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations.”

The term “firearm” includes any “barrelled weapon” which expels a shot, bullet or projectile by the action of an explosive, with the exception of firearms manufactured before 1899. The term “ammunition” includes components as well as assembled cartridges, subjecting components of ammunition to some of the controls in the Protocol. “Parts and components” of firearms are also defined. These must be both designed specifically for a firearm and essential to its operation, focusing controls on the most important and identifiable parts. The terms “tracing” and “transit” are also defined.

The term “illicit manufacturing” includes manufacture without legal authorisation, assembly from illicit parts, and manufacture without marking as required by the Protocol. The term “illicit trafficking” includes any form of transfer where firearms, parts, components or ammunition move from one country to another without the approval of the countries concerned. States Parties are required to make both illicit manufacturing and trafficking domestic offences.

Marking of firearms was the other complex issue that was resolved at the end of the negotiation process. A central policy of the Protocol is the creation of a series of requirements to ensure that firearms can be uniquely identified and traced from one country or owner to another, which deters offenders and facilitates the investigation of cases of transnational trafficking. The Protocol requires, at the time of manufacture of each firearm, either unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number, or maintenance of any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code. There is also the obligation to require appropriate simple marking on each imported firearm, if the firearm is not marked already. Records should be kept for at least ten years of transfers from one country to another, and that countries should cooperate closely in furnishing the information needed to trace a firearm when requested to do so. Firearms that are deactivated or destroyed are generally removed from national records, and to prevent cases of inadequate deactivation and the subsequent reactivation of unrecorded firearms, the Protocol also provides minimum requirements for deactivation.

The basis of the offence of “illicit trafficking” is that firearms, parts, components, or ammunition are transferred from one state to another without the legal authorisation of the states (including some transit states) concerned. To support this, the draft Protocol provides standard requirements for the licensing or authorisation of such transactions. Documents which identify the firearms and provide other relevant information would both accompany the shipment for reference by border, customs and other officials inspecting the weapons, and pass directly from government to government so as to ensure that the destina-

tion state is aware of and has licensed the importation of the shipment before the source state authorises or licenses its export. Provision is also made for security measures to prevent the falsification or misuse of documents and the loss, theft or diversion of actual shipments.

Several provisions of the Protocol call for international co-operation to combat illicit manufacturing or smuggling. The most significant of these, as noted, is co-operation with the tracing of firearms, but the sharing of information about offenders and their methods and more general scientific or forensic matters related to firearms are also called for.

THE PALERMO HIGH-LEVEL SIGNING CONFERENCE

The Convention and the two Protocols finalized by the Ad Hoc Committee at its October 2000 session were submitted to the General Assembly for consideration and action at its fifty-fifth session, together with a draft resolution that the Ad Hoc Committee prepared at its July and October sessions. The General Assembly adopted unanimously the resolution²⁰ and, by virtue thereof, the Convention and the two Protocols. By striking his gavel in the morning of 15 November, the President of the General Assembly brought to a successful conclusion the strenuous efforts of the international community to negotiate in good faith a set of instruments to collectively fight organized crime. Because of the fully participatory nature of the negotiating process and the sustained political commitment that formed the core of the joint efforts of the all States, the new instruments take into full consideration all legitimate concerns of all countries, big or small. They do so without in any way compromising the quality, functionality and, most importantly, universality of the instruments. Perhaps one of the most significant features of the negotiation process was that all countries engaged in it came away with a strong sense of ownership of the new instruments. It will be this sense of ownership that will constitute the best guarantee for the expeditious entry into force of the Convention and its Protocols and their subsequent implementation.

The new Convention and its Protocols were opened for signature on 12 December 2000 at a high-level political signing conference in Palermo. The symbolism and significance of this action by the General Assembly²¹ extend beyond the obvious. By gathering in Palermo, the 149 States present sent a powerful message to the world about their determination to join forces against transnational organized crime. The successful conclusion of the negotiations for the Convention and its Protocols in record time was only the beginning of joint

²⁰ General Assembly resolution 55/25 of 15 November 2000.

²¹ The High-Level Political Signing Conference was convened pursuant to General Assembly resolution 54/129 of 17 December 1999.

efforts in this field. The political commitment remained as strong as ever. In evidence of this commitment, the Convention was signed by 123 countries and the European Community, while the Protocols against Trafficking in Persons and Smuggling of Migrants received 81 and 78 signatures respectively. There are currently 126 signatories to the Convention and 85 and 82 signatories respectively to the Protocols. The Firearms Protocol will be open for signature in New York on 30 June 2001.

THE PROTOCOLS ON TRAFFICKING IN PERSONS AND SMUGGLING IN MIGRANTS

GILLIAN BLACKELL*

INTRODUCTION

On December 14, 2000, Canada signed the United Nations (UN) *Convention against Transnational Organized Crime* (TOC Convention) and two Protocols to this Convention. These Protocols are the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol) and the *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (Smuggling Protocol). This paper provides a brief overview of the distinction between smuggling in migrants and trafficking in persons, as well as a short description of the involvement of organized crime in these activities. This overview is followed by an explanation of the steps leading to the completion of the Smuggling and Trafficking Protocols and an overview of the contents of these Protocols.

ISSUE

In this era of “globalization,” with the increased movement of goods and capital across borders, it is not surprising that there would be a parallel increase in the movement of people across borders.¹ In fact, the International Organization on Migration (IOM) estimates that 150 million persons live outside their countries.² While many individuals are displaced due to war, internal

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¹ The United Nations Development Program’s (UNDP) *Human Development Report 1999*, listed trafficking as one of the criminal activities found to have increased with the rise of globalization.

² International Organization on Migration’s (IOM) *World Migration Report 2000*, the report also indicates that women make up almost 50% of the estimated 150 million migrants world-wide.

armed conflict in their countries of origin or the need for political asylum, others are drawn by the lure of a better life abroad. Asylum seekers often have to resort to the use of smuggling operations to escape persecution. Moreover, Churches and humanitarian organizations sometimes play a role in assisting asylum seekers to migrate, even if such migration may be irregular. The Protocols would not apply to the latter organizations, as they would be exempt from the definition of organized crime in the main Convention.

With few legal migration opportunities available and a high demand for foreign labour in some sectors, smugglers and traffickers are poised to exploit individuals seeking to migrate.³ In a recent report, the International Labour Organization has indicated that forced labour, slavery and criminal trafficking in human beings, especially women and children, are on the rise world-wide and taking new and insidious forms.⁴ The rise in irregular migration and the role organized crime has taken in profiting from the demand for migration that is not being met through regular channels, has emerged as a significant concern to the international community of nations at the dawn of the twenty-first century.

Distinctions between Smuggling in Migrants and Trafficking in Persons

Based on the definitions set out in the Trafficking and Smuggling Protocols, trafficking in persons involves some form of deception, coercion or force in order to exploit the trafficked persons, in particular, upon their arrival in the destination State, through sexual exploitation, forced labour, servitude, slavery, slavery-like conditions or other forms of exploitation. It should be noted that trafficking in persons might include situations of legal entry into the destination or transit State. By contrast, the smuggling of migrants refers to the international movement of persons across an international boundary contrary to the immigration legislation of the transit or destination State. Smuggling, therefore, involves persons knowingly procuring false documents and smuggling services in order to circumvent a country's legitimate entry processes. It is viewed as a form of queue jumping by States. Moreover, persons who are smuggled are, generally, left to their own devices once they enter the destination State.

This is not to state that smuggling cannot arise in abuses of the human rights of the migrants because some are beaten, raped, deprived of food and water,

³ Paiva, Robert, Presentation at the Metropolis Conference, Vancouver, November 14, 2000: "With few exceptions, legal migration opportunities have been shrinking in much of the world. Shrinking even though the demand for foreign labour in some sectors of receiving country economies either has remained unchanged or has even grown as a result of an aging and changing national labour force."

⁴ *Stopping Forced Labour*, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 89th Session 2001, International Labour Office, Geneva.

placed in boats that could only be described as “sink worthy” or otherwise placed in life-threatening situations. There are numerous incidents of smuggling or trafficking victims intercepted in situations where their lives were placed in jeopardy or lost. For example, in June 2000, 58 illegal Chinese immigrants were found suffocated to death in the back of a truck in the English Port of Dover in an attempt to cross the English Channel.

The fundamental distinction between smuggling and trafficking lies in the commodification of the individual, who is transported, transferred, harboured or received. While smuggling operations offer considerable profits to criminal organizations or individuals, trafficking operations provide even greater profits to these organizations because the trafficked person is repeatedly exploited and may be trafficked more than once. Trafficked persons are subject to extreme forms of exploitation including forced prostitution, other forms of sexual exploitation, forced labour, slavery, practices similar to slavery or servitude. Children are trafficked for sexual exploitation, forced labour, forced begging or drug trafficking. As the definition in the Trafficking Protocol indicates, there have been reports of young children or babies being trafficked for their body parts. Trafficking has been identified as a modern form of slavery.

Despite the theoretical distinctions between trafficking and smuggling, from a practical perspective, it is often difficult to determine whether an individual has been trafficked or smuggled. This is particularly the case where the migrating individual is intercepted in transit and is not fully aware of the extent to which she/he will be held captive upon arrival in the destination State. Determining whether an individual has been trafficked requires not only an assessment of how the person entered the destination State but also an assessment of the working conditions and the physical liberty of the person upon arrival in that State.⁵ A person may enter the State willingly, whether legally or illegally, enter into an apparently voluntary agreement with the recruiting agent, yet have been deceived regarding the nature or conditions of the work. In many cases this involves deception regarding the type of work they will be required to perform, as is sometimes the case for women trafficked for prostitution, or the non-payment of promised wages accompanied by the seizure of passports and restrictions on the freedom of movement of the trafficked person. In other cases the exploitation involves more brutal forms of coercion and violence against the trafficking victims.

The Scope of Trafficking and Smuggling Globally

Due to the clandestine nature of migrant smuggling and trafficking in persons, it is challenging to gather data on these illegal activities and to desegregate

⁵ Salt, J. and Hogarth, J., *Migrant trafficking and human smuggling in Europe: A review of the evidence* (Geneva, IOM, 2000).

the data collected. The paucity of empirical data on trafficking in persons and smuggling in migrants is a barrier to policy development in these areas.⁶ The United Nations estimates that as many as 250 million young people work as slaves or in slavery-like conditions and that four million people are trafficked throughout the world every year.⁷ United States White House officials have estimated that two million women and children are trafficked world-wide for the sex trade.⁸ Moreover, the United Nations Population Fund estimates that some two million girls between the ages of five and fifteen are bought and sold world-wide each year, either into forced marriages, slavery or prostitution.⁹

There is very limited information available on trafficking in persons in Canada. The estimates for yearly figures on trafficking and smuggling into Canada vary from 8,000 to 16,000 migrants, who either stay or try to enter the United States.¹⁰ It has been estimated that trafficking to and through Canada profits organized crime to the tune of between \$120M (US) and \$400M (US) per annum.¹¹ Fees for irregular migration to the US have been reported to be around US \$50,000 in the late 1990's.¹²

This booming trade in human beings is now the third largest source of revenue for international organized crime, surpassed only by the drug and illegal arms trade.¹³ As indicated at the Interpol Second International Conference on Trafficking in Women and Illegal Migration, in November 2000, criminal penalties on conviction for trafficking in persons in the overwhelming majority of cases are less stringent than for trafficking in drugs.

Viewed as a lucrative and relatively low-risk enterprise by transnational criminal organizations, trafficking in persons is considered a serious violation of

⁶ *Ibid.*

⁷ United Nations, backgrounder on the Convention Against Transnational Organized Crime at <http://www.odccp.org/palermo/theconvention.html>.

⁸ O'Neill Richard, Amy, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime*, United States State Department's Bureau of Intelligence and Research, April 2000.

⁹ United Nations Population Fund (UNFPA), *The State of the World's Population – Lives Together, Worlds Apart – Men and Women in a Time of Change*, 2000.

¹⁰ Porteous, Samuel D., *Organized Crime Impact Study Highlights*, Ottawa: Public Works and Government Services Canada, Catalogue No. JS42-83/1998 (1998) (<http://www.sgc.gc.ca/Epub/Pol/e1998orgcrime/e1998orgcrime.htm>).

¹¹ Office of the Senior Co-ordinator for International Women's Issues, United States Department of State; Trafficking in Migrants, International Organization for Migration (IOM), No. 19, July 1999.

¹² Skeldon, Ronald, *Myths and Realities of Chinese Irregular Migration*, International Organization for Migration, 2000, p 21 (<http://www.iom.int/iom/Publications/entry.htm>).

¹³ United States Secretary of State, National Post, March 30, 2000.

fundamental human rights which often results in physical, sexual or economic exploitation. Economic and sexual slavery is a highly lucrative global industry controlled by powerful criminal organizations, such as the Yakuza, the Triads and the Mafia. These groups amass an estimated \$7 billion a year while making use of electronic technology to expand their network in source, transit and destination States.¹⁴

From most media accounts, women and children appear to be the most vulnerable targets of traffickers.¹⁵ However, as indicated above, data related to trafficking and smuggling is difficult to disaggregate and most information regarding trafficking remains largely anecdotal and garnished from case studies. The factors influencing trafficking in women are quite distinct from those that facilitate trafficking in children. Children are often sold by their parents to intermediaries or simply abducted by traffickers. The children are then often addicted to drugs and forced into prostitution or the production of child pornography. The growing trade in children is fuelled by the demand for sex tourism, accompanied by the fear of contracting HIV/AIDS from individuals previously involved in the sex trade.

Women, on the other hand, are often lured into trafficking through promises of gainful employment and better opportunities abroad. Gender-based discrimination in labour markets, causing unequal access for women to remunerative employment, at a time when women and men are now migrating in roughly equal numbers, has contributed significantly to the increase in the trafficking in women. For example, Europe has witnessed an explosion in trafficking since the break-up of the former Soviet Union (FSU),¹⁶ and women happen to be the hardest hit by unemployment in the FSU States.¹⁷ Moreover, a surge in the number of women trafficked in East Asia has been attributed to the economic crisis in that region and the need for these women to escape sudden poverty.¹⁸

Young women and teenagers are often lured into prostitution rings by ads for domestic positions abroad and find themselves caught in a web of organized crime. The women are often beaten and raped, before being bought and sold

¹⁴ IOM, *press release, op cite.*

¹⁵ ILO, *Stopping Forced Labour, op cite.*

¹⁶ *Ibid.*

¹⁷ In the Russian Federation women made up 52% of the labour force but accounted for 71% of the unemployed in 1992 (Barr, N. 1994. "Income Transfers: Social Insurance." *Labour Markets and Social Policy in Central and Eastern Europe: A World Bank Book*, New York, Oxford University Press).

¹⁸ United Nations, *Violence Against Women*, report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, United Nations Commission on Human Rights, 56th session, New York, 29 February 2000 (UN doc. E/CN.4/2000/68).

from one brothel owner to the other, frequently working in risky and unhealthy conditions for little or no pay. Trafficked persons often have their passports seized by their traffickers and are charged exorbitant fees for the return of their passports.¹⁹ Trafficked individuals are often afraid to turn to the local authorities for assistance for fear of being arrested for engaging in illegal activity and for fear of deportation. These barriers clearly facilitate trafficking operations.

Smuggling and Trafficking Cases in Canada

The problem of trafficking in persons into Canada first came to widespread public recognition in 1991 with a case known in the press as the “Gorby Girls.” This case involved the sexual exploitation of 11 women from the former Soviet Union who were forced to become exotic dancers against their will. In that case, two men were arrested and fined respectively \$1,000 and \$2,000. Another high-profile case, known as “Operation Orphan,” was profiled in the press as a “trafficking” case. Operation Orphan involved the arrest of 23 Thai and Malaysian women on prostitution-related charges in Toronto in 1997.²⁰ This case was followed by “Project Trade” in 1998, which involved the raid of a massage parlour in which 68 people were charged with prostitution-related offences and trafficking was suspected. The recent case of a young Toronto woman, who testified in court, in May 2001, that she was lured from her village in Thailand, brought to Canada and sold as a sex slave for \$15,000 is one recent example.

In cases of trafficking involving sexual exploitation, the federal and provincial authorities have come under criticism for criminalizing the victims of trafficking and not charging the traffickers with offences serious enough to act as a deterrent. Of particular concern regarding the criminalization of trafficking victims is their subsequent vulnerability at the hands of the traffickers who often pay for their judicial interim release (bail). As a result, trafficking victims who are “bailed out” by their traffickers become subject to even longer periods of servitude or debt bondage. One of the policy issues arising from trafficking relates to identifying trafficking victims and providing them with the ability to testify against their traffickers rather than criminalizing them for acts stemming from their having been trafficked.²¹

¹⁹ O’Neill Richard, *op cite*. Some trafficked women have been charged as much as \$4,000 US for the return of their passports (p. 19).

²⁰ For an assessment of the impact of “Operation Orphan” see “*Trafficking In Women, Including Thai Migrant Sex Workers, In Canada*” by the Toronto Network Against Trafficking in Women, the Multicultural History Society of Ontario and the Metro Toronto Chinese and Southeast Asian Legal Clinic, June 2000, at http://citd.scar.utoronto.ca/MHSO/trafficking_women.html

²¹ The September 1999 Background Papers for the Organization for the Security and Co-operation in Europe Review Conference repeatedly highlighted the importance of adopting policies and protocols

continued

Trafficking victims are clearly not free agents and in many circumstances may be forced to engage in illegal activities under threats of harm to themselves, their friends or their families. The recent Supreme Court of Canada decision in *R. v. Ruzic*,²² may consequently bear some significance to those representing trafficked persons who have committed certain offences under duress. In *Ruzic*, the Supreme Court of Canada struck down the requirement in section 17 of the *Criminal Code* (the defence of duress) that the threat of harm must be “immediate” or “imminent.” The defendant in *Ruzic* was relieved from criminal liability for importing heroine into Canada on the grounds that she was acting under duress (the common law defence) because a man in Belgrade had threatened to harm her mother unless she brought the heroine to Canada.

With regards to smuggling cases in Canada, the recent rash of intercepted boatloads of illegal Chinese migrants off the coast of British Columbia in the summer of 1999 brought the issue to the centre of media attention. The current *Immigration Act* contains a specific offence related to organizing the illegal entry of persons into Canada (section 94.1) which has been the subject of a number of cases. In *R. v. Mihama*, (1992) the Nova Scotia Provincial Court sentenced a man to a term of 15 months incarceration and a fine of \$5,000 for aiding and abetting the entry of more than ten illegal aliens into Canada. In a more recent case related to the boatloads of illegal Chinese migrants that arrived in 1999, the British Columbia Supreme Court found three individuals guilty of aiding and abetting the illegal entry of ten or more persons into Canada in contravention of section 94.1 of the *Immigration Act*.²³ In this case, the accused, the captain of the vessel and two organizers and enforcers, were each subject to a sentence of four years imprisonment. In determining the appropriate sentence the Court considered the fact that the accused assisted in bringing the illegal migrants into Canada in an unsafe, unseaworthy, unsanitary vessel, under deplorable conditions with a lack of sufficient food or water and with wanton disregard for the life of the passengers.

that treat trafficked persons as victims of crime and potential witnesses, for acts stemming from their trafficking rather than treating them as criminals. Moreover, in a paper submitted by the European Institute for Crime Prevention and Control, affiliated with the United Nations, in preparation for the workshop on women in the criminal justice system at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, there was a strong indication that treating trafficked individuals as criminals increases their victimization and runs counter to the efforts to target the traffickers.

²² April 20, 2001.

²³ *R. v. Li*, (2001) British Columbia Supreme Court, Vancouver Registry No. CC000568, March 16, 2001.

THE ORIGINS OF THE TRAFFICKING AND SMUGGLING PROTOCOLS

Such well-publicized human tragedies as the Dover incident have prompted the international community to step up the fight against smuggling of migrants. With regards to trafficking in persons, particularly women and children, the international community has identified the issue in a number of international instruments, among them the *International Slavery Convention*, the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* and the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*. While Canada is a party to the first two Conventions, it is not a party to the last one, known as the 1949 Convention. Also, the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), the 1995 *Beijing Platform for Action*, and the *Outcome Document* adopted at the 23rd UN General Assembly, all contain references to the need to combat trafficking in women and children.²⁴

United Nations Convention against Transnational Organized Crime and the Protocols on Migrant Smuggling and Trafficking in Persons

With the recognition that smuggling and trafficking are becoming increasingly profitable enterprises for organized criminal networks, these issues were raised in discussions regarding global efforts to combat transnational organized crime. The idea of a global treaty to combat transnational organized crime was first discussed at the UN World Ministerial Conference on Transnational Organized Crime in Naples, in 1994. In December 1994, the UN General Assembly approved the Naples Political Declaration and Global Action Plan against Organized Transnational Crime which requested the Commission on Crime Prevention and Criminal Justice to initiate the process of requesting the views of Governments on the impact of a convention against transnational organized crime. The Naples Action Plan focused both on member States' efforts to

²⁴ Article 6 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) obliges States Parties to "take all appropriate measures, including legislation, to suppress all forms of trafficking in women." Canada ratified CEDAW on December 10, 1981. Paragraph 130 of the *Beijing Platform for Action* (PFA) deals specifically with a series of actions to "eliminate trafficking in women and assist victims of violence due to prostitution and trafficking." The PFA also refers to trafficking in paragraphs 99, 107(q), 113(b), 122 and 143(d). Article 70 of the *Outcomes Document*, adopted at the 23rd UN General Assembly in 2000, requires States to, *inter alia* "devise, enforce and strengthen effective measures to combat and eliminate all forms of trafficking in women and girls through a comprehensive anti-trafficking strategy consisting of, *inter alia*, legislative measures, prevention campaigns, information exchange, assistance and protection for and reintegration of victims and prosecution of all the offenders involved, including intermediaries." The *Outcomes Document* also refers to trafficking in Article 97.

combat organized crime and on international co-operation to effectively target and prevent transnational organized crime.

Pursuant to a series of UN General Assembly Resolutions,²⁵ the General Assembly established an Ad Hoc Committee to negotiate a draft Convention against Transnational Organized Crime and to discuss the elaboration of international instruments to address trafficking in women and children, the illegal trafficking in and transporting of migrants, including by sea, and combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.²⁶

The first draft of the *UN Convention against Transnational Organized Crime* was prepared by Poland. The first negotiating meeting of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime took place in Vienna, Austria from 19-29 January 1999. This was followed by an additional 10 meetings (11 in all) with each often consisting of a number of sessions on either the Convention and/or the Protocols.

A first draft of the *Protocol Against The Smuggling Of Migrants By Land, Sea and Air* was prepared by Italy and Austria. The United States and Argentina were tasked with preparing the first draft of the *Protocol To Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children*. Canada took an active role in assisting the United States in the preparation of this first draft. Much of the initial text survived the final negotiations. Through the negotiation process it took some time for negotiators to fully understand the difference between the Trafficking and Smuggling Protocols, given the interrelation between these two phenomenon.

Formal UN negotiations on the Convention and Protocols began in January 1999. Citizenship and Immigration Canada, through its Secretariat for Protocols on Human Smuggling and Trafficking, co-ordinated Canada's posi-

²⁵ UNGA Resolution #49/159 of 23 December 1994, approving the Naples Political Declaration and Plan of Action against Organized Transnational Crime which requested the Commission on Crime Prevention and Criminal Justice to initiate the process of requesting the views of Governments on the impact of a convention against transnational organized crime; resolution #51/120 of 12 December 1996, which took note of the proposed draft UN framework convention against organized crime introduced by Poland at the 51st General Assembly and requested the Commission to consider, as a matter of priority, the possible elaboration of a convention against organized transnational crime; resolution #52/85 of 12 December 1997, which establish an inter-sessional intergovernmental group of experts for the purpose of elaborating a preliminary draft of a possible comprehensive international convention against organized transnational crime that would report to the Commission at its 7th session; and resolution 53/114 of December 9, 1998, which called upon the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime to devote attention to the drafting of the main text of the convention, as well as the protocols on trafficking in persons, migrant smuggling and trafficking in firearms.

²⁶ UNGA Report of 2 November 2000.

tion with respect to the Migrant Smuggling Protocol and jointly with Status of Women Canada, co-ordinated Canada's position with respect to the Protocol on Trafficking in Persons, Especially Women and Children. This co-ordination function was done through the work of an Interdepartmental Working Group composed of representatives from the following departments and agencies: Canada Customs and Revenue Agency; Canadian Security Intelligence Service; Citizenship and Immigration Canada; Department of National Defence; Foreign Affairs and International Trade; Human Resources Development Canada; Justice Canada; Passport Office; Privy Council Office; Royal Canadian Mounted Police; Solicitor General Canada; Status of Women Canada; and Transport Canada.

Also of relevance to the negotiation of the Convention against Transnational Organized Crime and the Smuggling and Trafficking Protocols was the involvement of the G-8 Senior Experts Group on Transnational Organized Crime, known as the 'Lyon' Group.²⁷ With the advent of the UN negotiations on the Migrant Smuggling and Trafficking Protocols, a sub-group of 'Lyon' was established, with the mandate to develop the G-8 positions, in regard to these two Protocols, to take to the UN negotiations. This Sub-group remained active throughout the negotiations (January 1999 through to completion of the negotiations in October 2000) under the chairmanship of Canada. Part of its work included the development of a Statement of Guiding Principles and Plan of Action that were adopted at the G-8 Ministerial Meeting on Transnational Organized Crime that took place in Moscow in October 1999.

Negotiations on the TOC Convention were successfully completed at the UN negotiations held in July 2000. Negotiations on the Migrant Smuggling and Trafficking Protocols were successfully completed at the UN negotiations held in October 2000. All negotiations occurred at the head quarters of the UN Crime Commission in Vienna, Austria.

At its Millennium Meeting in November 2000, the United Nations General Assembly adopted the United Nations Convention against Transnational Organized Crime and its two Optional Protocols on Migrant Smuggling and Trafficking in Persons and instructed that these agreements be opened for signature at a high level conference to be held in Palermo, Italy (12-15 December, 2000). Canada was one of 77 nations that signed all 3 Instruments opened for signing at the Palermo signing ceremony. In all, 123 States signed the Main Convention, 80 States signed the Trafficking in Persons Protocol and 77 States signed the Protocol on Migrant Smuggling. Each of these instruments must be ratified by 40 States Parties before they come into force. Moreover, in order for a country to ratify any

²⁷ At the G-8 Heads of Government Summit in Halifax (1995) it was agreed that the G-8 would make the issue of combating transnational organized crime one of its priorities. This was followed by the establishment of the G-8 Senior Experts Group (the 'Lyon' Group).

or all of the Optional Protocols, they must first ratify the Main Convention, as per general practice in international law. In addition, the main Convention provides many of the necessary tools to combat trafficking in persons and migrant smuggling such as the provisions related to extradition and mutual legal assistance.

Negotiations on the Firearms Protocol, were successfully concluded at the UN session in Vienna, 26 February-2 March 2001. Canada played a lead role in the development of this Protocol, including having authored its first draft text.

CONTENTS OF THE TRAFFICKING AND SMUGGLING PROTOCOLS

The Convention against Transnational Organized Crime (TOC) is the first global instrument to target transnational organized crime and provides a tools-based approach and multilateral framework for the co-operation needed to combat this serious problem. The Convention has two main aspects (1) co-operation and law enforcement provisions, and (2) provisions that require criminalization of certain activities. The TOC Convention requires the criminalization of the following conduct: Conspiracy (Article 5 – participation in an organized criminal group); Money Laundering (Article 6 – laundering of proceeds of crime); Corruption (Article 8 – corruption) and Intimidation of Witnesses and Officers of the Crown (Article 23 – obstruction of justice). Since these activities are all already criminal in Canada, no new enforcement obligations need to be created.

According to the Convention an ‘Organized Criminal Group’ is defined as follows (Article 2 (a) of the main ‘TOC’ Convention):

‘Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

Given that both the Smuggling and the Trafficking Protocols supplement the main Convention, they both contain provisions to the effect that they are to be interpreted together with the Convention and its provisions apply to the Protocols *mutatis mutandis*, unless otherwise provided (Articles 1 in each Protocol).

The Smuggling Protocol

The main objective of the Migrant Smuggling Protocol is to criminalize the acts of smuggling in migrants and in so doing, ensure that the penalties against smugglers are severe enough to act as effective deterrents. The Smuggling Protocol is designed to prevent and combat the smuggling of migrants, as well as

to promote co-operation among States parties to that end, while protecting the rights of smuggled migrants.

The Smuggling Protocol defines “smuggling of migrants” in Paragraph 3(a) as follows:

For the purposes of this Protocol:

- (a) “Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;
- (b) “Illegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

Article 5 of the Smuggling Protocol is also noteworthy because it ensures that migrants shall not become liable to criminal prosecution under the Protocol for the fact of having been the object of a migrant smuggling operation.

The Smuggling and Trafficking Protocols contain a large number of similar or indeed identical provisions. For example, they respectively require States Parties to criminalize the smuggling and trafficking of humans; take measures against the creation and use of fraudulent travel documents, accept and facilitate the return of nationals and permanent residents; improve border controls; enhance the exchange of information among States Parties; and to safeguard other international legal obligations including the 1951 UN Convention and the 1967 Protocol relating to the Status of Refugees.

For many States, the wording of the “return clauses” was particularly important. Article 18 of the Smuggling Protocol provides that

- (e) each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of (smuggling in migrants), and who is a national or who has the right of permanent residence in its territory at the time of return.

With regard to the return of smuggled migrants who had the right of permanent residency in the source or transit state at the time of entry into the destination State, Subarticle 18(2) provides that States Parties “shall consider the possibility of facilitating or accepting (their) return.” These provisions may be contrasted to the repatriation provisions of the Trafficking Protocol which provides that State Parties “shall facilitate and accept” the return of a trafficked person who was a national or a permanent resident at the time of entry into the destination State.

The distinction between the Protocols on this point was the result of intense negotiations and may be justified on the basis that trafficking victims, many of

whom are unwittingly roped into a continued illegal status in the destination State, should not be refused a request to return to the State where they held permanent residency status when they left, even if such status was subsequently withdrawn by the source or transit State. Some States were considerably more open to accepting the return of a trafficked person who had permanent residence status at the time of leaving the State than they were to accepting the return of a smuggled migrant who also had residency status before leaving the State. This was due primarily to the perception of trafficked persons as ‘victims’ as opposed to queue jumpers.

The Trafficking Protocol

The Trafficking Protocol represents a new approach to the complex issue of trafficking in persons, by combining traditional crime control measures for investigating and punishing offenders with measures for protecting and assisting trafficked persons and for preventing future trafficking.

Originally, the main objective of the Trafficking Protocol mirrored that of the Smuggling Protocol – to criminalize the act of trafficking in humans and to promote co-operation among States parties in order to effectively prevent and combat trafficking in persons. However, at the conclusion of the negotiations, the purpose provision of the Trafficking Protocol contained a third objective, namely “to protect and assist the victims of such trafficking, with full respect for their human rights.” It is of interest to note that the addition of the reference to protection and assistance as a purpose of the Trafficking Protocol was made in haste at the very last round of negotiations in Vienna in October 2000. The late inclusion of this purpose may be reflective of the fact that the Trafficking Protocol was crafted originally as an instrument of crime control but with time negotiators recognized the significant human rights concerns related to trafficking in persons. This additional purpose assists in differentiating the two Protocols that are otherwise quite closely related.

Many experts on trafficking in persons have noted that one of the challenges in addressing trafficking was the lack of an internationally recognized definition of trafficking in persons.²⁸ The UN Trafficking Protocol has addressed this deficiency by providing a modern definition of trafficking in persons which is as follows:

Article 3 (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion,

²⁸ Derks, Annuska, *Combating Trafficking in South-East Asia – A Review of Policy and Programme Responses*, International Organization for Migration Research Series, February 2000, p 63 (<http://www.iom.int/iom/Publications/entry.htm>).

of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) “Child” shall mean any person under 18 years of age.

Since the offence of trafficking in persons may involve a number of players from the recruitment stage in the source State, to the exploitation phase, usually in the destination State, the definition had to be crafted to apply to all players knowingly involved in the activity or demonstrating negligence in regard to the welfare of the trafficked person. As a result, the thread running through the various aspects of the trafficking process is the use of deception, coercion or force. These elements effectively vitiate any free and informed consent of the trafficked person. With regards to minors, the elements of deception, coercion or force are not required; the exploitative purpose of the trafficking is sufficient.

Subparagraph 3(b) was specifically included to ensure that traffickers would not be able to rely on exploitative labour contracts to justify the trafficking in light of the fact that the alleged consent was not free and informed consent. However, as indicated in the *travaux préparatoires* (the interpretative notes in the official records of the negotiations), subparagraph 3(b) should not be interpreted as imposing any restriction on the right of the accused to a full defence and the presumption of innocence. All legal defences and basic legal principles applicable under the domestic law are also safeguarded by Article 11, paragraph 6 of the Main Convention. The *travaux préparatoires* also indicate that as in any criminal case, the burden of proof is on the State or public prosecutor to prove all elements of the offence, as per domestic law.

The *travaux préparatoires*, which are highly instructive in regards to the interpretation of the Protocol, also indicate that the reference to “abuse of a position of

vulnerability” is understood to refer to any situation where the trafficked person has no real and acceptable alternative but to submit to the abuse involved. In effect, “abuse of a position of vulnerability” is the flip side of “abuse of a position of authority” This interpretative note was deemed necessary given the need to be relatively explicit regarding the nature of the behaviour subject to criminalization.

With regards to the forms of exploitation, the *travaux préparatoires* indicate that the terms “exploitation of the prostitution of others,” or “other forms of sexual exploitation” are not defined in the Protocol and are without prejudice to how States Parties address prostitution in any other context. This reference was deemed necessary due to the differing domestic laws on prostitution ranging from outlawing prostitution to legalizing prostitution and prostitution-related activities. In Canada, prostitution itself is legal, however, the exploitation of the prostitution of others, as interpreted in the *Criminal Code*, and certain prostitution-related activities are criminal.

Finally, the *travaux préparatoires* also indicate that the removal of organs from children with the consent of a parent or guardian for legitimate medical or therapeutic reasons should not be considered exploitation. This explanation was deemed necessary given the fact that the elements of force, coercion or deception are not required in cases involving the recruitment, transportation, transfer, harbouring or receipt of persons under 18. In the absence of this note, a parent who transports his or her child across a border for a medically necessary removal of organs could conceivably be criminalized under the trafficking definition.

In addition to the obligations that are similar or identical to those set out in the Smuggling Protocol, the Trafficking Protocol also requires States Parties to recognize the need to protect and assist trafficked persons through social measures; consider providing residency status, in the receiving State, to victims of trafficking; introduce measures to prevent trafficking; provide for the denial of entry or the revocation of visas of persons implicated in trafficking offences; and provide training for law enforcement officials regarding the experiences of trafficking victims, including gender and child-sensitive human rights training.

The primary goal of the Trafficking Protocol is to catch and prosecute traffickers. However, victims of trafficking currently have little to gain and much to lose by co-operating with law enforcement. Many trafficking victims fear retribution against themselves or their families should they contact or assist law enforcement authorities. As a result, the Protocol promotes the use of witness protection programs (art. 7(1)) and other forms of victim assistance to protect the interests of the victims of trafficking while advancing the interests of justice.

The provisions on the assistance and protection of victims cover matters such as the physical and psychological recovery of victims (art. 6(3)). In addition, measures to avoid immediate deportation of victims are proposed and safe repatriation

of victims is addressed (art. 8). With regards to the prevention of trafficking, the Trafficking Protocol addresses, among other things, the need for comprehensive prevention policies and programs (art. 9(1)).

IMPLEMENTATION OF CANADA'S COMMITMENTS

The Smuggling Protocol

The provisions in the Smuggling Protocol are reflective of current Canadian law in regards to preventing and combating the smuggling of migrants into and through Canada. There currently is a provision in the *Immigration Act* that criminalizes the act of smuggling in migrants. Section 94.1 of the *Immigration Act* provides that organizing the illegal entry into Canada of under ten persons is a hybrid offence punishable by a maximum of a fine of \$100,000 or a term of five years imprisonment, or both, on indictment or a fine of \$10,000 or a term of one year imprisonment, or both, on summary conviction. The smuggling of ten or more persons is currently punishable by indictment with a fine not exceeding \$500,000 or a term not exceeding ten years imprisonment, or both. The current *Immigration Act* also contains provisions regarding disembarking persons at sea (Section 94.4), offences relating to transportation companies (Section 97.1) and other provisions relevant to the Smuggling Protocol.

Bill C-31, amendments to the *Immigration Act*, which died on the Order Paper with the dissolution of Parliament in October 2000, contained amendments to the offence of smuggling in migrants. Bill C-31 was effectively re-introduced as Bill C-11 (*An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*) in the House on February 21, 2001. The new offences set out in Section 117 of Bill C-11 are also divided into the offence of smuggling under ten persons, which is a hybrid offence, and the offence of smuggling over ten persons, which is an offence on indictment only. The maximum penalty on indictment for a first offence of smuggling less than ten persons will be a fine not exceeding \$500,000 or a term of ten years imprisonment, or both. For a subsequent offence of smuggling less than ten persons the new provision will result in a fine not exceeding one million dollars (\$1M) or a term of imprisonment of 14 years, or both. The same offence on summary conviction will attract maximum penalties of a fine of \$100,000 or a term of two years imprisonment, or both. With regards to the new offence of smuggling more than ten persons, the maximum penalty will be a fine of \$1M or life imprisonment, or both.

The Trafficking Protocol

The development of policies to address the issue of trafficking in persons in Canada is still in its infancy. There is little quantitative data available on traffick-

ing in Canada, which would assist in providing a clear picture of the magnitude of the problem.

In regards to the obligation to criminalize trafficking in persons, Article 5 of the Trafficking Protocol requires States to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct set forth in article 3” (trafficking in persons). While the trafficking offence as set out in the Protocol is likely covered through existing *Criminal Code* and *Immigration Act* offences (e.g., extortion, assault, sexual assault, uttering threats, forcible confinement, smuggling, etc.), a new offence of human trafficking is currently before Parliament in the new *Immigration and Refugee Protection Act* (Bill C-11). This proposed new offence currently reads:

118. (1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.

(2) For the purpose of subsection (1), “organize,” with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons.

120. A person who contravenes section 118 or 119 is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

121. (1) The court in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether

- (a) grievous bodily harm or death occurred during the commission of the offence;
- (b) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;
- (c) the commission of the offence was for profit, whether or not any profit was realized; and
- (d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

This new offence should help in raising awareness of this heinous activity and in discouraging those that would profit from it. In addition, having a specific trafficking offence should facilitate collecting data on trafficking in Canada.

Another key provision of the Trafficking Protocol is paragraph 9(1) which requires States to “establish comprehensive policies, programs and other measures

to prevent and combat trafficking in persons and to protect victims of trafficking in persons, especially women and children, from revictimization.” In this regard, Canada does have a number of programs designed to address illegal migration and trafficking in persons including prevention efforts funded through the Canadian International Development Agency (CIDA) as well as law enforcement and other measures on the part of departments such as Justice, Citizenship and Immigration Canada and the Solicitor-General. Status of Women Canada has also funded research papers on trafficking and non-governmental organizations that assist trafficking victims.²⁹

A related provision, paragraph 10(2), of the Trafficking Protocol requires States to “provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons” that “take into account the need to consider human rights and child- and gender-sensitive issues.”

Some Canadian law enforcement agencies provide gender-sensitivity training, however, there are currently no specialized training programmes in place in regards to trafficking in persons *per se*. This is understandable in light of the fact that Canada does not yet have a specific trafficking offence (Bill C-11 is still before Parliament).

The Federal Government recognizes that trafficking in persons is a violation of fundamental human rights and is a form of violence against women.³⁰ What makes women particularly vulnerable to trafficking is the attitudinal and systemic gender based inequalities that exist in many countries around the world. The unequal status of women in families and society, the feminization of poverty and harmful stereotypes of women as property, commodities, servants and sexual objects are among some of the root causes of trafficking in women.³¹

²⁹ Status of Women Canada (SWC) has contracted three independent research projects on the Canadian dimensions of trafficking in women. The projects are: “*Canada: The New Frontier for Filipino Mail-Order Brides*” (Philippine Women Centre), “*Migrant Sex Trade Workers from Eastern Europe and the Former Soviet Union: The Canadian Case*,” (Lynn McDonald), and “*Le trafic des femmes au Canada: une analyse critique du cadre juridique des mariages par correspondance et des aides domestiques immigrantes*” (Louise Langevin and Marie-Claire Belleau). The first two reports were released to the public on November 15, 2000 and are available at <http://www.swc-cfc.gc.ca/research/>. The other report has not yet been released. The Toronto Network Against Trafficking in Women, the Multicultural History Society of Ontario and the Metro Toronto Chinese and Southeast Asian Legal Clinic produced a document though funding from SWC entitled “*Trafficking In Women, Including Thai Migrant Sex Workers, In Canada*,” June 2000, at http://citd.scar.utoronto.ca/MHSO/trafficking_women.html

³⁰ As stated in Canada’s Paper for EU Conference on Trafficking in Women for Sexual Exploitation, “International definitions of violence against women include trafficking in women and it is recognized that such violence against women involves a breach of their human rights.”

³¹ Please see “Report From the Roundtable on the Meaning of “Trafficking in Persons”: A Human Rights Perspective” in *Women’s Rights Law Reporter*, Volume 20, Number 1 Fall/Winter 1998.

Also of interest, is article 7(1) of the Trafficking Protocol, which encourages States to adopt “legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.” Canada provides for status on humanitarian and compassionate grounds and has an extensive and internationally reputed asylum application process.

Finally, paragraph 6(3) of the Trafficking Protocol calls upon States Parties to “consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons,” including housing, counseling, medical, psychological and material assistance, and employment, education and training opportunities. Moreover, paragraph 6(4) requires that in applying the protection and assistance provisions of Article 6, States Parties “shall take into account... the age, gender and special needs of the victims of trafficking in persons, in particular, the special needs of children, including appropriate housing, education and care.” For the most part, the assistance referred to in paragraph 6(3) falls under provincial jurisdiction.³² Compared to most States, Canada provides significant assistance to victims of crime. Moreover, in cases where victims of organized crime are able to assist law enforcement, there is the possibility that the federal Witness Protection Program may be applicable. We need now to assess how many such victims are currently in Canada.

CONCLUSION

If we are to make any significant advances in preventing and combating migrant smuggling and trafficking in persons multi-dimensional and collaborative international approaches will be required. The main Convention and the Protocols will only really be effective if they are broadly supported by source, transit and destination States. In the case of trafficking victims, efforts will also be required to protect and assist such victims given the exploitation they are subject to in transit and destination States. Moreover, due regard for the human rights of smuggled and trafficked migrants is both a moral and a legal obligation for States Parties.

Given that the lack of stiff penalties for trafficking in persons and smuggling in migrants plays a role in the increase in these illegal activities, stiffer penalties and effective prosecutions are one aspect of a solution to these problems. Protecting the trafficking victims and smuggled migrants from the organized

³² In addition to the commitments under paragraph 6(3) of the Trafficking Protocol, Canada is committed under paragraph 25(1) of the *Convention against Transnational Organized Crime* to “take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular, in cases of threat of retaliation or intimidation.”

crime networks and enlisting their support in prosecuting traffickers and smugglers is another aspect. As indicated in the Trafficking Protocol, addressing some of the root causes, both in regards to the demand and the supply, are yet other aspects to a multifaceted approach to this phenomenon. Efforts to prevent trafficking in persons and smuggling in migrants through education and information campaigns also need to be part of the solution.³³ Finally, training for officials who come into contact with trafficking victims and smuggling migrants are desirable to raise awareness of the context of these people's experiences, including an understanding of their human rights and the challenges they face due to barriers based on sex, race, age and language, among others.

There currently exists an emerging array of domestic and international tools to address trafficking and smuggling³⁴ – tools that may prove to be most informative and instrumental in developing the evolving Canadian approach to these illegal and sinister activities. Clearly, more data will be required and ongoing data collection will assist us in tracking the effectiveness of our efforts to address trafficking in persons and smuggling in migrants, in a manner fully respectful of the human rights of these unfortunate souls.

³³ Canada, along with the US and Australia have implemented information campaigns in parts of China to reveal the dangers involved in the treacherous journey and the outcomes for illegal entry for non-refugees. The IOM has an extensive information campaign against trafficking in women from the Ukraine, which could serve as an excellent model. The IOM also has some 60 counter trafficking programmes world-wide, including information campaigns, direct protection and assistance to victims, research, and technical co-operation to help governments address trafficking (<http://www.iom.int/iom/Publications/entry.htm>).

³⁴ For instance, the United States (US) has drafted extensive legislation (H.R. 3244) outlining detailed measures to be taken with respect to creating offences and providing support for trafficking victims. This legislation also makes some trafficking victims eligible for the Federal Witness Protection Plan and created a new visa status for victims who co-operate with law enforcement. In the Netherlands, the Dutch Aliens Law (Paragraph B17) currently provides trafficking victims with the option to lay charges against a trafficker "[i]n the presence of the least suspicion of trafficking." A residence permit is granted to the trafficking victim (whether she/he is the complainant or witness) for the duration of the legal proceedings. The trafficking victim may eventually be granted indefinite residence on humanitarian grounds. Austria gives trafficked women the right to temporary to stay pending prosecution of the accused traffickers. Also, Italy provides victims of trafficking with social assistance and integrated programs under Act No. 40 of March 27, 1998. Members of the European Union (EU) have also implemented legal and non-legal mechanisms as part of a concerted effort to combat trafficking in persons. The European Commission has two trafficking prevention programs (STOP & Daphne) and the EU has encouraged member states to establish co-ordinating bodies on trafficking, which some EU States now have. For detailed information regarding international legislation to address trafficking please see the *Human Rights Report on Trafficking of Women and Children: A Country-by-Country Report on a Contemporary Form of Slavery* by Professor Lederer, 2001, John Hopkins University, available through <http://www.protectionproject.org>.

THE UNITED NATIONS FIREARMS PROTOCOL

JAMES HAYES*

Over the last five years, governments have made exceptional progress on measures to deal with the issue of firearm violence in civil society. Unfortunately, the motivation has been strong. Three million people have been killed over the last ten years as a result of firearms violence. Scores more have been injured. I will be talking today about the areas where thinking among countries about ways to deal with the problem has evolved and coalesced. Before I begin, however, I would like to thank you very much for the invitation and the opportunity to tell you about the initiatives in this area of crime prevention and crime control.

The most recent international development to combat violence fed by the trafficking of firearms occurred last week when the UN General Assembly adopted the *Firearms Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition supplementing the UN Convention against Transnational Organized Crime (Firearms Protocol)*. The *Firearms Protocol* is the first global treaty creating an international standard for the transnational movement of firearms, and a vehicle for international law enforcement cooperation to prevent, detect, investigate and prosecute trafficking offences.

This achievement represents a remarkable moment for those, including myself, who have been working on this issue for the last several years. It also represents the culmination of a number of different activities on firearms issues within international organizations, including the UN, the OAS and the G8. These initiatives, while starting from different points and different approaches to the problem, have arrived at the same conclusion: the need to combat the illicit manufacturing of and trafficking in firearms and to develop mechanisms of international cooperation to that end.

The UN Crime Commission's work, which began with the Study on Firearms Regulation, and the resolutions flowing from it, represented a high degree of consensus within the international community, a consensus that has grown and evolved within the last six years.

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A similar degree of consensus is reflected in the work of the Organization of American States. Two related and very important results have come out of the work of that body related to firearms: the first is the *Model Regulation for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Model Regulations)*, which was developed by a group of experts working in the Inter-American Drug Abuse Control Commission (CICAD) which was adopted by the OAS at a meeting in Peru in November 1997. The second is the *Inter-American Convention Against the Illicit Trafficking and Production of Firearms, Ammunition, Explosives and Other Related Materials (OAS Convention)*, which was signed at a special assembly of the OAS also in November 1997.

The work of the group of experts leading up the *Model Regulations* and, eventually, to the negotiation of the *OAS Convention*, was highly significant in that it represented a breakthrough in thinking about the problem of the illegal trafficking of firearms. Coming out of a forum whose main objective is the control of drug smuggling, the group of experts realized that drug smuggling and firearms smuggling were inter-related. But more importantly, the group realized that combating illegal trafficking of firearms required greater transparency in the legal trade and a tool was developed for achieving that transparency: a model regulation setting out what information is necessary for the import, export and in-transit movement of commercial shipments of firearms and how that information should be co-ordinated among trading nations.

The *Model Regulations* are a set of guidelines requiring countries which adopt them to provide standardized import and export authorization information and, where appropriate, authorization information for in-transit shipments. It is designed to have multilateral application with options for bilateral arrangements. Following up on the principle that the best way to combat illicit trafficking is to have more effective controls on the legal trade, the *OAS Convention* calls for an effective system of import/export/in-transit authorizations; more stringent security during transportation; firearms marking (including serial numbers applied at the time of manufacture and additional markings at the time of import); enhanced information exchanges; and provisions for training and technical assistance.

The UN Study was launched in 1995 at Cairo. Work on the *Model Regulations* at the OAS began earlier but moved towards consensus in 1995. At its Economic Summit of the same year, held in Halifax, the G8, recognizing the negative economic impact of international crime, began its work on Transnational Organized Crime with the preparation of 40 recommendations of the Senior Experts Group on Transnational Organized Crime. This work continued through the Lyon Summit in 1996, with the establishment of the Lyon Group of Experts which produced an action plan to address the 40 recommendations to combat international crime and presented them to the 1997 Summit in Denver. The Denver Communiqué called

for increased efforts to combat illegal firearms trafficking through standard systems for firearms identification and consideration of a stronger regime for import and export licensing of firearms. It was then recommended that consideration be given to a new international instrument – a recommendation that was confirmed and strengthened by the Birmingham Summit the following year – which called for a *legally binding* international instrument to be negotiated within the context of a convention on transnational organized crime.

Over the course of this time period, the Government of Canada had begun work on implementing the *Firearms Act*. One of the main policy objectives of Canada's firearms legislation is to combat illicit trafficking and smuggling of firearms. Greater legislative controls over importing and exporting of firearms are included in the *Firearms Act* and new and separate offences for smuggling and trafficking are included in the *Criminal Code*. In support of these legislative objectives, Canada played a lead role in the evolution and advancements of the international instruments. Within the G8, for instance, Canada placed firearms on the agenda at the summit in Cairo. Emerging from Cairo, was the resolution creating the mandate for the Study on International Firearms Regulation. The first of its kind, the Study served as a catalyst for the development of a targeted strategy to deal with firearms trafficking. Then again in Washington in 1997, when Ministers of Justice and the Interior were considering the form of the instrument to deal with the illicit transnational movement of firearms, Canada was instrumental in obtaining consensus to develop a global, legally binding treaty.

We can discern in all of the above-mentioned international activity a certain cross-pollination of ideas and results. The work of the G8 Experts Group influenced the work of the *OAS Convention* and the *Model Regulations* and vice-versa. The UN Crime Commission recognized the work of the OAS in its Resolution to develop the *Firearms Protocol* and the Birmingham Summit – acknowledging the connection between firearms trafficking and transnational organized crime – identified the *UN Transnational Organized Crime Convention* as the vehicle for the elaboration of a binding international legal instrument on firearm trafficking.

This cross-fertilization is partly the result of the fact that certain 'experts' worked in more than one forum. In fact, several countries have developed substantial internal expertise in and among their various departments and have arrived at coherent strategies for working internationally on this issue. But it is also the result of the fact that the serious and concerted efforts undertaken in the various international fora have led to some basic principles that, once recognized, achieved universal agreement.

One of these principles I have already mentioned: that the best way to combat illegal trafficking of firearms is through greater transparency of the legal commercial trade. Closely connected with this is the recognition that firearms are a dangerous commodity that can no longer be treated as simple trade items and

for which ordinary trade and customs laws and agreements may no longer suffice. Firearms that start off from legal production and trade often find their way into the illegal market through thefts or diversion, making improved methods of tracking and tracing imperative.

Several principles dealing with the connection between firearms and crime have achieved wide consensus: firearms empower criminals and are a source of profit in the criminal world. Illicit transfers of firearms are often carried out by organized criminal channels and move into civilian markets through transnational networks. Globalization – and the technology that makes it possible – is contributing to the ever-increasing sophistication of international firearms smuggling networks.

Another important principle that has come to light and has received widespread recognition is the fact that countries can no longer limit their concern about firearms trafficking to what comes into their country but must be equally concerned about what passes through and goes out. There is a need for greater accountability and transparency over imports, exports and in-transit shipments. This reflects a widely held belief that there should be *no safe haven* for firearm traffickers.

Thus a very strong consensus has emerged from our international firearms activity: a consensus that the central focus of our efforts internationally must be on trafficking; and a consensus as to the tools to use in order to combat such trafficking. Adequate legislation and regulation, law enforcement, training and technology (e.g. for marking of firearms or for firearms identification), are all important to achieving this result, whether we are dealing with peaceful societies or with societies emerging from conflict.

These tools are contained in the recently adopted *UN Firearms Protocol*. Negotiated at the Centre for International Crime Prevention in Vienna as part of the *UN Convention Against Transnational Organized Crime*, the *Firearms Protocol* focuses on crime prevention. In this regard, perhaps the most essential component of the *Firearms Protocol* sets out comprehensive procedures for the import, export and transit of firearms, their parts and components, and ammunition. It is a reciprocal system requiring countries to provide authorizations to one another before permitting shipments of firearms to leave, arrive or transit across their territory. It also enables law enforcement to track the legal movement of shipments to prevent theft and diversion. As is the case with the *OAS Convention*, these standards will help to ensure we achieve the level of transparency needed to assist member states to better target illicit transactions.

Linked to the import/export/transit regime is the article dealing with firearms marking. Both domestic and international efforts to reduce illicit trafficking rest on the ability to track and trace individual firearms. This, in turn, requires firearms to be uniquely identified. One of the law enforcement tools in the

Firearms Protocol is, therefore, the marking of newly manufactured and imported firearms.

These measures to control the legal movement of firearms are enforced through the criminalization provision in the *Protocol*. Recognizing that criminal offences cannot be detected or prosecuted effectively without the appropriate evidence, the *Firearms Protocol* contains articles requiring comprehensive record-keeping on the transnational movement of firearms, as well as a provision for exchange of information between countries involved in such transactions. The tools contained in the *Transnational Organized Crime Convention* are also critical in this regard. In particular, the articles dealing with mutual legal assistance and extradition for commission of offences covered by the *Firearms Protocol* will be essential tools for law enforcement.

During the *Firearms Protocol* negotiations many important coalitions and dialogues were established not the least of which was between Canada and the European Union. Several areas in the *Protocol* presented challenges to the EU, particularly in the area of import/export/transit authorizations and firearms marking. This enhanced control over firearms was seen to be inconsistent with the fluid border control configurations among countries within the EU, which were designed to facilitate trade. The European Commission had competence to negotiate these articles on behalf of the 15 member states and near the end of the negotiations, on behalf of the 13 accession countries. It worked hard to develop an approach to balance its trade and crime control concerns. During the course of these deliberations, the European Commission engaged Canada and others in the internal EU discussions of its Multi-Disciplinary Group on Organized Crime and ultimately a consensus was reached. With the Commission's increased emphasis on Justice and Home Affairs issues, this alliance was critical.

The collective work within international governmental organizations in the last few years has been followed up by analysis, lobbying and support by non-governmental organizations. While initially such groups were primarily active on the disarmament side, their increased interest in and contribution to the discussions was very useful. The British American Security Information Council, or, in Canada, the Coalition for Gun Control, shared their expertise and resources to foster public awareness and education. The Vancouver – based International Centre for Criminal Law Reform and Criminal Justice Policy facilitated a Canadian hosted workshop on firearms marking prior to the final negotiation session for the *Firearms Protocol* which was extremely helpful.

Of course, now that the approach to dealing with firearms trafficking has coalesced in a global treaty – the *Firearms Protocol* – the challenge which lies ahead is to address obstacles to its implementation. The expanding body of agreements (the *UN Firearms Protocol*, the *OAS Convention*, and other regional and sub-regional agreements, including, to name a few, those of the EU, the OSCE, Mercosur, the

OAU, ECOWAS, SADC), is encouraging but makes the promotion of consistency in implementation another important goal. In this context, the regional differences that characterize the phenomenon of firearms trafficking and the various ways in which regions counter this activity must be recognized. We must, therefore, formalize high levels of international cooperation as widely as possible, among governments, international, regional, sub-regional organizations and civil society, to harmonize and coordinate our efforts and to pool resources.

Before concluding, I want to stress the importance of the completion of the UN Firearms Protocol and how it brings together the work that has been accomplished in the various international fora in the last 6 years. From different starting points we have arrived at one main conclusion: the problem of firearms is a problem of crime prevention, crime control and combating illegal trafficking. Combating the illegal flow of firearms necessitates greater transparency in the legal trade—and in legal ownership. Thus the problem has a domestic and an international dimension for all countries involved.

In some respects the first phase of our efforts has been completed. We must now maintain the political will to achieve the second, and more intense, phase of implementation in order to stem the fear of firearms violence. The fear of violence creates a vicious cycle of arming for self-protection, which results in more violence, which results in further arming for self-protection – a cycle that consumes more and more innocent victims. With our new firearms legislation, Canada is well placed to meet the requirements the international community has developed to address firearms trafficking as well as the criminal activity associated with it. This is a great tribute and legacy to the 14 women killed at Montreal's Ecole Polytechnique in 1989, and to all others who have lost their lives as a result of firearms violence.

INTERNATIONAL FIREARMS ACTIVITIES (1995–2001)

UN International Study on Firearm Regulation

- In 1995, the UN Crime Commission launched the UN Study on Firearm Regulation. The study was the result of an ECOSOC Resolution (Cairo Resolution) declaring that “for the purposes of crime prevention and public safety, there is currently an urgent need for effective strategies to ensure the proper regulation of firearms at both the national and transnational levels” and requesting the Commission, among other things, to consider “the measures to regulate firearms commonly applicable in Member States, such as the prevention of transnational illicit trafficking in firearms, with a view to suppressing the use of firearms in criminal activities.”

- The Cairo Resolution recognized that “criminal activities in which firearms are used have been increasing, in part because of an increase in illicit trafficking, at both the national and transnational levels,” and invited “Member States to take effective action against illicit trafficking in firearms, through mutual cooperation, the exchange of information and the coordination of law enforcement activities, considering that illicit trafficking in firearms is a widespread transnational criminal activity that frequently involves transnational criminal syndicates.”
- The study, which was the first of its kind, was completed within a fourteen-month period and served as a catalyst for bringing countries together and strengthening cooperation on this issue at the international level. The final report of the study shows a high participation rate with sixty-nine countries representing 70% of world population taking part. The co-sponsoring by 33 countries of the Resolution resulting from the survey is an indication of a high degree of consensus among the participating countries.
- The study resulted in many interesting findings including the fact that while historically most countries have import controls, few have export controls and there is no real accountability on exports or on in-transit shipments. The study served as a catalyst for some countries which became aware, through their responses to the study questionnaire, of the magnitude of the problem in their own country. Since participating in the Study, several countries have gone on to make changes to their laws to increase accountability of firearms owners and strengthen measures to deal with illicit trafficking.
- Four UN sponsored regional workshops on firearm regulation were held as a follow-up to the study. These were held in Slovenia in September 1997, Tanzania in November 1997, Brazil in December 1997 and India in January 1998. These workshops allowed different countries to discuss specific problems related to their region and to exchange experience and knowledge on different approaches to firearm regulation in their countries. In many cases, the different countries were meeting for the first time on the question of firearms and the workshops offered a valuable opportunity to exchange information and create knowledge networks.
- Non-governmental organizations were also present at the regional workshops, including organizations advocating firearm control in the interest of public health and safety and crime control, as well as those representing the interests of people who own and use firearms for hunting, sport shooting and collecting.
- All four regional workshops highlighted the problem of illicit trafficking in firearms and agreed that it is a serious problem that requires immediate action and a high degree of international cooperation and coordination. In

particular, the workshops recommended the development of standard systems for firearm identification and a stronger international regime for import and export licensing of firearms.

- The UN Crime Commission, at its Seventh session held in Vienna in 1997 accepted the final report of the UN Study and recommended that States
 - work towards the elaboration of an international instrument to combat the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition within the context of a United Nations convention against transnational organized crime.

The Commission recommended that discussions on the elaboration of such an instrument include the development of effective methods of identifying and tracing firearms, as well as the establishment of an import, export and in-transit licensing or similar authorization regime for the international commercial transfer of firearms, their parts and components and ammunition, to prevent their diversion for criminal misuse.

OAS Inter-American Drug Abuse Control Commission (CICAD)

- Another important initiative undertaken since 1995 is the *Model Regulation for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Model Regulations)* which was developed by a group of experts working in the Inter-American Drug Abuse Control Commission (CICAD) of the Organization of American States.
- Essentially, the OAS *Model Regulations* are a set of guidelines to govern the import, export and in-transit movement of all commercially traded firearms. These guidelines will require countries that adopt them to provide standardized import and export authorization information and, where appropriate, authorization information from countries across whose territories the shipments will travel en route to a final destination. Specific information relating to the shipment, including importer and exporter information, quantity, type and serial numbers of firearms, etc. must accompany the firearms at the time they are shipped. The *Model Regulations* are designed for use with both electronic and paper-based systems.
- Since the procedure entails the keeping of records of these transactions, governments and law enforcement officials will be able to track lost or stolen shipments more accurately and quickly. The procedure recognizes the principle that greater transparency in licit movements of firearms will result in more effective identification and tracing of illicit move-

ments, thus enabling governments to better target resources to deal with criminal trafficking.

- The *Model Regulations* were adopted in Peru in November 1997 and will become a standard for member countries within the OAS. They are designed to have multilateral application with options for bilateral arrangements where appropriate.
- The *Model Regulations* are designed to apply to commercial shipments of firearms only and do not cover government-to-government transfers of military arms.

The Inter-American Convention Against the Illicit Trafficking and Production of Firearms, Ammunition, Explosives and Other Related Materials

- Negotiations for the *Inter-American Convention Against the Illicit Trafficking and Production of Firearms, Ammunition, Explosives and Other Related Materials* (OAS Convention) began in May of 1997 and it was signed at a special assembly of the OAS in November 1997 in Washington D.C.
- The *OAS Convention* contains measures to encourage and facilitate enhanced cooperation among OAS countries in dealing with illicit transnational trafficking associated with firearms, their parts and components, ammunition and explosives. Recognizing that the best way to control illicit trafficking is to have more effective controls on the legal trade, the *OAS Convention* calls for:
 - ◆ an effective system of import/export and in-transit authorizations for legal firearms transfers,
 - ◆ more stringent security during transportation,
 - ◆ the marking of firearms both at manufacture and again at import for better identification and tracing,
 - ◆ enhanced information exchanges,
 - ◆ provisions for training and technical assistance

The G8

- Since its 1995 summit in Halifax, the Group of Eight has undertaken as a priority the reduction and elimination of transnational organized crime.
- At the 1997 Summit in Denver, the leaders of the G8 countries committed themselves to continue their work against transnational organized crime and, specifically, to take action against illegal firearms trafficking. As stated in the Communiqué issued after the Summit,

We also will develop additional methods to secure our borders. Border security is central to all efforts to fight transnational crime, drug trafficking and terrorism. To this end, we will combat illegal firearms trafficking, by considering a new international instrument. We will seek to adopt standard systems for firearms identification and a stronger international regime for import and export licensing of firearms....

- The key element in the above excerpt is the development of a new international instrument which to enable the standardization of systems for firearm identification and a stronger international regime for import and export licensing of firearms.
- This priority was confirmed by the 1998 Birmingham Summit which called for the negotiation of a legally binding instrument.

UN Firearms Protocol

- The legally binding instrument contemplated by the G8 firearms expert group found a home in the UN when UN member states decided to begin negotiation of a Convention on Transnational Organized Crime (TOC) and a related protocol to deal with firearms trafficking. The proposal to develop an international firearms protocol within the TOC was widely supported with the 1999 UN resolution that created the mandate receiving the endorsement of 53 countries.
- The *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition (Firearms Protocol)* was negotiated at the Centre for International Crime Prevention in Vienna as part of the UN Convention Against Transnational Organized Crime. Negotiations began in early 1999 and were completed in March 2001. The *Firearms Protocol* was adopted by the UN General Assembly in May 2001.
- The UN Firearms Protocol creates a legal regime for the transnational movement of firearms and contains practical, tools-based measures designed to assist law enforcement by enhancing international cooperation and promoting greater transparency in legal transfers of firearms.
- Perhaps the most essential component of the *Firearms Protocol* is contained in the article which sets out comprehensive procedures for the import, export and transit of firearms, their parts and components, and ammunition. It is a reciprocal system requiring countries to provide authorizations to one another before permitting shipments of firearms to leave, arrive or transit across their territory and enables law enforcement to track the legal movement of shipments to prevent theft and diversion.

- Linked to the import/export/transit regime is the article in the UN Firearms Protocol dealing with firearms marking. Both domestic and international efforts to reduce illicit trafficking rest on the ability to track and trace individual firearms. This requires firearms to be uniquely identified. One of the law enforcement tools contained in the *Firearms Protocol* is, therefore, the marking of newly manufactured firearms with unique serial numbers.
- While a unique identifier applied at the time of manufacture is essential, the proposal in the UN Firearms Protocol requiring import marking recognizes that law enforcement officials may need additional tools to conduct a tracing investigation. Since there are a number of firearms currently in circulation which cannot be uniquely identified or the country of manufacture may not have the records to trace the legal chain of transfers, an import mark indicating the country of the individual or business that acquired firearms, provides a starting point in the chain of accountability. Supported by an adequate record-keeping system, the UN Firearms Protocol provides a solid foundation upon which to track and trace firearms.
- The above-noted measures are linked, of course, to the criminalization provision in the *Protocol*. Recognizing, however, that criminal offences cannot be detected or prosecuted effectively without the appropriate evidence, the *UN Firearms Protocol* also contains articles requiring comprehensive record-keeping on the transnational movement of firearms, as well as the provision for exchange of information between countries involved in such transactions (Article 14). The tools contained in the main convention on Transnational Organized Crime are also critical in this regard. In particular, the articles dealing with mutual legal assistance and extradition for commission of offences covered by the *UN Firearms Protocol* will be essential tools for law enforcement.

CANADA'S NATIONAL AGENDA ON ORGANIZED CRIME

**POLICING AND LAW ENFORCEMENT DIRECTORATE
SOLICITOR GENERAL CANADA**

INTRODUCTION

Organized crime is a threat to Canada, infiltrating all levels of society in every community across the country. This pan-Canadian phenomenon cannot be addressed by one jurisdiction acting alone. Only concerted action can achieve the results Canadians have the right to expect. This paper describes Canada's National Agenda on Organized Crime, as well as the mechanisms used to set the agenda, including the establishment of national priorities.

Given that the nature of organized crime is increasingly transnational, Canada is working with international partners to fight the problem globally. This paper also outlines Canada's participation in key international anti-organized crime fora.

IMPACT OF ORGANIZED CRIME

The Government of Canada faces many emerging and pressing demands in addressing organized crime. Organized crime is not just something in which 'Mafia' style groups engage. Its impact goes far beyond the terror felt and casualties incurred during such high profile events as the outlaw biker wars. The criminal pursuit of profit needs to be recognized in all its forms and consequences, from readily recognized violence and economic loss to the less easily quantified but no less important environmental, social, and health and safety implications. The illicit drug trade, for example, can have indirect cost such as health care, reduced labour productivity, as well as significant direct enforcement costs. Other costs can stem from the unmet potential of youth targeted by the drug trade, drug related property crimes and declining property values of neighbourhoods plagued by drugs. Each year, contraband smuggling cost both federal and provincial governments billions in foregone revenue.

Governments and the law enforcement community have to deal with the challenges posed by new forms of crime. Organized crime is increasing its involvement in activities such as illegal migration, economic crimes and frauds,

and environmental crime. Illegal migration, including the smuggling and international trafficking in human beings, lines the pockets of criminal organizations at the expense of human dignity. Economic crime, including securities and telemarketing fraud, is estimated to cost Canadians millions per year, often affecting some of the most vulnerable members of our society, such as the elderly.

Environmental organized crime activities such as trafficking in hazardous waste and endangered species affect the health of Canadians and the environment in general. The laundering of proceeds for these highly lucrative criminal activities has an enormous impact on the national and global economy, but also on the basic values within our society to the extent that if it is allowed to continue, it is a clear signal that crime does indeed pay.

The Government of Canada is continuing to respond to these diverse challenges with a mix of public policy instruments. This includes legislation, regulations, financial measures (e.g., duties and taxes), enhanced intelligence gathering and sharing, strengthened law enforcement, policy research and evaluations, national and international cooperation among law enforcement and legal authorities, action at border points and ports, the use of the newest informational technologies and training of employees. The Government of Canada is exploring opportunities to promote community awareness and community action. Strategies to reduce the demand for illicit goods and services offered by organized criminals are also being pursued. New and innovative partnerships with communities and the private sector are being developed. Finally, the Government of Canada is exploring effective international partnerships within the context of political commitments and an evolving global environment.

SETTING THE NATIONAL AGENDA

In their 2000 platform, *Red Book III*, the Liberal Party of Canada committed to introducing additional anti-organized crime measures. They stated their intention to target proceeds of crime, facilitate investigation and prosecution of organized crime, protect members of the justice system from intimidation, and strengthen anti-gang laws. *Red Book III* also underscored the importance of establishing a national drug strategy to reduce both the supply of and the demand for drugs. The Liberals further committed to addressing transnational crime issues, such as computer crime, the exploitation of migrants, arms and drug smuggling, requiring international solutions.

In the *Speech from the Throne* opening the 37th Parliament, the Government of Canada reiterated its commitment in fighting organized crime, by providing law enforcement with enhanced tools to deal with emerging threats to security, such as cybercrime and terrorism. The *Speech from the Throne* stated that work should continue with provinces and territories, communities, and all its partners to im-

plement a balanced approach to addressing crime – focussing on prevention as much as punishment, strengthening penalties for serious crime, and considering the needs of victims.

Significant achievements to address the organized crime problem have been realized at the federal, provincial, and territorial level. In 1998, the Ministers Responsible for Justice endorsed a *Joint Statement on Organized Crime*. The *Joint Statement* committed governments to *Shared Principles for Actions*, emphasizing the need for the federal government to take a national leadership role in this area, in partnerships with the provinces and territories.

At their 2000 meeting, Federal-Provincial-Territorial Ministers reiterated their commitment by declaring organized crime a national priority to be dealt with at all levels through a multi-disciplinary approach. To help guide the efforts and work of each jurisdiction, Ministers endorsed the following priorities as part of a *National Agenda to Combat Organized Crime*. These priorities mirror international preoccupations:

Illegal drugs – Illegal drugs are still at the heart of the organized crime problem. Drug trafficking is still the major profit-making activity of most organized crime groups.

Outlaw motorcycle gangs – Criminal biker gangs are expanding across the country. They are well organized and do not hesitate to resort to violence and intimidation to get what they want. Their criminal activities are sophisticated, involving international drug trafficking, money laundering, prostitution and fraud, among others.

Economic crimes and frauds – Economic crime includes a range of activities, such as telemarketing fraud, stock market based manipulation, offences related to property rights, bankruptcies, security frauds, and counterfeiting, among others. Economic crime affects the competitiveness of markets in the most serious cases. In recent years, the types of crimes being committed are more sophisticated and victimize a larger proportion of the population.

Money laundering – Money laundering is the conversion of illicit assets to another type of asset in order to hide the true source or ownership of the criminal proceeds. Taking proceeds out of the hands of criminals is a key way to disable criminal organizations.

High-tech crimes and crime on the Internet – Organized criminals are increasingly taking advantage of technological advancement to commit crime and avoid detection. They are exploiting advances in telecommunications to commit traditional offences on-line (such as fraud, pyramid schemes and others) where they can reach more potential victims and have less of a chance of being apprehended.

Illegal migration, including prostitution and trafficking in humans – Increased global, social, economic and political instability has resulted in a dramatic increase

in the number of global migrants throughout the world. Canada is not only a destination point for illegal migrants, it is often a transit country to the United States. This movement of people has attracted the attention of organized crime groups who reap tremendous profits through the exploitation of those seeking to enter Canada and other developed countries.

Ministers also noted other pressing and emerging concerns, many of which have significant regional or local implications. They include:

Street gangs – Major urban centers are increasingly confronted by problems posed by street gangs. Typically modeled on outlaw motorcycle gangs, street gangs are violent and rely on the drug trade as their main source of income.

Intimidation of persons in the criminal justice system – Acts of intimidation directed against those involved in organized crime cases pose a threat to our democratic institutions and the integrity of the criminal justice system.

Illegal gaming – Illegal gambling machines produce tremendous profits for organized criminals, with undeclared income from these machines being used to finance other criminal activities. Organized crime also undermines legal gaming activity in Canada.

Auto theft – Auto theft is a serious offence often associated with organized criminals with significant financial and social consequences. The law enforcement community has indicated that organized crime is increasingly involved in international stolen vehicle networks.

Illegal trading in diamonds – With the recent development of diamond mining in the Northwest Territories, authorities have expressed serious concerns regarding the potential infiltration of organized crime in their communities. With diamond explorations currently underway in six provinces, these local concerns may eventually resonate across the country. There is typically a high degree of organized criminality in the diamond industry, in diamond producing and marketing centres.

Threat of corruption as an international concern – Even isolated cases of corruption can undermine public confidence in governance and the rule of law. It can distort fair competition and even hinder economic development. Many countries now recognize the adverse impact of corrupt practices and are moving towards a united response through international instruments, as well as more focused attention to the issue at the domestic level.

THROUGH NATIONAL AND REGIONAL COORDINATION

To address these priorities, governments and law enforcement are working together in a number of forums, locally, regionally and nationally. Recognizing that cooperation and coordination are key to combating organized crime, the National Agenda established a coordinating machinery to advance efforts in a

concerted way. The FPT Deputy Ministers Steering Committee on Organized Crime is central to this mechanism. Co-chaired by the Deputy Solicitor General and a provincial counterpart (currently from Ontario), it coordinates the work of FPT officials and provides strategic advice to Ministers.

Chaired by the Senior Assistant Deputy Solicitor General, the National Coordinating Committee on Organized Crime (NCC) is also a key component of this machinery. The NCC develops proposals to address national priorities and emerging issues, and provides input in support to the Deputy Ministers Steering Committee on Organized Crime. It is comprised of federal, provincial and territorial Assistant Deputy Ministers or their representatives. It includes representatives from criminal law policy and prosecution services, as well as representatives of the policing community. The NCC engages these officials in collaborative discussions and provides an opportunity for updates and consideration of legislative and regulatory issues relating to organized crime.

Recognizing that they are not sheltered from organized crime, municipalities are increasingly taking an active role in fighting this problem locally. In 1999, the Federation of Canadian Municipalities hosted a National Symposium "Towards a Community Response to Organized Crime." This event was organized with the support of the Department of the Solicitor General of Canada, in cooperation with other federal departments and agencies, including Justice Canada, Citizenship and Immigration, and the RCMP. Event participants called for greater coordination on the part of government, law enforcement agencies, the business community and Canadian citizens, as a whole, in assessing the threat of organized crime, in ensuring effective information and intelligence coordination and in the identification of shared actions aimed at dismantling organized crime groups. Other key conclusions included the need to mobilize community-based crime prevention initiatives, and to develop education and awareness campaigns for those members of society who are most vulnerable to the predatory activities of organized criminals.

While coordination is key at the strategic and policy levels, cooperation is also vital at the operational level. Federal, provincial and municipal police services routinely cooperate to combat organized crime. The recent joint forces, "*Operation Spring Clean-up 2001*," is an excellent example of this. In March 2001, over 2000 police officers across Quebec descended on the Hell's Angels after a four-year investigation. The RCMP worked with provincial and local police. Over 100 people were arrested in 77 different locations, in Quebec, as well as several other provinces, and the eastern United States. Police seized millions of dollars in cash, hashish and cocaine, buildings owned or used by the gang members, vehicles and firearms, including machine guns and a grenade launcher. The success of the operation can be attributed to the sharing of information and intelligence by all police; significant investments of time and money; and importantly a con-

sensus at all levels, from Ministers to the police on the street, that targeting gangs was a national priority.

The success of the Integrated Proceeds of Crime (IPOC) units also testifies to the importance of operational coordination in fighting organized crime. IPOC units attack the illegal proceeds generated from the smuggling of alcohol and tobacco, and enterprise crimes such as fraud and gambling, in addition to those realized from drug related offences. Each unit is multi-disciplinary, comprising a mix of federal, provincial and municipal police, Department of Justice Crown counsel, Customs officers, public and private sector forensic accountants and support staff. The first units were established in Vancouver, Toronto and Montreal, based on the work of the earlier Anti-drug Profiteering teams. Ten new IPOC units were subsequently introduced in Edmonton, Calgary, Regina, Winnipeg, London, Ottawa, Quebec City, Halifax, Fredericton, and St. John's. To provide better coverage of the country, satellite units, composed of investigative staff only, were also established in Whitehorse, Yellowknife, Saskatoon, Kingston, Niagara Falls, Sherbrooke and Charlottetown.

Since 1996, the IPOC initiative has resulted in over 1700 persons being charged with proceeds-related offences. Also since that time, \$79 million has been confiscated from criminals through asset forfeiture and taxes collected as a result of cases referred to the Canada Customs Revenue Agency from the IPOC units. Of this, IPOC-related cases have returned \$54 million to government accounts.

LEGISLATIVE AND REGULATORY TOOLS

While policy and operational initiatives are critical, the fight against organized crime must also be pursued on the legislative front. Since 1988, the Government of Canada has enacted at least twelve pieces of legislation designed to provide law enforcement authorities with the tools needed to combat this problem. The most recent initiatives include:

Bill C-24 amending the Criminal Code acts on the first phase of the *National Agenda on Organized Crime* and helps address a number of priorities. The Bill introduces three new offences and tough sentences that target various degrees of involvement with criminal organizations. It improves the protection of people who play a role in the justice system from intimidation against them and their families. It simplifies the current definition of 'criminal organization' in the *Criminal Code*, allowing better targeting of criminal organizations, such as outlaw motorcycle gangs. It broadens the powers of law enforcement to forfeit the proceeds of crime, in particular the profits of criminal organizations, and to seize property that was used in a crime. Bill C-24 also establishes an accountability process to protect law enforcement officers from criminal liability when they commit what would otherwise be considered illegal actions while investigating and infiltrating criminal

organizations. The Bill was passed by the House of Commons in June 2001, by a vote of 210-7.

The *Proceeds of Crime (Money Laundering) Act*, which received Royal Assent in 2000, provides for mandatory suspicious transaction reporting, cross-border currency reporting, and the creation of a new national agency (the Financial Transactions Reports and Analysis Centre of Canada – FINTRAC) to collect, analyze and, where appropriate, disclose information to assist in the detection and deterrence of money laundering. Reporting and record-keeping requirements will apply to all forms of financial institution, casinos, and to lawyers and accountants when they are acting as financial intermediaries. Penalties for knowingly failing to comply with the legislation will include both fines and imprisonment.

Bill C-11, the *Immigration and Refugee Protection Act*, was introduced in February 2001. The Standing Committee on Citizenship and Immigration tabled their report to the House of Commons on May 28. The Bill seeks to increase penalties for existing criminal offences in the *Immigration Act*, such as people smuggling, and creates a new offence for human trafficking. Individuals convicted in Canada of smuggling or trafficking humans risk life in prison and a penalty of up to \$1 million. New provisions allow for the seizure of assets in cases of migrant smuggling and trafficking. They also create a new offence for the possession and laundering of proceeds from immigration offences. History has shown that an integral part of fighting organized crime is the seizure of assets and the subsequent disruption to business that ensues.

Some provinces have also adopted legislative measures to combat organized crime within their jurisdictions. For example, Ontario has proposed the *Remedies for Organized Crime and Other Unlawful Activities Act*. This legislation would allow the province to ask the courts to freeze, seize and forfeit assets that are proceeds of crime or that are likely to be used as instruments in the commission of an offence. This legislation would also allow the province to take to court two or more people who conspire to harm the public. The legislation would also enable victims of unlawful activity to claim compensation against the forfeited proceeds.

FIGHTING THE PROBLEM INTERNATIONALLY

Because crime transcends national borders, there is an ongoing need to forge relationships with international partners. Canada participates in many bilateral and multilateral initiatives that address the harm caused by the various manifestations of transnational crime and other public safety concerns.

The relationship between the Canadian and United States governments and their agencies in combating organized crime is very important given the economic and cultural ties between the two countries. The *Canada – United States Cross-Border Crime Forum* (CBCF) was created in 1997, to develop joint solutions to

shared concerns. The Forum is led by the Solicitor General and the US Attorney General, and co-chaired by the Senior Assistant Deputy Solicitor General and his US counterpart. It includes officials from a range of Canadian and US agencies, provincial and state governments and police. It is a key bilateral mechanism for officials from Canada and the United States to regularly discuss transnational crime problems, as well as strategies to improve operational and policy cooperation and coordination along the border. It addresses problems like drug and people smuggling, telemarketing fraud, money laundering and crimes using computers.

While Canada's bilateral relationship with the United States is key in the fight against Organized Crime, Canada is also involved in a number of international fora. For example, it participates in the principal UN agencies and offices that focus on organized crime and related problems. The emphasis has been on the elaboration of cohesive and strategic policies and the coordination of targeted projects to combat various public safety problems, such as corruption, drugs and tobacco smuggling. Canada contributes to the development of agreements, such as the recent Convention against Transnational Organized Crime and its protocols on smuggling of migrants, trafficking in persons, and the illegal trade in firearms. The United Nations will soon embark on the negotiation of a global instrument against corruption – an exercise in which Canada will play a pivotal role.

Canada has also been actively involved in the G8. The G8 Group of Senior Experts on Transnational Organized Crime, known as the *Lyon Group*, is the only international forum that places public safety and law enforcement issues at the forefront of legal and foreign policy development processes. The Lyon Group develops common G8 positions and principles, helps coordinate G8 strategies and encourages/facilitates program-specific multilateral and bilateral co-operation. The group has made considerable progress in identifying priorities in such organized crime related issues as high-tech crime, mutual legal assistance, and law enforcement co-operation.

The illicit drug trade problem spans our hemisphere and circles the globe. In recent years, countries in the Americas have joined forces to develop common approaches to deal with all aspects of the drug issue. Through its leadership role in the Inter-American Drug Abuse Control Commission (or "CICAD," as it is known by its Spanish Acronym) of the Organization of American States (OAS), Canada has been an active partner in this collaborative effort. As the Chair of the CICAD Multilateral Evaluation and Monitoring Working Group, the Senior Assistant Deputy Solicitor General of Canada has been working with other OAS countries towards the development of an Hemispheric Anti-Drug Strategy. The Strategy combines a balanced approach of firm enforcement with prevention and treatment, that will have a positive impact in Canada and across the Americas.

Finally, Canada is a leading member of the *Financial Action Task Force*, the key international forum addressing money laundering, which now comprises 28 member states and regional organizations. Established at the 1989 G7 Paris Summit, FATF has drawn up 40 recommendations to combat money laundering through legal, regulatory and enforcement measures.

INTERNATIONAL COOPERATION AND TECHNICAL ASSISTANCE

Canada has a broad public safety objective of assisting other countries to fight crime in their own jurisdictions. This also has a positive impact domestically, by limiting the ability of transnational organized criminal groups to cross the Canadian border. In the public safety and organized crime context, international cooperation and technical assistance help law enforcement communities in all jurisdictions take effective action against organized criminal groups, develop solutions against common threats, and move towards international standards.

Technical assistance can take many forms, from a financial contribution, to training of experts or assistance in assessing and drafting legislation. Canadian practice is moving towards offering technical assistance in partnership with the private and not-for-profit sectors, other government partners, and non-governmental organizations.

One of the greatest challenges public safety departments and agencies face in Canada in the area of technical assistance is coordinating our work with the efforts of others in the international community. There is a need to understand the activities of other countries and of multilateral institutions, such as the United Nations, the World Customs Organization or the Organization for Economic Cooperation and Development, to assess project requests properly. The importance of common understanding of each other's agendas are as critical in the international arena as they are in our federal, provincial, and territorial context.

CONCLUSION

Organized crime poses a significant threat to all nations. It is a global problem requiring global solutions. International instruments, such as the *United Nations Convention against Transnational Organized Crime*, are valuable tools that form the foundation from which individual nations can combat organized crime on a common global front.

But the fight against organized crime starts at home. The federal government, along with its provincial and territorial partners, has established a comprehensive response to the challenges posed by organized crime, focussing on specific national priorities which mirror international concerns. This inter-relationship between the national and international agendas is key to effectively combating organized crime now and in the future.

**COMBATING IMPUNITY:
THE CONVENTION AGAINST
TORTURE**

THE CONVENTION AGAINST TORTURE AND DIMINISHING IMPUNITY

PETER BURNS, Q.C.*

INTRODUCTION TO THE INTERNATIONAL DEVELOPMENTS

In 1999 the United Kingdom refused to recognize the argument that its courts had no jurisdiction to hear and possibly extradite to Spain the former President of Chile, Senator Pinochet, to stand trial for acts of torture committed in his name against Spanish citizens.¹ At the Hague the International Criminal Tribunal for the former Yugoslavia convicted Radislav Krstic, a former Bosnian Serb General, of genocide for his part in the murders of 8,000 Muslims in Srebrenica, in July 1995.² Slobodan Milosovic, former President of the Republic of Yugoslavia, is presently in custody upon charges arising from his role in both the Bosnian and Kosovo conflicts.³

In Sierra Leone an international war crimes tribunal is being developed under the sponsorship of the United Nations⁴ and in Cambodia, a mixed international and domestic war crimes tribunal has been created by legislation in that country.⁵

What do these events have in common? They reveal a trend towards the removal of traditional immunities, that previously existed in relation to grave human rights breaches by political and military actors, in both the international and

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¹ *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet (No. 3)*, [1999] 2 W.L.R. 827 (H.L.).

² *National Post*, (Canada), 3 August 2001, at A3.

³ *National Post*, (Canada), 6 July 2001, at A10.

⁴ *National Post*, (Canada), 10 July 2001, at A10.

⁵ *The New York Times*, On the Web, 23 July 2001, [wysiwyg://http://www.nytimes.co](http://www.nytimes.co).

domestic contexts. Impunity for the commission of war crimes, crimes against humanity and genocide is waning fast and in most instances has disappeared. In order to understand the way in which impunity from prosecution for international criminal conduct has diminished in recent years, a short chronological account is the most effective. Impunity can be defined as exemption from punishment or penalty.⁶

By the turn of the twentieth century, apart from piracy, over which crime any state could at customary international law exercise a universal jurisdiction, an emergent system of prohibited conduct in time of war was in the process of emerging.⁷

After the First World War by the Treaty of Versailles 1919 the allies determined to prosecute Kaiser Willhelm for a “supreme offence against international morality and the sanctity of treaties,” but Holland, the country to which the Kaiser had fled, refused to extradite him to stand trial. The Treaty of Sèvres, 1920, had provisions to try the Turkish perpetrators of the Armenian genocide of 1915, but it was replaced by the Treaty of Lausanne in 1923, which deleted these provisions.⁸

When Germany was defeated in the Second World War, the Allies created the Nuremberg International Military Tribunal (1945)⁹ with jurisdiction over crimes against the peace, war crimes and crimes against humanity; and in 1946 the Tokyo International Military Tribunal for the Far East¹⁰ was set up to deal with the same crimes perpetrated by the defeated Japanese leadership.

As well, in Germany, military tribunals exercised jurisdiction over cases of war crimes,¹¹ and throughout formerly occupied Europe domestic criminal courts dealt with cases that intersected with war crimes and crimes against humanity.¹² The one unfortunate characteristic of all these tribunals was that they were imposed by the “victors” upon the “vanquished.”

The truly momentous development at this time was the creation of the United Nations Organization and through its sponsorship there were treaty developments designed to diminish the range of impunity for certain international crimes. These

⁶ *The Shorter Oxford Dictionary* (Oxford, Clarendon, 1973), at 1038.

⁷ Bassiouni, *Crimes Against Humanity in International Criminal Law*, Second Revised Edition (1999), Kluwer, at 56-58.

⁸ *Ibid.*, at 62-69.

⁹ *Ibid.*, at 1-19.

¹⁰ *Ibid.*, at 8, 32-33, 525-531.

¹¹ *Ibid.*, at 531-537.

¹² *Ibid.*, at 543-546.

included the four Geneva War Crimes Conventions 1947,¹³ and the two protocols thereto,¹⁴ and the Genocide Convention 1948.¹⁵ The Geneva Conventions gave states parties a universal jurisdiction over grave breaches of the Conventions and imposed an obligation to investigate and prosecute such breaches, and the Genocide Convention obliged states to prohibit and punish the crime of genocide.

But the Cold War, from 1948, set the United Nations adrift in a tide of East-West bickering and obstruction based upon mutual distrust and ideological animosity. It was only with the collapse of the Soviet Union in 1992 that a sea change occurred. As Eastern European states threw off the shackles of Soviet colonialism other nations in other federations, notably the Balkans, did the same. The Federal Republic of Yugoslavia lost Slovenia in a relatively bloodless dismemberment,¹⁶ and Croatia¹⁷ and Bosnia¹⁸ soon also declared their independence. The vicious battle for territory and resources that followed was one of the bloodiest in recent history, giving rise to the commission of the most serious international crimes that there are.

The security Council responded, *inter alia* by creating an International Tribunal for the Former Yugoslavia in 1993 (“ICTY”),¹⁹ with jurisdiction over crimes against humanity, war crimes and genocide, and in the following year a similar tribunal was set up in Arusha, Tanzania with similar jurisdiction relating to the genocide in Rwanda (“I.C.T.R.”).²⁰

¹³ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 28.

¹⁴ Additional Protocol 1, (1977) and Additional Protocol 2, (1977).

¹⁵ Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 U.N.T.S. 277.

¹⁶ Slovenia declared independence on June 25, 1991 and Yugoslavian forces moved to preserve the central authority but withdrew in the face of strong Slovenian resistance within two weeks. A truce was entered into on July 7, 1991.

¹⁷ Croatia also declared independence from Yugoslavia on June 25, 1991 and war broke out between the Croatian and Federal forces, the latter being essentially Serbian forces.

¹⁸ Both Bosnia and Herzegovina, and Macedonia announced in December 1991, that they would seek independence from Yugoslavia. In March 1992 Bosnia and Herzegovina declared independence.

¹⁹ S.C. Res. 827, U.N. Doc. S/Res/827, 1993; I.L.M. 1203, adopting the draft contained in S.C. Res 808, U.N. Doc S/Res/809 (1993), 32 I.L.M. 1203.

²⁰ S.C. Res. 995, (1994).

Finally, in July 1998 the draft Rome Statute of the International Criminal Court (“I.C.C.”) was agreed to by a Diplomatic Conference of Plenipotentiaries, convened by the General Assembly of the United Nations.²¹ This court, which will be created by the 60th ratification of its statute,²² has jurisdiction over war crimes, crimes against humanity and genocide; and later will extend its jurisdiction to the crime of waging a war of aggression.²³

All three of these tribunals reject the defences of sovereign and state immunity and specifically make provision for individual criminal responsibility.²⁴ But unlike the Yugoslavian²⁵ and Rwandan Tribunals²⁶ the International Criminal Court grants primacy in terms of jurisdiction to domestic courts under a doctrine generously described as the “complementarity” principle.²⁷

THE CONVENTION AGAINST TORTURE

The “universal” system of human rights protection relates to a series of treaties that are open to any state, sponsored by the United Nations,²⁸ of which the Convention Against Torture (the “Torture Convention”)²⁹ is an illustration.

²¹ U.N. Doc. A/Con F. 183/9; Rome, July 17, 1998.

²² *Ibid.*, art. 126.

²³ *Ibid.*, art 5(d).

²⁴ *I.C.C.*, *ibid.*, art 27; I.C.T.Y., *supra*, note 19, art. 7(2); and I.C.T.R., *supra*, note 20, art 6(2).

²⁵ *Supra*, note 19, art. 9(2).

²⁶ *Supra*, note 20, art. 8(2).

²⁷ *Supra*, note 21, arts. 17-19.

²⁸ The full range of these instruments can be found in *Human Rights: A Compilation of International Instruments* U.N. (1997), ST/H.R./I/Rev. 5.

²⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1985) (entered into force 26 June 1987), reprinted in (1984) 23 *I.L.M.* 1027 [hereinafter “CAT” or “the Convention”]. The Convention created a monitoring body known as the Committee Against Torture to oversee its implementation pursuant to art. 17. At the time of writing there are 117 state parties to the Convention. Voyame and Burns, “The Convention Against Torture,” in *Manual on Human Rights Reporting* (U.N.O. Geneva, 1977) at 367. For a full account of the origins of the Convention and how it applies, see Lippman, “The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” (1994) 17 *Boston College Intl. and Comp. L. Rev.* 275; Burgers and Danelius, *The United Nations Convention Against Torture* (Dordrecht: Martinus Nijhoff, 1988); Burns and Okafor, “The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or How it is Still Better to Light a Candle than to Curse the Darkness,” (1998) 9 *Otago L. Rev.* 399.

The “regional” system³⁰ on the other hand is best illustrated by the Convention for the protection of Human Rights and Fundamental Freedoms 1950 which is open to all states in the Council of Europe.³¹ The other major “regional” system is the Inter-American System³² which, pursuant to the Charter of the 35 member states comprising the Organization of American States, is for our purposes the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights.

The Torture Convention had its formal genesis in a General Assembly resolution in 1984 and came into effect on 26 June 1987. In its preamble it makes clear its goal of reinforcing the struggle to prevent torture and other cruel, inhuman and degrading treatment or punishment throughout the world.

It does this in a variety of ways. Pursuant to Art. 19 of the Torture Convention States Parties are obliged to submit reports to a Committee of Experts created by Art. 18 (the “Committee”). These reports are required to outline the measures taken by the state to ensure (*inter alia*) the prohibition of torture, the pursuit and prosecution of torturers and the compensation and rehabilitation of torture victims. The same requirements extend to other cruel, inhuman, degrading treatment or punishment.³³ The “Committee” receives the reports, analyses and comments upon them and issues appropriate conclusions and recommendations.

This reporting obligation applies to all States Parties and receiving and commenting upon reports is the most fundamental jurisdiction exercised by the Committee. The Committee also has jurisdiction, under Art. 21, to adjudicate in situations where one State Party has denounced another for breaching the terms of the Convention³⁴ and under Art. 22 can receive individual complaints.

The Convention is unique among the United Nations Human Rights treaties in granting, by virtue of Art. 20, an investigative jurisdiction to the “Committee.” But this is a jurisdiction that is dependent upon a number of qualifications. It can only be exercised if the state party, under Art. 28(1), has not at the time of ratification reserved against such jurisdiction, and if the Committee is convinced that it has received reliable information which appears to it to contain well-founded indications that *torture* is being systematically practiced in the territory of the

³⁰ The relevant instruments are contained in Vol. II, *supra*, note 28.

³¹ Europ. T.S. No. 5, as amended.

³² The American Convention on Human Rights was adopted in 1969. See for its contents: Steiner and Alston, *International Human Rights in Context* (2000, Oxford, 2nd ed.) at 1436 – 1448. The other major regional system is that created by the Organization of African Unity, through the *African Charter on Human and Peoples’ Rights*, 1981: see Steiner and Alston, *ibid.*, at 920-937, and 1449-1457.

³³ The Torture Convention, *supra*, note 29, art. 16(1).

³⁴ To date no such denunciation has occurred.

State Party. It also obliges the Committee to attempt to obtain the co-operation of the State Party in implementing Art. 20.³⁵

The Torture Convention in Article 1(1) defines torture as:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The features of this definition which should be noted are that the pain or suffering must be severe, that it must be inflicted to accomplish one of the specific purposes outlined (or similar purposes by virtue of the use of the words “such ... as”), and that it must be inflicted in relation to some form of ‘state’ agency. A single act of torture would suffice to bring the provisions of the Convention into effect. It should finally be noted that, to the extent the definition in the Torture Convention is narrower on its face – or comes to be interpreted as being narrower – than definitions found elsewhere in domestic or international law, the Torture Convention itself makes clear that it cannot be invoked to constrain these more ample definitions.³⁶

Article 2 of the Torture Convention goes on to oblige states to take effective measures against torture in any territory under their jurisdiction. This article also excludes any defence of necessity or duress as well as any defence of superior orders. An obligation to criminalize torture, and related offences associated with it, is found in article 4. It grants states parties a universal jurisdiction over alleged torturers and imposes an obligation to prosecute all such persons in its territory whom it does not extradite to another state to stand trial, pursuant to article 5(2).

Historically, certain entities have been immune from prosecution in foreign courts and even before international tribunals. Immune entities included: heads of state and government, possibly with special immunity for ministers of gov-

³⁵ Some of the views following were first expressed in a chapter of *Torture As Tort*, (Scott ed.), (2001, Hart Publishing, Oxford), Burns and McBurney, “Impunity and the United Nations Convention Against Torture: A Shadow Play Without Ending,” at 275.

³⁶ Torture Convention, *supra*, note 29, art. 1(2).

ernment; foreign states themselves, including institutional appendages of those states; and members of the diplomatic corps accredited to a host state, most notably ambassadors. For our purposes, and in light of the attention having been paid to the *Pinochet* extradition³⁷ case in the United Kingdom, the immunity of greatest interest is that related to the conduct of current or former foreign heads of state concerning acts taking place in their own country.³⁸ But the seeds of the erosion of these immunities were planted in the Treaty of Versailles after the First World War, before flowering in the London and Tokyo Charters after the Second World War.³⁹ With the rise of the United Nations legal order as the primary source of legitimate constraint upon international conduct during both conflict and peacetime, such immunities are less frequently available for crimes that also amount to the most serious kinds of human rights violations.

A very recent development has been the creation of truth and reconciliation commissions as part of the process of facilitating a transition from a conflict-ridden and brutal regime to a more open and inclusive form of governance.⁴⁰ These commissions investigate grave breaches of international human rights, and tend to have the power to grant amnesties on a case-by-case basis.⁴¹ They usually require the individuals involved to admit their guilt and demonstrate contrition in order to receive an amnesty, but may reserve the power not to grant amnesty for crimes of a particularly horrific nature.

Torture, as defined by the CAT, is all too common in authoritarian states, particularly in times of fragile government control, or when civil conflict has occurred. The whole premise of the Torture Convention is that torturers are not to enjoy impunity – that they must be investigated, arrested and tried for their

³⁷ *Supra*, note 1.

³⁸ *Hutch v. Baez*, 7 Hun. 596 (1876); 5 *Amer. Intl L. Cases* 434 (NYCA).

³⁹ Treaty of Versailles, 1919, arts. 228-230. See also Treaty of Sèvres, 1920, which contained provisions to punish the Turkish perpetrators of the Armenian genocide of 1915. The Treaty of Sèvres was replaced by the Treaty of Lausanne, 1923, which deleted these provisions. Charter of the International Military Tribunal, annexed to the London Agreement, 8 August 1945; analysed in Bassiouni, *supra*, note 7, at 1-32. Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, as attached to Proclamation by the Supreme Commander for the Allied Powers of the same date: see Bassiouni, *ibid.*, at 32-37.

⁴⁰ See Haynor, "International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal," (1996) 59 *Law and Contemporary Problems* 173; Cassell, "Lessons From the Americas: Guidelines for the International Response to Amnesties for Atrocities," (1996) *Law and Contemporary Problems* 197. Pasqualucci, "The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System," (1994) 12 *Boston U. Intl. Law Jnl* 321.

⁴¹ Parker, "The Politics of Indemnities, Truth Telling and Reconciliation in South Africa: Binding Apartheid Without Forgetting," (1996) 17 *Hum.Rts L. Jnl.* 1.

crimes. From *Pinochet (No. 3)*⁴² and the Committee Against Torture's own view of the Torture Convention,⁴³ we know that individuals cannot successfully raise a defence of sovereign immunity, nor, logically, diplomatic immunity,⁴⁴ for acts defined as torture under the Convention, whatever the inconsistencies and complexities with the way the situation is perceived in domestic law. To what extent, then, can general or specific amnesties be regarded as a breach of a state party's obligations under the Convention?⁴⁵ Clearly, *general* amnesties would constitute such a breach by their very nature. By excluding investigation and not addressing guilt or innocence, they obviously conflict with the obligations contained in articles 12 and 13 of the Torture Convention. Where there is no provision to compensate torture victims, the conflict with article 14 of the Torture Convention is even more obvious. Since such general amnesties are usually proclaimed by a brutal regime on the eve of its demise, or by a successor regime that is reliant upon the good will of the former regime's military and police agencies, the removal of impunity for torturers, the primary purpose of the Convention Against

⁴² *Supra*, note 1.

⁴³ U.N. Doc. CAT/C/SR 360, 23 November 1998, 5-6.

⁴⁴ The matter of diplomats raises a particular issue: since they are immune from prosecution pursuant to the Vienna Convention on Diplomatic Relations 1961, 500 U.N.T.S. 95, does this immunity extend to *international* crimes, such as torture? An argument can be made that since the I.C.T.Y., the I.C.T.R. and the I.C.C. specifically exclude heads of state or governmental position immunity and are silent as to diplomats, diplomatic immunity is retained.

Another, and it is suggested better view, is that diplomats are merely state functionaries with certain powers recognized by customary international law and crystallized in the Vienna Convention. As such, they are not immune from prosecution before one of the international tribunals. It is more problematic so far as domestic process is concerned, particularly in the light of the recent decision of the International Court of Justice in *The Democratic Republic of the Congo v Belgium*, *infra*, note 50. But, the Vienna Convention is a general one, whereas the Torture Convention is of a more specific nature. It is concerned, *inter alia*, with removing impunity for the commission of torture anywhere by any government functionary, of which an ambassador is one.

We know, as a result of *Pinochet No. 3*, *supra*, that the Torture Convention excludes Sovereign Immunity for the crime of torture. What possible logical distinction could be made for retaining diplomatic immunity in the same circumstances? Certainly, once diplomatic status was lost such immunity would no longer pertain. If the status of diplomat was granted by the sending state to create immunity for the commission of an international crime such as torture, it would be a perversion of the principles of the Vienna Convention for the receiving states courts to recognize it.

The only sound rationale for recognizing an immunity for a present ambassador would be that to do otherwise would cause damage to the legitimate interests of the sending state, and, in a wider sense, create the potential for relationships based upon comity and expectations arising out of the Vienna Convention regime to become uncertain and open to improper manipulation.

This must be weighed against the fact that a torturer or genocidist may escape prosecution for those crimes. On balance, the arguments in favour of arresting and prosecuting such diplomats seem the stronger, in the light of recent developments in state practice and in principle.

⁴⁵ For a general discussion of the policies involved, see Weisman, "A History and Discussion of Amnesty," (1972) 4 *Columbia H. Rts. L. Rev.*, 529.

Torture, is frustrated. Such general amnesties cannot be in conformity with the obligations of the Convention.

So, too, is the legal situation when truth and reconciliation commissions⁴⁶ are driven, as they very often are, by policies that have no real bearing upon the guilt or innocence of an alleged perpetrator or the vindication of the interests of the victim. When this is the case, it seems impossible to say that the prohibition on torture and the duty to sanction it once it has occurred have at all been taken seriously. It is not the case that the truth and reconciliation process has fulfilled the state's responsibilities in a different way from that contemplated in the Convention. Rather, it has derogated from its norms completely.

Specific amnesties present a harder case, particularly where they are granted after a truth commission hearing. If a specific amnesty did not involve an inquiry into the substantive question and did not involve evaluating the merits of prosecution against the objectives of the specific amnesty, such amnesty would also be in breach of the terms of the Convention – for reasons similar to those whereby general amnesties are unacceptable. But what of an amnesty granted by a truth commission for the worthwhile purpose of fostering national reconciliation, where the amnesty is conditional upon the recipient admitting his or her guilt?

Even here a case can be made that the terms of the Convention are being breached. Article 7 imposes an obligation upon a state party to submit the alleged torturer's case to its competent authorities "for the purpose of prosecution." It obliges such authorities to "make their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state." This does not necessarily mean that every case will be prosecuted. Most notably, where the evidence is too weak to anticipate the probability of a conviction, prosecution would not be required. But, to remain consistent with article 7, it does mean that each case must be pursued in the same way and evaluated for the purposes of a criminal prosecution in the same manner as any ordinary criminal case would be. Truth and reconciliation commissions are not usually part of the standard criminal process. That being the case, even in instances of individual admissions of guilt before truth commissions, the granting of an amnesty for the purposes of national reconciliation may not meet the obligations contained in this provision.

On the other hand, if a truth and reconciliation commission has been created with the power to order prosecution or amnesty in any given case pertaining to the conduct of state or even non-state but "authorized" actors over a period

⁴⁶ See Haynor, "International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal," (1996) 59 *Law and Contemporary Problems* 173; Cassell, "Lessons From the Americas: Guidelines for the International Response to Amnesties for Atrocities," (1996) 59 *Law and Contemporary Problems* 197. Pasqualucci, "The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System," (1994) 12 *Boston U. Intl. Law Jnl* 321.

of time, it may be regarded as part of the normal investigative and adjudicative criminal procedure of that state for the period that the commission operates. If all similar allegations of criminal conduct are dealt with in the same manner and even-handedly, such amnesties as are granted may not be in breach of the Convention Against Torture. This will be the case especially if provision was made to ensure compensation and rehabilitation of torture victims despite the amnesty. In such instances, one of the primary purposes of the Convention, the abolition of the torturer's impunity, would be met by applying the same, "ordinary" investigative and adjudicative processes of the commission to all cases, and by including the bottom-line requirement of admission of guilt. The torturer would be exposed to the world and subjected to all the consequences of such exposure. As well, another main purpose of the Convention would be met – the compensation of torture victims. Where the amnesty does not stop legal pursuit of the torturer or state by the victim for compensation, part of the obligations imposed by article 14 are met. If a state is further prepared also to commit resources to rehabilitation of torture victims, such amnesties are probably in conformity with the Convention.

REGIONAL AND DOMESTIC DEVELOPMENTS

In Europe, over the past decade, there have been several prosecutions based upon international crimes that do not involve a national of the prosecuting state and which occurred outside the territorial jurisdiction of that state. In short, these countries have adopted a universal criminal jurisdiction over such crimes. Germany,⁴⁷ Denmark,⁴⁸ Switzerland,⁴⁹ Belgium,⁵⁰ France⁵¹ and the Netherlands⁵² have all taken such proceedings. This development is probably as significant as those on the international horizon, in terms of ensuring the effective evolution of

⁴⁷ (2001) Redress, "Universal Jurisdiction in Europe website <http://www.redress.org/impract.html>, at 2; and note 50, *infra*, at 10-12.

⁴⁸ *Ibid.*, Annex, <http://www.redress.org/annex.html>, at 5-6.

⁴⁹ *Ibid.*, at 19-21.

⁵⁰ *Ibid.*, at 2-5. However, in a very recent decision the International Court of Justice has distinguished between immunity and impunity to reach the conclusion that certain persons (encumbent heads of state and foreign ministers) are by customary international law immune from prosecution in domestic courts. This does not create impunity because they may still be tried before international tribunals or even domestic tribunals in certain cases when their encumbency ceases for the commission of war crimes etc. This was a majority decision that struck down an arrest warrant issued by Belgium against the Minister of Foreign Affairs of the Congo, alleging that he was guilty of war crimes and crimes against humanity: *Democratic Republic of Congo v Belgium*, 14th February, 2002.

⁵¹ *Ibid.*, at 7-10.

⁵² *Ibid.*, at 14-16.

international criminal law. Spain⁵³ has arrested an Argentinian naval officer who admitted involvement in throwing some of the Generals' opponents out of an aeroplane during the "Dirty War," and in 1990 France sentenced an Argentinian military officer to life imprisonment *in absentia* for his part in the torture (and presumed murder) of two French nationals in Argentina.⁵⁴ The *Pinochet* case⁵⁵ also demonstrates the dramatic erosion of traditional impunity whereby the House of Lords held that whatever the range of the defence of Sovereign immunity at international and domestic law, it is confined to conduct that could be described as a legitimate state function and that engaging in deliberate acts of torture did not fall within the defence.

A regional development, through recent determinations of the Inter-American Commission of Human Rights, shows how far and quickly that we have travelled in the journey towards removing traditional impunity for gross breaches of international human rights norms.

In recent determinations, that body declared that "self-amnesty" laws could be a violation of several Articles of the American Convention on Human Rights, relating to the duty to investigate human rights violations, the duty to prosecute violators, the duty to ensure compensation to victims and the duty to provide legal protection to those under its jurisdiction.⁵⁶ All of these tendencies: domestic courts exercising a universal criminal jurisdiction, the development of international criminal tribunals, domestic adoption and implementation of the relevant human rights treaties, regional declarations by norm-creating human rights commissions (and courts), and the unremitting pressure upon all these bodies and institutions by pertinent non-governmental organizations are inevitably leading to the same conclusion. Impunity for gross breaches of international human rights norms (international crimes) is fast becoming a relic of the past. Of course, the world will never be free of opportunistic brutes and sadists. But they are now on notice that the life in the sun that they previously could have anticipated once they lost their political authority, or when the mists of war have dissipated, is no longer a real option. Instead, exposure, condemnation and incarceration or worse, are their probable future. This may deter some, and for those it does not, at the very least the interests of their victims will be symbolically (and in some cases really) vindicated, and the relevant international and domestic criminal law norms reinforced.

⁵³ *Ibid.*, at 16-19.

⁵⁴ *Ibid.*, at 9.

⁵⁵ *Pinochet* (No. 3), *supra*, note 1.

⁵⁶ See Scharf, "The Letter of the Law: the Scope of the International Legal Obligation to Prosecute Human Rights Crimes," in Bassiouni and Morris (eds.), *Accountability for International Crime and Services Violations of Fundamental Human Rights*, (1996) 59 *Law and Contemporary Problems*, 41, at 50-52.

COMBATING IMPUNITY: THE CONVENTION AGAINST TORTURE

WARREN ALLMAND, P.C., O.C., Q.C.*

The theme of this conference is “The Changing Face of International Criminal Law” – and the subject of this panel – “Combating Impunity: The Convention against Torture.” I am going to speak principally about the campaign against impunity and the crime of torture as a case study.

I can say immediately that one area of international criminal law where there has been extraordinary progress in combating impunity is in the area of torture – and one can say that the torture cases were paramount in advancing the campaign against impunity.

There has been progress on other crimes as well – but torture has led the way.

Foremost of course, was the Pinochet case, where a Spanish prosecutor, on the basis of “universal jurisdiction” requested the extradition of General Pinochet from the United Kingdom for the torture of Spanish citizens in Chile during the period when Pinochet was President. This resulted in the two precedent-setting House of Lord decisions that followed. I will have more to say about these issues in a moment. But in addition to the Pinochet decision, there has been an enormous expansion in the number of international law instruments dealing with “torture” – pressed ahead in response to the widespread use of torture, especially by repressive regimes, and the impunity granted to those who carried it out.

Since World War II, at the global level we have had:

1. The *Universal Declaration on Human Rights 1948* – art. 5, “no one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.” While only a Declaration, these articles have been cited so often in courts, that they have become part of customary international law.
2. The four *Geneva Conventions* of 1949, ratified by 159 countries including Canada – dealing with the protection of civilians in time of war; the treat-

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ment of prisoners of war; and the condition of the military wounded and sick in time of war – which deal with torture directly and indirectly.

3. We have the *International Covenant on Civil and Political Rights* with art. 7, which repeats the words of art. 5 of the UDHR but adds that no one shall be subjected without free consent, to medical or scientific experimentation. There have been 141 ratifications including Canada.
4. We have the *Convention against Torture of 1984*, (entry into force 1987). There have been 74 ratifications including Canada. Canada has also ratified the two protocols. This convention builds on the UDHR and the ICCPR and expands the definition of torture. It also requires that State Parties make acts of torture offences under their respective criminal codes. Canada has done this in Criminal Code, art. 269.1 and art 7 (.3.7). The Convention also has a prohibition against expelling, returning, or extraditing a person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture (art. 3). This section has been used against Canada for certain refugee deportations – as well as extradition to countries with a reputation of extensive torture and with the death penalty.

You will recall the recent Supreme Court case of Rafay and Burns (14 February 2001), where the Court ruled that Canada could not extradite Burns and Rafay to Washington State unless Canada could get a commitment that the death penalty would not be used. We also have the cases of Monsour Aboni and M. Suresh, two suspected terrorists from Iran and Sri Lanka – and Jamohid Farhadi, an international drug dealer from Iran – all arguing that they should not be deported to Iran and Sri Lanka because they would be subjected to “torture’ as defined in the Convention. These cases are now before the Supreme Court of Canada and we are awaiting a decision.

5. Finally we have the *Rome Statute for the International Criminal Court*. Torture, for the purposes of this court – is made a crime against humanity in art. 7(1)(f) and 7(2)(e) and a war crime in art. 8(2)(a)(ii) – and still further a war crime in a civil war under art. 8(2)(c)(i).

It is interesting to note that the definition of torture in this statute is slightly different for crimes against humanity than it is for war crimes. For crimes against humanity they have a new definition. On the other hand for war crimes – they repeat the definition of the Geneva Conventions.

We also have several *Regional Instruments*, which deal with torture:

1. We have the *European Convention on Human Rights* of 1950 – and the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* of 1987 – which instruments have been used in certain cases to condemn the UK for torture against alleged terrorists in Northern Ireland – and against Spain for similar behaviour against alleged Basque terrorists of the ETA.
2. Then we have the *African Charter for Human and Peoples' Rights* – approved by the Organization of African Unity in 1981 – ratified by 49 of the 53 African States.
3. We also have the *American Declaration of the Rights and Duties of Man* (1948), which applies to all 34 members of the Organization of American States – and the *American Charter on Human Rights (ACHR)* (1969) which has been ratified by 24 of the 34 countries. Both instruments contain provisions on torture. Neither Canada nor the US has ratified the ACHR.

Canada joined the OAS ten years ago and is subject to the Declaration and the scrutiny of the Inter-American Commission on Human Rights for alleged violations. *Art. 25* deals with the right to humane treatment while in custody – and *art. 26* with cruel, infamous, or unusual punishment. Significantly Canadian lawyers have restricted their use of the Declaration and the Commission for cases of refugees returned to countries where torture was practised. Canada is not subject to the Inter-American Court on Human Rights since it has not ratified the ACHR. There is also the *American Convention to Prevent and Punish Torture* of 1985 (in force in 1987), ratified by 13 of the 35 members of the OAS, but not by Canada, or the US. I should point out that Rights & Democracy is conducting a campaign to have Canada ratify the ACHR and the American Convention on Torture.

There are no regional human right's treaties or mechanisms in Asia, although some Asian countries have ratified global instruments.

There are also a number of *global and regional mechanisms* to investigate and enforce the instruments mentioned above. Due to limitations of time, I cannot go into detail on all of them – but they are:

1. The United Nations Commission on Human Rights (UNCHR), which oversees the enforcement of all United Nations human rights instruments and which has appointed a Special Rapporteur against Torture.
2. Since 1993, the Special Rapporteur against Torture has been Sir Nigel Rodley of the United Kingdom. His report of 20 January 2001 made some very important comments on the widespread use of torture and referred to specific countries.

3. Then we have the Human Rights Committees (HRC) which enforces *art. 7* of the ICCPR (torture) – and which hears individual cases under its Optional Protocol. It was this body which condemned Canada for violations against the Convention in the cases of Lovelace, McIntyre and Waldman, – and as a result of which statutory amendments were made in two of the cases. Neither case dealt with torture and I am not aware of any that did.
4. The Committee against Torture (CAT) established to enforce *the Convention against Torture (art. 17)*, which committee can investigate alleged violations of the Convention and review the records of all countries, which are State Parties.
5. The European Commission and European Convention of Human Rights.
6. The Inter-American Commission and the Inter-American Committee.
7. The Special Tribunals for Yugoslavia and Rwanda.
8. Truth and Reconciliation Commissions. There have been 15 since 1974 and nine in the last decade. These were in El Salvador, Chile, Argentina, Chad, South Africa, East Germany, Rwanda, Ethiopia and Guatemala. Some have been sponsored by the United Nations.

Another major element in investigation and enforcement has been the work of NGOs, especially, Amnesty International, Human Rights Watch, Office Mondial Contre la Torture (OMCT), Médecins Sans Frontières, Fédération Internationale des ligues des droits de l’Homme (FIDH), etc. NGOs have a critical role – to investigate, report and lobby – at the UNCHR, the Committee against Torture and the Human Rights Committee – to lodge complaints and to provide information.

Finally I want to deal with the issue of universal jurisdiction. In the preamble of the ICC statute, it says, “That it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” We in Canada did this with the passage of Bill-C19 last year (2000). The Crimes against Humanity Act deals with genocide, war crimes and crimes against humanity – and implements the Rome Statue of the ICC. But in addition to implementing the Rome Statute, the Act also provides for universal jurisdiction over war crimes and crimes against humanity. *Art. 4* deals with such offences in Canada, *Art. 6 & 8* deals with such offences outside Canada.

Note that there are different definitions of war crimes and crimes against humanity in *art. 4* (offences in Canada) and in *art. 6* (offences outside Canada)

– and especially in *art. 8(b)*. In the first case the definition is the same as the Rome Statute; in the second case it is not. Here we have legislated universal jurisdiction – and Canada has done more or less what the House of Lords ruled in the Pinochet case. In effect the Lords said that., – If Chile, Spain and the UK had all ratified a human rights treaty (i.e. – Convention against Torture) – then the UK could arrest a Chilean in the UK for a violation of the treaty committed against Spanish nationals in Chile. Yesterday, we learned of a similar case in Belgium where Rwandan nationals were convicted by a Belgian court for crimes committed in Rwanda. This practice goes much beyond traditional jurisprudence which restricted prosecutions to crimes committed in the prosecuting state, or on ships and planes of the said state – or by its soldiers abroad (the case of crimes committed by Canadian soldiers in Somalia).

This doctrine of universal jurisdiction as found in Canadian Bill C19 and in the Pinochet decision, is an outstanding breakthrough in the campaign against impunity – especially for war crimes and crimes against humanity including torture. Soon, as a result of this doctrine it will be impossible for tyrants to leave their own countries (or countries which shelter them) without being arrested for alleged criminal behaviour under customary or conventional international law which has universal application.

In conclusion – we can confirm that there has been exceptional progress in the last 50 years in setting international standards and legislating these standards at the international, regional and national levels.

On the other hand we are still having difficulty in enforcing and implementing these standards – in Colombia, Serbia, Rwanda, Sierra Leone, Afghanistan, Chechnya, Burma, Zimbabwe, and the former Yugoslavia.

Our challenge in this Century will be to make these excellent instruments and institutions more effective – to combat impunity – and to protect the human rights of all humanity.



**SUBSTANTIVE ISSUES
IN THE DEVELOPMENT
OF THE ROME STATUTE**

COMMAND RESPONSIBILITY AND SUPERIOR ORDERS IN THE ROME STATUTE*

KIM S. CARTER**

The concept of personal criminal responsibility for the actions of troops under a commander's control has existed in one form or another for over 500 years in international law. Not surprisingly, the "defence" of superior orders has been claimed, with varying degrees of success, over the same length of time.¹

Any international treaty which imposes personal criminal responsibility for war crimes must address these two concepts. The *Rome Statute* does so in articles 28 and 33 – not only reflecting the state of customary international law, but also arguably making several progressive and positive developments.² The process leading up to the definitions agreed to in the Statute highlights some of the classic and continuing debates in international humanitarian law and the decisions taken during the negotiations have ramifications for not only international, but also domestic law in many countries.

This paper examines those two aspects of command responsibility and superior orders from the perspective of one country that has already ratified the *Rome Statute* – Canada.

BACKGROUND

All military organizations operate to a greater or lesser degree in a hierarchical manner. Obedience to lawful orders of military superiors is a prerequisite for,

* The treaty which establishes the international criminal court is known as the *Rome Statute of the International Criminal Court*. The abbreviated title of the *Rome Statute* is used throughout this paper.

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¹ Green, Leslie, 'Superior Orders and the Reasonable Man' in *Essays on the Modern Law of War* (1985; Transnational Publishers Inc; New York) at 54.

² *Rome Statute of the International Criminal Court*, U.N. Doc A/CONF. 183.9* 17 July 1998 also found at www.un.org/law/icc/n9828144.pdf

and an integral part of, effective military operations. In almost every military force disobedience of a lawful order carries with it adverse disciplinary and/or administrative consequences.³ Prompt obedience to lawful orders is important not only in achieving military goals but also in ensuring that individuals trained in the use of force and in possession of significant weaponry only use their training and resources in an authorized fashion. Ultimately civilian control of the military, which is usually considered a hallmark of democracy, depends upon military discipline, that is the prompt obedience to lawful commands whether or not the individual soldier agrees with the specific order, the general political direction underlying the order, or whether the order has potentially adverse or even fatal consequences for him or her personally. A part of this 'moral contract' between soldier and commander is that the soldier is usually entitled to rely on the orders he or she receives as being lawful. The orders may involve 'killing people and destroying things' but that, in a situation of armed conflict, would not necessarily give rise to doubts as to the lawfulness of the orders.⁴ In armed conflict enemy combatants may lawfully be killed and property which makes a clear contribution to enemy military operations may be lawfully destroyed. If an order is lawful, or reasonably appears lawful, then the soldiers who carry it out should not have to worry about potential personal criminal liability for doing acts which would, under other circumstances, attract criminal consequences.⁵ It is the superior who issues a seemingly lawful, but ultimately unlawful order who is held responsible.⁶ At the same time obedience to superior orders cannot protect a soldier from personal criminal responsibility when the order he or she follows is manifestly unlawful.⁷ Manifestly unlawful has been described as an order that would 'offend the conscience of every reasonable, right-thinking person'.⁸

ORIGINS

In part the success of the *Rome Statute* is in obtaining agreement on a single definition of both the means of committing the offence (command responsibility)

³ In the Canadian military a member can face a disciplinary charge for disobedience of a lawful command for which the maximum punishment is life imprisonment.

⁴ Commander (retired) William Fenrick is, from my perspective, the originator of this rather memorable phraseology.

⁵ 'Killing people and breaking things' is generally contrary to Canadian law – see sections 222, 229, 232, 322 and 430 of the *Criminal Code of Canada*.

⁶ *R v. Finta* (1994) 28 C.R. (4th) 265 (SCC) at 310.

⁷ *Supra* note 6 at 314.

⁸ *Supra* note 6 at 314.

and the defence (superior orders). Historically there has been both confusion and disagreement concerning when the concepts apply.

Although at the beginning of the 20th century there was some domestic law that indicated that superior orders were not a defence to a charge if those orders were “manifestly illegal,” nevertheless some military manuals (published in the same jurisdiction) still baldly stated that superior orders were a defence.⁹

Fortunately, in practice, many courts seemed to be able to distinguish between lawful or reasonably perceived as lawful orders and manifestly unlawful orders. This is illustrated in two post World War One trials of German sailors at Leipzig, the *Dover Castle* case and the *Llandoverly Castle* case. In the first, the captain of a German U-boat charged with unlawfully sinking a hospital ship successfully pleaded the defence of superior orders. Those orders, which originated in the German admiralty, were ones that authorized the sinking of allied hospital ships as they were believed to be unlawfully being used for military purposes.¹⁰ Almost contemporaneously, in the same series of trials, a naval officer was tried and convicted of killing shipwrecked survivors of a hospital ship, despite his defence that he had done this in compliance with the orders of a superior.¹¹ The court in that case held that the rule of international law violated in this case was simple and universally known.¹²

The trials at Nuremberg and the trials of Japanese commanders after World War Two, together with the war crimes trials of subordinates who actually committed atrocities such as murdering prisoners-of-war, appeared to further clarify some aspects of the two concepts. The trial of General Yamashita for his “command responsibility” for the atrocities committed by Japanese troops in Manila established that a commander did not have to approve or encourage troops to commit war crimes to be held liable under the application of the concept of command responsibility – it was sufficient to fail to prevent your troops from committing atrocities.¹³ The defence of obedience to superior orders was ruled no defence, for senior military commanders and civilians with political authority and influence who were alleged to have been involved in the commission of shocking crimes on an enormous scale at Nuremberg. The 1945 *Charter of the International Military Tribunal* stated that obedience to superior orders was not a

⁹ Green, Leslie, *The Contemporary Law of Armed Conflict* (1993; Manchester University Press; Manchester) at 294 and 295.

¹⁰ *Supra* note 1 at 55.

¹¹ *Supra* note 1 at 56.

¹² *Supra* note 1 at 56.

¹³ *Supra* note 1 in “War Crimes, Extradition and Command Responsibility” at 227 and 228.

defence but might be considered as a factor in mitigation of punishment in appropriate circumstances.¹⁴

In 1949 the four *Geneva Conventions*, which today are considered customary international law, were signed. Although all four *Geneva Conventions* made provision for the repression of grave breaches, none made specific reference to the responsibility or obligations of commanders in this regard. The obligation for the repression of breaches lay with the High Contracting Parties.¹⁵ Neither was there any mention made of the defence of obedience to superior orders, though this is perhaps less surprising post-Nuremberg, given the concepts lack of applicability to most actions which would normally constitute grave breaches.

In 1977, when the *Protocols Additional to the Geneva Conventions* were signed the issue of command responsibility was considered of sufficient significance that a provision relating to it was included in *Protocol I*, which is applicable to international armed conflicts. Article 86 states a superior is not “absolved from penal disciplinary responsibility” if he or she “knew or had information which should have enabled them to conclude in the circumstances at the time” that a subordinate was committing or going to commit a grave breach and the superior did not take all feasible means within his or her power to prevent or repress the breach.¹⁶ Article 87 also imposes an additional obligation on the High Contracting Parties to require any commander who is aware that subordinates or other persons under his or her control are going to commit or have committed a breach to take steps to prevent the breach occurring or to initiate appropriate disciplinary or penal action if it has already taken place.¹⁷

Protocol II, applicable to non-international conflicts, does not contain any provisions relating to breaches of that Protocol, nor any providing for command responsibility.

By the early 1990's the concept of command responsibility for war crimes was clearly applicable in international armed conflicts. It applied to military commanders and, in certain circumstances to very senior civilians who effectively acted as military commanders. In addition, the example of Nuremberg demonstrated that both military commanders and senior civilians who exercised similar authority could be held liable for crimes against humanity committed by subordinates. There was no similar liability in international humanitarian law for

¹⁴ Taylor, Telford, *The Anatomy of the Nuremberg Trials* (1992; Alfred A. Knopf; New York) at 648.

¹⁵ *The Geneva Conventions of August 12 1949*, International Committee of the Red Cross (GC1-article 49 at 42); (GC2-article 50 at 68); (GC3-article 129 at 130); (GC4-article 146 at 210).

¹⁶ *Protocols Additional to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, *Protocol I*, article 86(2) at 65.

¹⁷ *Supra* note 16 article 87 at 65 and 66.

gross violations of fundamental human rights that occurred in non-international armed conflicts. Although the *Genocide Convention* made the commission of genocide in any circumstances an offence of universal jurisdiction there had simply been little action to enforce its provisions before domestic criminal tribunals. Indeed, by the beginning of the 1990's the only viable mechanism for dealing with allegations of war crimes, crimes against humanity and genocide were domestic criminal tribunals who were notable for their lack of action in this regard.

THE ROAD TO ROME

The end of the Cold War which permitted more effective Security Council action, combined with reports of atrocities in conflicts in the Balkans and later Rwanda broke through a road block which had, for nearly fifty years prevented the second important step in the development of international humanitarian law, international enforcement. As a result of World War Two war crimes trials and subsequent international humanitarian and human rights law treaties there was sufficient customary and conventional international law to prohibit the atrocities that occurred in the Balkans and Rwanda. There was not however an effective international enforcement mechanism in place to work as a deterrent or to take action to punish such violations. The International Law Commission had been asked in 1947 to work on a draft text of international crimes but for a variety of undestandable reasons its draft *Code of Conduct of Crimes Against the Peace and Security of Mankind* had not been adopted by 1991.¹⁸

Although the initial reaction of the Security Council and other inter-governmental bodies to the allegations of war crimes and crimes against humanity which were reported in the Balkans was to set up commissions of experts to see if such a shocking situation could really exist, once it was established that there was reliable evidence substantiating such allegations action was quickly taken.¹⁹ The Security Council in May 1993 acting under its Chapter 7 authority adopted by UN Resolution the statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY).²⁰

The statute of ICTY dealt with both command responsibility and superior orders. Article 7 of the statute provided that a superior was not "relieved of criminal

¹⁸ For a review of the ILC work on the Code of Conduct of Crimes Against the Peace and Security of Mankind see the *Report of the International Law Commission on its 48th Session 6 May-26 July 1996*, General Assembly Official Records, Fifty-first Session, Supplement No. 10 A/51/10 which can also be found at www.un.org/ilcreport1996reptra.htm

¹⁹ The Security Council established a Commission of Experts to look into allegations of war crimes in the Former Yugoslavia by UNSCR 780 (1992) 6 October 1992.

²⁰ UNSCR 808 (1993) 25 May 1993.

responsibility” if he or she knew or had reason to know that a subordinate was about to commit a war crime or crime against humanity and the superior had “failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”²¹ It also provided that the fact that an accused person “acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment.”²²

In 1994 the Security Council again used its Chapter 7 authority to establish an International Criminal Tribunal for Rwanda (ICTR).²³ This tribunal had jurisdiction over what was clearly a non-international armed conflict. Although the issue of command responsibility and superior orders in the context of international humanitarian law had not until that time been applied in such a non-international setting, the ICTR statute at article 6 included the same provisions as the ICTY statute.

Both tribunals within a relatively short time frame had the opportunity to apply these provisions at the trial level. In 1995 in the Blaskic case, a trial chamber of the ICTY stated:

the accused himself is not charged with having committed the physical act constituting the basis of any of the crimes in the indictment ... The truly essential question which arises is whether General Blaskic ... otherwise failed in his duties as a commander and whether crimes were committed ... The accused ... moreover, did not take the reasonable measures which would have allowed the crimes to be prevented from being committed or the perpetrators thereof to be punished.²⁴

The following year a trial chamber of the ICTR, in the Akayesu case, a trial chamber dealt with the responsibility of a civilian superior for the actions of civilian subordinates in the context of a non-international armed conflict. The trial chamber stated:

As bourgemestre, Jean Paul Akayesu was responsible for maintaining law and public order in his commune. At least 2000 Tutsi were killed in Taba between April 7 and the end of June, 1994, while he was still in power. The killings in Taba were openly committed and so widespread that, as bourgemestre, Jean Paul

²¹ International Criminal Tribunal for the Former Yugoslavia, *Basic Documents* (United Nations;1995) article 7(3) at 9.

²² *Supra* note 21 article 7(4) at 9 and 11.

²³ UNSCR 965 (1994) 30 November 1994

²⁴ Blaskic, IT-95-14 at paras 56 and 58.

Akayesu must have known about them. Although he had the authority and responsibility to do so, Jean Paul Akayesu never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence.²⁵

Although these decisions were not binding outside of the tribunal setting, they nevertheless set out the background against which the negotiations of the *Rome Statute* took place. The document which formed the basis for early negotiations was the draft *Code of Crimes Against Peace and Security* which the International Law Commission had adopted in 1996. Article 5 of the draft *Code* provided that an individual charged with a crime against the peace and security of mankind was not “relieved of criminal responsibility” if he or she acted pursuant to an order of a Government or a superior, but that fact might be taken into account in mitigation of punishment.²⁶ Article 6 of the draft *Code* also made superiors potentially liable for the crimes of their subordinates if they “knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime” and did not take all necessary steps within their power to prevent the crime or punish the offenders.²⁷

THE NEGOTIATIONS

When the negotiations of the statute of the International Criminal Court began in New York in 1997 it was evident that both command responsibility and superior orders would have to be addressed. In doing that the negotiators had to resolve differences in a number of areas including the applicability of the concepts in non-international conflicts; whether military and civilian superiors should face the same liability for the actions of their subordinates; and whether superior orders could be a defence to any offence included in the statute in any circumstances.

The challenge faced by the diplomats, lawyers, soldiers and academics who were members of the various delegations was to take nearly fifty years of academic analysis and advice, meld it with a hundred years of state practice, overcome inherent and entrenched affection for and belief in the fundamental superiority of quite different domestic legal systems, and package it all in a sufficiently appealing manner that domestic politicians would embrace this new and probably expensive institution which ultimately might override their countries' sovereignty.

²⁵ Akayesu, ICTR-96-4-IT at para 12.

²⁶ *Supra* note 19 at para 50.

²⁷ *Supra* note 19 at para 50.

I must leave to others the full account of how that was achieved in less than three years – it is perhaps enough to say that the existence of the statute can be seen as a monument to the death and suffering of many individuals in the former Yugoslavia, Rwanda and other areas of crisis across the world.

The concepts of command responsibility and superior orders were not as thorny as some of the others that had to be dealt with, but nevertheless held their own challenges. Canada and the other members of the Group of “Likeminded States” played an active role in the negotiations of these provisions. All delegations struggled with how to assign their various personnel resources to the many working groups and informal sessions. Countries who had military personnel on their delegations tended to play a more active role in the development of the provisions relating to command responsibility and the defence of superior orders given those personnel were familiar with and had a practical interest in the topics.

The final wording of articles 28 (Responsibility of commanders and other superiors) and article 33 (Superior orders and prescription of law) of the *Rome Statute* reflect various compromises between idealism and pragmatism; academics, governments and non-governmental players; between civil, common and other systems of law and, of course, set out the current status in international law.²⁸

The first and major issue of the applicability of the articles to non-international armed conflicts was resolved as part of the broader negotiations. It had always been accepted that genocide did not require any connection with armed conflict, but a consensus that crimes against humanity did not require any connection with armed conflict was only resolved in the negotiations in Rome.²⁹ Article 8 of the *Rome Statute* includes war crimes committed in international armed conflict, and building on common article 3 of the *Geneva Conventions and Protocol II*, incorporates war crimes committed in non-international conflicts. Articles 28 and 33 apply in connection with all three types of offences.³⁰

The issue of command responsibility of civilian superiors is addressed in Article 28 by dividing them into two categories. Those persons who effectively act as military commanders are to be held criminally responsible on the same basis as military commanders; those who act in an essentially civilian capacity are to be held criminally liable for the actions of their subordinates (military or civilian) on a more restricted basis.

²⁸ Lee, Roy S. (ed), *The International Criminal Court: The Making of the Rome Statute* (1999; Kluwer Law International; The Hague) at 500 and 502.

²⁹ *Supra* note 28 in Herman von Hebel and Darryl Robinson “Crimes Within the Jurisdiction of the Court” at 92 and 93.

³⁰ *Supra* note 29 at 119.

It must be remembered that all persons, including military commanders and civilian superiors are criminally responsible as a party to the offence when they order, solicit or induce the commission of an offence by another person; or for the purposes of facilitating its commission aid or abet its commission; or are involved in a conspiracy to commit the offence pursuant to article 25 of the *Rome Statute*.³¹ This responsibility exists separate and apart from the concept of command responsibility. It is only where a military commander does not fall under the provisions of a party to an offence that it is necessary to rely upon the principle of command responsibility.

In article 28 of the *Rome Statute* a military commander who fails to properly exercise command over his or her forces is criminally responsible for offences committed by troops under his or her effective command and control by the application of the principle of command responsibility where the commander knew, or due to the circumstances at the time, should have known, that the forces were committing or were about to commit such crimes and the commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or submit the matter to competent authorities for investigation and prosecution.

This definition of command responsibility incorporates not only the ILC proposed text but elements of both the ICTY and ICTR statute. It also sets out clearly for the prosecutor what must be proven for both the actus reus and the mens rea to engage this mechanism of criminal liability.

The standard to engage criminal liability for civilian superiors who do not exercise command is higher. This is appropriate since there is neither the same degree of control exercised by civilian superiors, nor the same long tradition of the application of the concept of command responsibility. Article 28 provides that civilian supervisors who fail to exercise proper control over their subordinates are criminally responsible for crimes committed by subordinates under their effective authority and control where those subordinates' activities fall into the sphere over which the civilian superior exercises authority and control and the superior knew or consciously disregarded information which clearly indicated that the subordinates were committing or were about to commit a crime and the civilian superior failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of such offences or failed to submit the matter to competent authorities for investigation and prosecution.

Article 33 relating to superior orders takes an almost opposite approach to article 28, incorporating neither the ILC text, nor the ICTY and ICTR provisions. During negotiations one of the issues which had to be wrestled with was that

³¹ *Supra* note 28 at 499.

there clearly was a difference between serious offences committed by senior commanders or civilian supervisors and individual acts, committed by relatively junior personnel, which although identified in the *Rome Statute* as war crimes were ones where state practice had traditionally accepted a 'defence' of obedience to superior orders. An example of this is found in article 8(b)(xiii) of the *Rome Statute* which prohibits destroying or seizing enemy property unless such destruction or seizure is absolutely required by the "necessities of war."³² In certain circumstances a soldier or even a lower level commander may be in the position of seizing or destroying such property pursuant to orders which they reasonably believe are lawful. This is not a situation where the order is so manifestly unlawful that any reasonable soldier would know that the action was prohibited. In such limited situations state practice had often permitted obedience to superior orders to be successfully raised, either directly or indirectly, as either a defence, or a lack of mens rea argument.³³

After considerable debate a text was agreed upon which provided that obedience to superior orders could provide a defence to both soldiers and civilian subordinates in a limited scenario. To be used successfully the individual would have to be charged with a war crime since obedience to superior orders is specifically prohibited as a defence for genocide or crimes against humanity. The prerequisites for a successful defence are that an order which was given to an individual cannot be manifestly unlawful; the individual him or herself must think the order was not unlawful; the individual would must be under a legal obligation to obey the order; and the order must come from a government or a superior.³⁴

Although a narrow exception, its inclusion did cause concern among a number of non-governmental organizations who saw the acceptance of any defence of obedience to superior orders as a backward step in international law. A careful examination of the limitations placed on the defence in the statute however shows it does respect the "principles of Nuremberg" while incorporating the practices of customary international law and many domestic law jurisdictions in dealing with war crimes of a less severe or widespread nature.

By the end of the Rome Conference the concept of command responsibility in the statute was applicable in regard to military and civilian commanders and, in more limited circumstances to civilian superiors; and to crimes of genocide,

³² *Supra* note 28 at 486.

³³ The *Finta* case discusses the interplay of the defence of superior orders and mens rea. *Supra* note 6 at 310 to 325.

³⁴ This raises the interesting issue of whether there is any defence of superior orders available where the individual charged is a member of a rebel group, who arguably is under a 'legal obligation' *not* to obey any orders of his or her superior.

crimes against humanity and war crimes in both international and non-international conflicts. Superior orders as a defence was available to both military and civilian subordinates only for war crimes where the order complied with was not manifestly unlawful and the individual was under a legal obligation to comply with it and the individual him or herself believed it was not unlawful.

DOMESTIC IMPLEMENTATION

Once the work on the *Rome Statute* had been completed another Herculean task remained – domestic implementation of the treaty. In Canada treaties are not self-executing. This means that domestic implementing legislation must be introduced and passed into law by Canada’s parliament before Canada can implement its treaty obligations.³⁵

In Canada the ability to be able to effectively implement a treaty is taken very seriously and the practice is not to ratify a treaty until the necessary domestic implementing legislation can come into effect. Given Canada’s commitment to the International Criminal Court it was important that this implementing legislation be produced, and passed into force, quickly.

As a result of certain constitutional requirements in Canada it was felt necessary to make command responsibility a specific offence in criminal law. The concept of command responsibility had been applicable previously in Canada but given the broad scope of the Rome Statute’s provision it was felt that absolute clarity was desirable. Consequently, in Canada’s *Crimes Against Humanity and War Crimes Act*, which came into force in 2000, for the first time command responsibility is set out in sections 5 and 7 as a specific indictable offence with a maximum punishment of life imprisonment.³⁶ The two separate articles reflect an internal division in the act, in which certain offences are applicable to conduct inside Canada, while identically worded offences are applicable outside Canada.³⁷

In addition Canada has added a few idiosyncratic twists in its implementing legislation to augment the definitions in the *Rome Statute*. The definition of military commander specifically includes not only a person “effectively acting as a military commander” but also “a person who commands police with a degree of authority and control comparable to a military commander.”³⁸ While this

³⁵ Fortunately in the case of the *Rome Statute* one of the most complex and demanding part of the domestic implementation process could be largely avoided. As the *Rome Statute* dealt with criminal matters it fell into federal jurisdiction rather than into the jurisdiction of ten separate provinces and three territories.

³⁶ Statutes of Canada, 48-49, 2000, Chapter 24, sections 5 and 7.

³⁷ This is presumably because Canada still takes the concept of extraterritoriality seriously and has a suitably cautious approach even when dealing with offences of universal jurisdiction.

³⁸ *Supra* note 36.

arguably is not a necessary addition it certainly gives comfort to many of those who have served in peacekeeping operations in the Balkans and elsewhere, that persons who they have encountered can be held liable under the higher standard of command responsibility of a military commander.

The Canadian legislation has also incorporated an elaboration to the defence of obedience to superior orders which may be seen as addressing certain concerns raised after the *Finta* decision. In that case Mr Finta, a member of the Hungarian gendarmerie during World War Two was charged and prosecuted in Canada in the late 1980's on charges that he committed war crimes relating to the unlawful confinement, robbery, kidnapping and manslaughter of Hungarian Jews pursuant to government orders. He was found not guilty at trial; the Ontario Court of Appeal dismissed the Crown appeal from the acquittal at trial and the jury finding of not guilty was upheld again by the Supreme Court of Canada. In the decision for the majority in the Supreme Court of Canada, Mr Justice Cory stated that one of the circumstances which gave the defence of obedience to superior orders which had been raised by Mr Finta "an air of reality" was "...the general, publically stated belief in newspapers in Hungary that the Jews were subversive and disloyal to the war efforts of Hungary..."³⁹

The Canadian elaboration to the defence of obedience to superior orders provides that an accused person cannot base their belief that an order was lawful on information about a group which is likely to encourage, or attempts to justify the inhumane acts against the group.⁴⁰

IMPACT ON MILITARY MANUALS

Hopefully the most important impact of the International Criminal Court will be to deter those considering committing genocide, crimes against humanity and war crimes from doing so. Ultimately, that is a much more desirable result than effectively apprehending, convicting and punishing perpetrators, though a demonstration that such action can and will be taken is usually a prerequisite to achieving deterrence.

Certainly inclusion in domestic law of provisions implementing the *Rome Statute* is a critical first step. There are however other important steps which must also be taken to maximize the deterrent effect of the International Criminal Court. One of these is to ensure that military personnel are informed of the changes to international and domestic law in military manuals and training. The current Canadian Forces Manual on the Law of Armed Conflict at the

³⁹ Supra note 6 at 324.

⁴⁰ Supra note 36 at section 14(3).

Operational and Tactical Level (LOAC Manual) has a chapter on war crimes that deals with both command responsibility and superior orders.⁴¹

The LOAC Manual, in two sections entitled Individual Criminal Responsibility and Responsibilities of Commanders, sets out the provisions of the *Rome Statute* and the applicable provisions of the *National Defence Act* and its subordinate regulations, *Queen's Orders and Regulations for the Canadian Forces*. It has not at this time been amended to specifically include the provisions of the new *Crimes Against Humanity and War Crimes Act*. This slight temporal dissonance has no adverse impact however in regard to command responsibility and the defence of obedience to superior orders. The section on command responsibility reproduces article 28 of the *Rome Statute*.⁴² The section on superior orders, while including article 33 of the *Rome Statute*, very clearly stresses the limitations of the defence, as it begins with the statement "It is no defence to a war crime that the act was committed in compliance with an order."⁴³

CONCLUSION

The *Rome Statute*, while primarily reflecting current customary international law, has managed some progressive development in international law in the areas of command responsibility and the defence of obedience to superior orders. Incorporating these provisions into domestic law and educating the military and civilian populations about them is the next necessary step in making the International Criminal Court an effective deterrent.

⁴¹ The Law of Armed Conflict at the Operational and Tactical Level. B-GG-005-027/AF-020. This publication can also be found at the Canadian Forces website at www.dnd.gc.ca.

⁴² *Supra* note 41 at 16-7.

⁴³ *Supra* note 41 at 16-5.

THE INTERNATIONAL CRIMINAL COURT: AN HISTORIC LEAP FORWARD FOR HUMANITY

JOANNE LEE*

On 17 July 1998 in Rome, the international community overwhelmingly approved a Statute for a permanent International Criminal Court (ICC).¹ The adoption of this Statute (“the Rome Statute”) represents an historic leap forward in efforts to prevent gross human rights violations across the globe. The ICC will have jurisdiction to prosecute individuals who commit genocide, crimes against humanity, and war crimes, wherever these crimes take place.² For more than 70 years, a wide variety of actors from all over the world has been working towards this goal, in order to provide an effective mechanism to deter these “most serious crimes of concern to the international community as a whole.”³

This paper is intended to provide a general introduction to the history of the ICC, and to the main features of this important new international institution, in

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¹ UN Doc. A/CONF.183/9, 17 July 1998. The Rome Statute was adopted by States participating in a Diplomatic Conference in Rome, with a non-recorded vote of 120 in favour, 7 against, and 21 abstentions: UN Press Release L/ROM/22, “UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court,” 17 July 1998, available online via <<http://www.un.org/law/icc/>> Cf. para. 24, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/10, 17 July 1998 [hereinafter “Final Act”].

² Articles 5 and 13(b) together provide that the Security Council, acting under Chapter VII of the UN Charter, may refer all such crimes to the Court for investigation and possible prosecution. However, note that the Security Council may only refer to the Court “situations in which one or more of [the crimes referred to in article 5] appears to have been committed,” rather than referring specific individuals or acts for investigation.

³ Article 5, Rome Statute, provides that the jurisdiction of the ICC “shall be limited to the most serious crimes of concern to the international community as a whole.”

preparation for the Court's materialisation.⁴ The ICC is expected to come into being some time in 2002, approximately 2 months after 60 States have ratified the Rome Statute.⁵ Since the adoption of the Statute, 32 States have ratified already, and 139 States have signed the Statute.⁶ This indicates widespread interest – throughout the entire international community – for creating an effective ICC that represents the interests of every region and principal legal system, and with universal application.

HISTORY OF THE INTERNATIONAL CRIMINAL COURT

In historical terms, the idea of an international criminal court is a relatively recent phenomenon. Prior to the 20th century, the only “international criminal trial” appears to have been in 1474, when the Bergundian Governor of Breisach, Peter von Hagenback, was convicted of “crimes against the law of God and humanity,” by a court of 28 judges from various States within the Holy Roman Empire.⁷ Even during the 20th century, the small number of international criminal trials in no way accounted for the huge number of atrocities committed, largely because of the reluctance of States to prosecute such criminals.⁸

⁴ Note that it is beyond the scope of this paper to provide a comprehensive introduction to the background and features of the Court. For further details, see especially: M. Cherif Bassiouni, *The Statute of the International Court: A Documentary History* (New York: Transnational Publishers, 1998); A. Cassese, ed., *The Rome Statute and International Criminal Law* (New York: Oxford University Press, 2001); R. Lee, ed., *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999); and O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden, Germany: Nomos Verlagsgesellschaft, 1999).

⁵ Under article 126, the Statute will enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession.

⁶ As at 21 May 2001. Every region of the world is represented in the list of signatory States and States Parties, as are the major international political groupings. An updated list of signatures and ratifications, together with information on the status of the process of ratification in each State, is available online at the website of the NGO Coalition for the International Criminal Court (CICC): <<http://www.iccnw.org/>>.

⁷ The facts of the case alleged that troops under the Governor's command were responsible for the rape, murder, and pillage of innocent civilians in Breisach: G. Schwartzberger, *The Law of Armed Conflict: International Law as Applied by International Courts and Tribunals* (London: Stevens, 1968) at 462-466.

⁸ Many authors have discussed this phenomenon. For recent analyses, see especially: M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Netherlands: Martinus Nijhoff, 1992); M. Lippman, “The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later,” (1998) 15 *Arizona J. Int. & Comp. L.* 415; T.L.H. McCormack & G. Simpson, eds., *The Law of War Crimes: National and International Approaches* (The Netherlands: Kluwer Law International,

continued

The first attempt in the 20th century to create a permanent international criminal tribunal came after the First World War, when the victors in that War established a “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.” In accordance with the Commission’s recommendations, in 1920 the League of Nations appointed an Advisory Committee of Jurists to prepare a statute for a permanent international criminal court. The Commission had also recommended that a penal tribunal be established to address crimes committed during the First World War.⁹ However, there was no agreement as to what crimes could be included within the jurisdiction of either tribunal.¹⁰

The members of the Commission had suggested that the law to be applied by the non-permanent penal tribunal should be “the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience.”¹¹ However, the United States opposed such vague, subjective sources of law. Instead, article 227 of the subsequent *Treaty of Versailles* took a compromise position, providing that Kaiser Wilhelm should be tried “for a supreme offense against international morality and the sanctity of treaties.”¹² Ultimately, however, this was a moot distinction, as the Allies were not able to obtain custody of the Kaiser in order to try him, because the Netherlands refused to surrender him. German courts only tried a small number of lower ranking Germans for “war crimes” they had committed during the First World War.¹³

1997); and S.R. Ratner & J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (New York: Oxford University Press, 1997). The outstanding exception to this trend was the case of *Attorney-General of Israel v. Eichmann* (1962) 36 I.L.R. 5. But note the concerns of one commentator over the legitimacy of this trial: H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1994).

⁹ See *Report of the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties for Violations of the Laws and Customs of War*, presented to the Conference of Paris, 29 March 1919, (1919) Pamphlet 32, Carnegie Endowment for International Peace, Division of International Law, reprinted in (1920) Supplement 14, Am. J. Int’l L. 95.

¹⁰ League of Nations, “Minutes of the Third Committee (Permanent Court of International Justice),” *The Records of the First Assembly Meetings of the Committees*, in B.B. Ferencz, *An International Criminal Court: A Step Toward World Peace – A Documentary History and Analysis*, Vol. 1, *Half a Century of Hope* (London: Oceana Publications, 1980) at 38 & 225.

¹¹ *Report of the Commission*, supra.

¹² [my emphasis] Treaties were a recognised source of international law at this time, although this was the first attempt to invoke individual criminal responsibility for the breach of a peace treaty. Cf. *Treaty of Peace Between the Allied and Associated Powers and Germany*, signed at Versailles, 28 June 1919, 11 Martens Nouveau Recueil (ser. 3) 323, entered into force 10 January 1920.

¹³ These trials before the Supreme Court of the Reich at Leipzig were a compromise between the demands of the victorious Allies and the objections of an “indignant” Germany, and they have since been acknowledged as a sham: Ferencz, supra, at 32-33.

In 1920, the Legal Committee of the League of Nations concluded that there was “not yet any international penal law recognized by all nations,” in view of the failure of the Allies to establish a generally-accepted precedent for prosecuting Germany’s Head of State, and on the recommendation of the aforementioned Advisory Committee of Jurists.¹⁴ Thus, the issue of a permanent international criminal court was postponed for the time being.

The Second World War provided the next wake-up call for the international community to try and place clear limits on methods of warfare and on the treatment of citizens within a sovereign State. As reports trickled through of the atrocities in Nazi Germany and its growing expanse of conquered territories, the Allies began preparations for another international criminal tribunal. Again, they first established a “Commission for the Investigation of War Crimes,” to document the horrendous policies and practices of the Nazis and their supporters during the War.¹⁵ Again, they were unable to obtain custody of the highest-ranking official, Adolph Hitler, who disappeared before he could be captured. However, once Germany had surrendered, the Allies were able to obtain custody of a representative group of high-ranking Nazis, in order to try them “as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity.”¹⁶ All twenty-four of these major Nazi war criminals subsequently were found guilty at Nuremberg, Germany, under the Charter for the first ever International Military Tribunal (now known as the “Nuremberg Charter”).¹⁷ Some questions have been raised as

¹⁴ League of Nations, “Minutes of the Third Committee (Permanent Court of International Justice),” supra. However, several treaties on the treatment of soldiers in wartime were created during the League’s mandate: the *Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous Gases and Bacteriological Methods of Warfare*, 1925; the *Geneva Convention on the Treatment of Prisoners of War*, 1929; and the *London Procès-Verbal Relating to the Rules of Submarine Warfare*, 1936, set forth in Part IV of the *Treaty of London* of 22 April, 1930.

¹⁵ This Commission (later the UN War Crimes Commission) was created by the U.S. and Great Britain in 1942. Initially a fact-finding Commission, its members also continued the work that many of them had performed at the London International Assembly in preparing a convention for an international criminal court to prosecute war crimes (extracts reproduced in: International Law Commission, *Historical Survey of the Question of International Criminal Jurisdiction*, 1949, in Ferencz, supra, at 399). See also United Nations War Crimes Commission, *Draft Convention for the Establishment of a United Nations War Crimes Court*, reprinted in Ferencz, ibid, at 428.

¹⁶ *Judgment of the International Military Tribunal*, published at Nuremberg, Germany, 1947, reproduced in Ferencz, supra, at 469.

¹⁷ *Charter of the International Military Tribunal*, annexed to the *London Agreement* of 8 August 1945. This Charter was drafted between June and August 1945, by representatives of the United States, Great Britain, the Provisional Government of France, and the U.S.S.R. Nineteen nations then expressed their adherence to the *London Agreement* after it was completed: Australia, Belgium, Czechoslovakia,

continued

to the authority of the Nuremberg Tribunal to prosecute individuals for crimes that had not specifically been agreed to by all nations prior to the commission of the crimes.¹⁸ In particular there was a major disagreement, even amongst the members of the Commission for the Investigation of War Crimes, as to whether launching an aggressive war was a crime. The majority of members of the Commission agreed that “preparation and launching of the war was a crime not merely morally but also in accordance with criminal laws of the invaded countries and the general principles of international law.”¹⁹ However, the majority of members of the special Sub-Committee appointed specifically to address this issue concluded that:

“Acts committed by individuals merely for the purpose of preparing for and launching war ... [except for those acts committed before the outbreak of the war which command or procure the commission of “war crimes” after the outbreak of war] are, *lege lata*, not “war crimes....

However, such acts as mentioned [previously] ... and especially *the acts and outrages against the principles of the laws of nations and against international good faith perpetrated by the responsible leaders of the axis powers and their satellites in preparing and launching this war* are of such gravity that they should be made the subject of formal condemnation in the peace treaties [and] it is desirable that for the future penal sanctions should be provided for *such grave outrages against the elementary principles of international law.*”²⁰

Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia.

¹⁸ In fact, one of the first arguments raised by the defendants at Nuremberg was the principle of *nullem crimen sine lege, nulla poena sine lege*. The defendants argued that those who drafted the Nuremberg Charter had only recently “created” the crimes they were charging, *ex post facto*, and were arbitrarily exercising an elaborate form of the usual “victor’s justice.” However, the judges of the Tribunal held that “The [Nuremberg] Charter is not an arbitrary exercise of power on the part of victorious Nations, but in the view of the Tribunal, ... it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.” – *Judgment of the International Military Tribunal*, *supra*, reproduced in Ferencz, *supra*, at 475.

¹⁹ Ferencz, *supra*, at 63.

²⁰ [my emphases] United Nations War Crimes Commission, *Report of the Sub-Committee Appointed to Consider Whether the Preparation and Launching of the Present War Should Be Considered “War Crimes,”* 27 September 1944, in Ferencz, *supra*, at 63. The members of this Sub-Committee comprised two American, one British, and one Czechoslovakian expert (the latter of whom dissented from the view taken by the other three).

In other words, the majority of Sub-Committee members were hesitant to support the idea, as a general principle of international law, that launching an aggressive war should always be characterised as a “war crime” or a “crime against peace.” Instead, they effectively made a pre-determination of fact: that only such acts as those committed by the “axis powers and their satellites” should be characterised as “war crimes” or “crimes against peace.” This ambiguity and subjectivity in defining “crimes against peace” has continued to plague all subsequent efforts to define the “crime of aggression,” including current attempts to define the crime for inclusion within the jurisdiction of the ICC.²¹ Ultimately, the judges of the Nuremberg Tribunal relied mostly on peace and war crimes treaties to which Germany was a party, in order to find that “Crimes against Peace” and “War Crimes” had been committed by the Nazi leaders. However, as for “Crimes against Humanity,” there were no obvious sources of law for the concept at that time.²² Thus, the Nuremberg Charter took the cautious approach of linking “Crimes Against Humanity” to the other two crimes, effectively creating a special category of “War Crimes.”²³ The judges of the Tribunal respected this requirement of a nexus between “Crimes Against Humanity” and the commencement of hostilities in 1939, thereby setting a precedent in international law that held up until late in the 20th century.²⁴

²¹ The ICC will have jurisdiction over the crime of aggression “once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime ... [which] shall be consistent with the relevant provisions of the Charter of the United Nations” (article 5(2)). The UN General Assembly’s 1974 *Definition of Aggression* (GA Res 29/3314 of 14 December 1974), which was not supported by the major powers, merely defines a “crime of aggression” as a “war of aggression” – as opposed to the “acts of aggression” listed elsewhere in the *Definition*. It does not provide any further guidance as to the meaning of a “war of aggression.” The Preparatory Commission for the ICC (“Prepcom”) has been debating a definition of the “crime of aggression” since November 1999, in accordance with its mandate under Paragraph F, Final Act, *supra*. However, the working group on this issue has yet to arrive at a single consolidated text that adequately reflects all the various standpoints on the multitude of issues. The main point of contention at present is whether the Security Council, under the UN Charter, has *primary* or *exclusive* responsibility under international law to determine that an “act of aggression” has occurred, which could then provide a basis for individual criminal responsibility for the “crime of aggression.” Cf. C. Wittenauer, “Nations Struggle to Define Aggression,” *Associated Press* (28 February 2001), online: AP Worldstream.

²² M. Cherif Bassiouni, “Nuremberg: Forty Years After,” in *American Society of International Law, Proceedings of the 80th Annual Meeting, Washington D.C., 9-12 April, 1986*, 59 at 62.

²³ Article 6(c), Nuremberg Charter, *supra*.

²⁴ But note the judges’ comments in the Judgment, where they took the opportunity to condemn the “policy of terror” carried out by the German government prior to 1939, citing the “persecution of Jews” and the “persecution, repression and murder” of its political opponents as the most “revolting and horrible ...crimes,” but regrettably beyond the Tribunal’s jurisdiction (quoted in Ferencz, *supra*,

continued

In 1946, the International Military Tribunal for the Far East was established, under the supervision of United States General Douglas MacArthur, with a Charter that was based in large part on the Nuremberg Charter.²⁵ The “Tokyo Tribunal” (as it became known) was criticised by many commentators as being “shamefully unfair and riddled procedurally with every type of error, bias, prejudice and unfairness that one can imagine.”²⁶ However, it still provided a valuable contribution to the emerging jurisprudence on international criminal law, perhaps even *because* of its lack of procedural fairness.²⁷

The following year, the International Law Commission [hereinafter “ILC”] was established by the United Nations, and requested to formulate the principles

at 48). This requirement of a nexus between war and “crimes against humanity” has since allowed Pol Pot’s administration in Cambodia and others to escape criminal responsibility for committing “crimes against humanity,” where there was no international armed conflict involved: see generally Ratner & Abrams, *supra*. However, the International Criminal Tribunal for the Former Yugoslavia has now recognised that “crimes against humanity” can also be committed in the absence of an international armed conflict: *Prosecutor v. Tadic, Appeal on Jurisdiction*, International Criminal Tribunal for Yugoslavia (1995) 35 I.L.M. 32.

²⁵ *International Military Tribunal for the Far East*, proclaimed at Tokyo, 19 January 1946 and amended 26 April 1946, T.I.A.S. NO. 1589, 4 Bevans 20. Entered into force for the United States, 26 April 1946. Signed by General MacArthur on behalf of eleven Allied Powers.

²⁶ M. Cherif Bassiouni, “Nuremberg: Forty Years After,” *supra*. For example, one piece of evidence relied upon to prove the complicity of the defendants in ordering a particular invasion, was “a photostat of a newspaper report of an alleged official communiqué”: R. J. Pritchard, *An Overview of the Historical Importance of the Tokyo War Trial*, Nissan Occasional Paper Series No.5, 1987 at 32.

²⁷ While the jurisdiction of the Nuremberg Charter arose from the fact that Germany had surrendered unconditionally to the Allies, the Japanese government had made no such relinquishment of its authority, and the statutes for subsequent international criminal tribunals have been careful to specify the exact nature of their jurisdiction in order to avoid similar accusations to those directed at the Tokyo Tribunal. The Indian Justice on the Tribunal, Dr. Rahadbinod Pal, who was described by one American defence attorney as “the only deep student of international law on the bench,” caused considerable controversy by producing a lengthy dissenting opinion acquitting the accused on all counts. He felt it his duty to point out that the trial was solely a political exercise, that it did not have a sound legal basis, and that the characterization of the alleged activities as crimes could not be supported by an accurate interpretation of international law as it stood at the time: E. S. Kopelman, “Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial,” (1991) 23:2 N.Y.U. J. Int. L. and Politics, 373 at 378. It seems ironic now that he has been so heavily criticised for wanting to acquit the Japanese, when the lack of procedural fairness throughout the trial suggests that they probably should have been acquitted on that basis alone. Interestingly, Justice William O. Douglas of the United States Supreme Court concurred subsequently with Justice Pal’s political characterisation of the Tokyo Tribunal, stating that the Tribunal “took its law from its creator and did not act as a free and independent tribunal to adjudge the rights of petitioners under international law. As Justice Pal said, it did not therefore sit as a judicial tribunal. It was solely an instrument of political power.” *Hirota v. MacArthur*, 338 U.S. at 215 (Justice Douglas was outlining his reasons for refusing to hear the appeal of the Tokyo defendants).

of law recognised by the Nuremberg Charter.²⁸ The ILC was also requested to prepare a “Draft Code of Crimes Against the Peace and Security of Mankind,” which it has worked on ever since.²⁹ In 1948, the Genocide Convention was adopted,³⁰ and the United Nations requested the ILC to study the question of international criminal jurisdiction and “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.”³¹ The ILC reported subsequently that it considered the establishment of an international judicial organ for the trial of persons charged with genocide was both desirable and possible. A committee composed of the representatives of seventeen member states of the UN was then created to prepare “concrete proposals relating to the creation and the statute of an international criminal court.”³²

However, as Professor M. Cherif Bassiouni has pointed out, the entire project was doomed to failure from the start, with three different bodies taking responsibility for drafting different aspects of the same issues:

The consequences of proceeding along three parallel tracks are self-evident. The “Special Committee” charged with drafting a statute for the court completed its work in 1953 but the project was tabled because there could be no court without first having a code. Then the code project was tabled in 1954 because it could not be approved until aggression was defined.³³

²⁸ GA Res 177(II) of 21 November 1947. These Principles were finalized by the ILC in 1950: *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal*, adopted at Geneva, 29 July 1950, 5 UN GAOR Supp. (No. 12), at 11, UN Doc. A/1316 (1950).

²⁹ Adopted on first reading by the International Law Commission at its 43rd. Session, UN Doc. A/CN.4/448 of March 1993. After several governments had submitted comments and observations on the first complete version, the final text was whittled down to 20 draft articles, and adopted as a final text by the ILC in 1996 “with the understanding that, in order to reach consensus, the Commission had considerably reduced the scope of the Code. It is understood that the inclusion of certain crimes in the Code does not affect the status of other crimes under international law, and that the adoption of the Code does not in any way preclude the further development of this important area of law”: United Nations, *Analytical Guide to the Work of the International Law Commission, 1949-1997* (New York: United Nations, 1998) at 151-152, discussing the *Report of the ILC on the work of its 48th. Session, 6 May to 26 July 1996*, ILC Report, A/51/10, 1996, Ch.II, paras. 30-50. The Code has never been adopted by the General Assembly. Cf. McCormack & Simpson, *supra*, at 251.

³⁰ *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted 9 December 1948, 78 U.N.T.S. 277, 28 I.L.M. 763 (entered into force 12 January 1951).

³¹ GA Res 260 B (II) of 9 December 1948.

³² GA Res 489 (V) of 12 December 1950.

³³ M. Cherif Bassiouni, “Remarks on the Draft Code of Offenses Against the Peace and Security of Mankind,” *American Society of International Law, Proceedings of the 80th Annual Meeting*, *supra*, at 120.

In addition, the Cold War stifled any real attempts to establish a permanent international criminal tribunal, particularly with the definition of a “crime of aggression” unresolved.

In 1989, the idea of an international criminal tribunal was put back on the agenda by President Robinson of Trinidad & Tobago, who requested the General Assembly to look into creating such a tribunal to deal with illicit drug trafficking and other transnational crimes affecting the Caribbean region. His request was not met directly, but in 1992, the United Nations requested the ILC to re-commence work on a draft statute for an international criminal court, within the framework of the *Draft Code of Crimes*.³⁴ The ILC presented its *Draft Statute for an International Criminal Court* to the 49th. session of the United Nations General Assembly in 1994, and recommended that a diplomatic conference be called to finalise the statute as soon as possible.³⁵ However, many States were reluctant to see the Court come into being so rapidly, so the General Assembly established an *ad hoc* Committee to look into the matter.³⁶

In the meantime, the Security Council set up the Yugoslavian and the Rwandan *ad hoc* International War Crimes Tribunals in 1993 and 1994, respectively.³⁷ The jurisdiction of these tribunals was determined in a manner reminiscent of the Nuremberg and Tokyo experiences, with Special Rapporteurs for the Commission on Human Rights collecting evidence of “mass and flagrant human rights violations and ... breaches of humanitarian law” while the conflict was continuing.³⁸ Then the Security Council, whose Permanent Members were largely responsible for the Nuremberg and Tokyo tribunals, adopted resolutions

³⁴ GA Res 47/33 of 25 November 1992. In the same year, Professor Bassiouni also produced his own *Draft Statute for an International Criminal Tribunal*, which covers a broad range of crimes including drug trafficking and war crimes: published with commentary by Association Internationale de Droit Pénal, v.9, Nouvelles Études Pénales, (Pau Cedex, France : éditions érès, 1997).

³⁵ Report of the International Law Commission on the work of its 46th. session, Official Records of the General Assembly, 49th Session, Supp. 10, A/49/10, 1 September 1994.

³⁶ GA Res 49/53 of 9 December 1994.

³⁷ The International Criminal Tribunals for the Former Yugoslavia and for Rwanda [hereinafter “ICTY/R”] were both established by the Security Council acting under Chapter VII of the UN Charter. Cf. S/Res/808 of 22 February 1993 (in relation to the tribunal for the Former Yugoslavia) and S/Res/935 of 1 July 1994 (in relation to the tribunal for Rwanda).

³⁸ See *Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission Resolution 1992/S-1/1 of 14 August 1992*, E/CN.4/1992/S-1/9, 28 August 1992, para.69. See also: *Report of Mr. Bacre Waly Ndiaye on his mission to Rwanda from 8-17 April 1993*, E/CN.4/1994/7/add.1 of 11 August 1993.

declaring their intention to create tribunals to prosecute all those responsible for “serious violations of international humanitarian law” in both territories.³⁹

The successful establishment of the *ad hoc* tribunals helped to spur on the efforts that were being made at the *ad hoc* Committee, followed by the more rigorous work of the Preparatory Committee on the Establishment of an International Criminal Court.⁴⁰ By December 1997, there was enough support in the General Assembly for the idea of an international criminal court, that the Assembly finally decided to convene a Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, to be held in Rome, Italy, in 1998.⁴¹

As Professor Bassiouni recalls, the Draft Statute under consideration at the Rome Conference initially

consisted of 116 articles which were contained in 173 pages of text with some 1,300 words in brackets, representing multiple options to entire provisions or only to some words contained in certain provisions. ... To follow such a text was not easy even for those who participated in the three and a half years work of the *ad hoc* Committee and the PrepCom, and more so for those delegates who saw it for the first time just before coming to Rome, or who perhaps saw it for the first time in Rome.⁴²

Nonetheless, the delegates attending the Rome Conference were ultimately able to finalise the *Rome Statute of the International Criminal Court*.⁴³ In spite of

³⁹ S/Res/808 of 22 February 1993 (in relation to crimes committed in Yugoslavia) and S/Res/935 of 1 July 1994 (in relation to crimes committed in Rwanda).

⁴⁰ The *ad hoc* Committee met over two sessions in April and August, 1995: see *Report of the ad hoc Committee on the Establishment of an International Criminal Court*, United Nations General Assembly Official Records, Fiftieth Session, Supplement No. 22, A/50/22 (1995). The Preparatory Committee had six meetings between March 1996 and April 1998, culminating in the production of a Draft Statute, draft final act, and draft rules of procedure: see *Report of the Preparatory Committee on the Establishment of an International Criminal Court submitted to the Rome Conference*, A/CONF.183/2 (14 April 1998).

⁴¹ GA Res. 160/52, 15 December 1997. The Rome Diplomatic Conference was held between 15 June and 17 July 1998, and was attended by 160 States, 17 international organizations, 14 UN specialised agencies, and 124 NGO's participating as observers: U. Leanza, “The Rome Conference on the Establishment of International Criminal Court: A Fundamental Step in the Strengthening of International Criminal Law,” in F. Lattanzi and W.A. Schabas, eds., *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, (Italy: il Sirente, 1999) 7 at 10.

⁴² M. Cherif Bassiouni, “Historical Survey: 1919-1998,” in Bassiouni, *The Statute of the International Court: A Documentary History*, supra, at 32.

⁴³ The negotiations at the Rome Conference have been discussed in numerous publications: see especially R.S. Lee, “Introduction: The Rome Conference and Its Contributions to International Law,” in R.S. Lee, ed., supra, at 1.

many last-minute doubts, for the first time ever, more than one hundred States from all the major geographical regions and legal traditions of the world were able to negotiate an agreed structure, jurisdiction, procedures, and other important features for such a tribunal.

KEY FEATURES OF THE ICC

The jurisdiction of the ICC will be “complementary” to national jurisdictions, unlike most of its predecessors.⁴⁴ This means that State authorities will retain primary responsibility for investigating and prosecuting the crimes within the jurisdiction of the ICC.⁴⁵ The ICC will merely be a court of “last resort,” where no other court in the world is willing and able to prosecute a particular ICC crime. In an ideal world, the ICC will never have to prosecute or investigate anything, because competent national authorities will be taking responsibility for enforcing all international criminal laws.⁴⁶

Therefore, the ICC has been designed to defer to domestic investigations and prosecutions of ICC crimes, in all but the most exceptional circumstances. The first exceptional circumstance is where a State Party is “unable” to prosecute a person for a crime within the jurisdiction of the ICC. Under article 17(3) of the Rome Statute, “inability” to prosecute refers to situations where there has been a “total or substantial collapse or unavailability of ... [a State’s] national judicial system.”

The more complex exception is where a State Party is perceived to be “unwilling” to prosecute a person for a crime within the jurisdiction of the ICC. History has shown that some States prefer to allow perpetrators of atrocities to avoid any kind of responsibility for their actions. Therefore, in order to prevent one of these perpetrators from escaping justice, due to the assistance of a “rogue

⁴⁴ Article 1, Rome Statute. As mentioned previously, the jurisdiction of the Nuremberg Tribunal was based on the unconditional surrender of the German authorities, while the validity of the jurisdiction of the Tokyo Tribunal has often been questioned because the Japanese did not surrender their domestic authority. The ICTY/R Statutes specifically address this question, providing that the international tribunals will have primacy over all national courts, even though article 9 of the Statute for the ICTY and article 8 of the Statute for the ICTR both provide for “concurrent” jurisdiction between these tribunals and national courts.

⁴⁵ See preambular para. 6, Rome Statute. The existing obligations of States to investigate and prosecute these crimes arise from various treaties, such as the 4 Geneva Conventions and the Genocide Convention.

⁴⁶ Most States that have signed or ratified the Rome Statute are currently preparing legislation to empower their national authorities in this regard, if they have not already done so. For example, Canada recently introduced the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, which allows Canadian courts to prosecute a far wider range of international crimes than ever before.

State,” the ICC has the power to override national authorities at a certain point. This point is only reached after a lengthy series of procedures has been followed, as outlined in various parts of the Statute. In particular, Article 17(2) sets out the factors the Court will consider when determining the “unwillingness” of a State to prosecute. These factors are based on the following principles: (i) that genuine prosecutions and investigations should be respected by the ICC and the rest of the international community, in accordance with the principles of State sovereignty; and (ii) that sham proceedings and unjustified delays should not be allowed to shield a person from responsibility for committing horrendous atrocities, as happened in the case of Pol Pot and others in the past. Therefore, article 17(2) provides the ICC with very limited grounds for determining that a State is “unwilling” to prosecute or investigate a particular perpetrator, which all concern shielding the perpetrator from criminal responsibility in some way.

The jurisdiction of the ICC can be triggered in any 1 of 3 ways: (i) upon the referral by the Security Council of a “situation,” in the same way that the Council has used its Chapter VII powers previously to establish *ad hoc* tribunals as and where it was considered necessary to maintain international peace and security;⁴⁷ (ii) where a State Party refers to the Court a crime allegedly perpetrated by a national of a State Party, or committed on the territory of a State Party;⁴⁸ or (iii) the ICC Prosecutor may also initiate an investigation of a crime committed by a State Party national or on State Party territory, even without a State Party referral.⁴⁹ However, the Court will only have jurisdiction over crimes committed after the entry into force of the Rome Statute, so that world leaders and their military authorities have time to educate and re-train personnel, if necessary.⁵⁰

⁴⁷ The Court may also decide not to prosecute anyone in relation to the “situation” referred by the Security Council, in accordance with the relevant provisions of the Statute on admissibility (articles 17-20), general principles of criminal law (articles 22-33), and initiation of investigations and prosecutions (especially article 53). The Security Council will still have the power to establish its own tribunals when the ICC comes into being, and those tribunals created to prosecute crimes committed prior to the Court’s creation will continue their work (such as those being considered in East Timor, Sierra Leone, and Cambodia). But once the Rome Statute enters into force, the Court is intended to reduce almost entirely the need for any future *ad hoc* tribunals.

⁴⁸ Articles 13(a) and 14, Rome Statute. Note that States Parties may only refer “situations” for investigation, not individuals or specific acts. Under article 12(3), non-States Parties may also choose to accept the jurisdiction of the Court over particular crimes involving their nationals or committed on their territory.

⁴⁹ Articles 13(c) and 15, Rome Statute. Note that the Security Council may request the Court to defer a particular investigation or prosecution for a period of twelve months (article 16).

⁵⁰ Articles 11 and 24, Rome Statute. However, note para. 2 of article 11, which provides that if a State becomes a Party to the Statute after the Statute enters into force, “the Court may exercise its jurisdiction only with respect to crimes committed after entry into force of this Statute for that State,” unless that State makes a declaration to the contrary under article 12(3). Also note

continued

The Court will be comprised of several Chambers, to deal with the various stages of trials: pre-trial hearings, trial hearings, and appeals.⁵¹ All Judges and Prosecutors will be nominated by States Parties, and must meet high standards for selection.⁵² An Assembly of States Parties will select the Judges and Prosecutors, and will generally oversee the operations of the Court.⁵³ Since the ICC is a treaty-based institution, and not an organ of the UN, it will have a unique relationship with the UN system, which will be detailed in a special agreement currently under negotiation.⁵⁴ The Court will be based at The Hague, although it also has the authority to sit in other locations.⁵⁵

The Rome Statute upholds the highest standards of international justice, including the right of the accused to a fair trial (article 63) and the right of victims to participate in proceedings (article 68).⁵⁶ In addition to empowering the ICC to imprison convicted persons, the Statute also provides for the imposition of fines, forfeiture orders, and reparations orders for victims.⁵⁷ It also clarifies some areas of international criminal law that have previously appeared to limit the jurisdiction of national authorities. The official capacity of an individual, as well as sovereign and other immunities, will be irrelevant to the Court in determining whether it may exercise jurisdiction over a particular individual.⁵⁸ The Rome Statute also provides expressly for the criminal responsibility of commanders for crimes committed by persons under their effective authority or control.⁵⁹

article 124, which specifically allows States Parties to make a declaration of non-acceptance of the jurisdiction of the Court over war crimes listed in article 8 – where committed by their nationals or on their territory – for a period of seven years after entry into force of the Statute.

⁵¹ Article 34, Rome Statute.

⁵² See article 36, Rome Statute.

⁵³ Article 112, Rome Statute.

⁵⁴ The Prepcom is currently finalising a relationship agreement between the Court and the UN, in accordance with Resolution F, Final Act, *supra*.

⁵⁵ Articles 3 & 62, Rome Statute.

⁵⁶ These high standards are also emphasised and reflected throughout the *Finalized Draft text of the Rules of Procedure and Evidence* for the Court, UN Doc. PCNICC/2000/1/Add.1, 2 November 2000 [hereinafter “Rules”], which was adopted by consensus in June 2000, by States participating in the Prepcom, in accordance with Resolution F, Final Act (*supra*). These Rules will enter into force upon adoption by a two-thirds majority of the members of the Court’s Assembly of States Parties, and are subservient to the Rome Statute in all cases (article 51). Cf. C.K. Hall, “The First Five Sessions of the UN Preparatory Commission for the International Criminal Court,” (2000) 94 Am. J. Int’l L. 773.

⁵⁷ Articles 75 & 77, Rome Statute.

⁵⁸ Article 27, Rome Statute.

⁵⁹ Article 28, Rome Statute. However, note the distinction in this article between military commanders and other “superiors,” when determining the responsibility of a particular individual.

Those involved in finalising the Rome Statute were fortunate to have the benefit of the experience of several other international tribunals. They have tried to foresee every eventuality, and to provide appropriate mechanisms to deal with all the day-to-day issues that will need to be addressed. The *Rules of Procedure and Evidence* for the Court, *supra*, provide further guidance on the details of various procedures and principles. However, in the event that the Statute is found wanting, there is also a mechanism for amendments, involving a Review Conference to be held 7 years after entry into force of the Statute.⁶⁰

CONCLUSION

There is still more work to be done before the Court can begin its crucial work. Since 1999, a Preparatory Commission (“Prepcom”) for the ICC has been meeting regularly at the UN in New York, to negotiate the final details of the Court’s operations, such as the financial rules and regulations, and the first year budget.⁶¹ In addition, the Court will require the co-operation of States Parties, if it is to obtain custody of accused persons and to have access to all the evidence it requires. Every State that accepts the jurisdiction of the ICC is obliged to assist the Court with its investigations and prosecutions.⁶² Thus, there is currently an extraordinary amount of activity taking place all across the world, as States from every region try to ensure that they will be in a position to assist the Court with its important work once it comes into being. Most States will need to have implementing legislation in place that enables them to respond to requests from the ICC, and this is proving to be quite a complex undertaking.⁶³

⁶⁰ Articles 121 & 123, Rome Statute.

⁶¹ In accordance with Resolution F, Final Act (*supra*), the Prepcom has been meeting regularly since March 1999, to finalise the details of the Court’s operations, such as the Elements of Crimes, and all the practical arrangements. At the Prepcom meeting in February/March 2001, a number of working groups were negotiating the following issues: the crime of aggression, the relationship between the Court and the UN, the privileges and immunities of persons not provided for under the Rome Statute, the Court’s financial rules and regulations, and the rules of procedure of the Assembly of States Parties. The Prepcom has a further meeting scheduled for September/October 2001, and may also continue to meet in 2002, if required. Details of all the meetings and materials of the Prepcom are available online via <<http://www.un.org/law/icc/>>. The details of how the Court will be financed have yet to be completely finalised. Articles 114-115 & 117 set out the basic principles on financing of the Court, which includes assessed contributions by States Parties. The Prepcom will be looking at this issue in more detail, but it seems likely that all States Parties will be required to make a financial contribution to the costs of the Court. Cf. C. Romano & T. Ingadottir, *The Financing of the International Criminal Court – A Discussion Paper*, produced by the Project on International Courts and Tribunals, available online via <<http://www.pict-pcti.org/>>

⁶² See especially Parts 9 & 10, Rome Statute.

⁶³ For example, see the *Manual on the Ratification and Implementation of the Rome Statute*, *supra*.

Given the long and frustrating history behind the creation of this Court, since attempts to create a permanent international criminal tribunal began in the early years of the 20th century, it is tempting to believe that the Court will provide the solution to many of the world's problems. However, realistically, domestic criminal laws have yet to eradicate domestic crime, therefore it is unrealistic to believe that the ICC will prevent the commission of all future international crimes. The causes of such crimes must also be addressed adequately. At the same time, hopefully it will now no longer be possible to avoid criminal responsibility for the "most serious crimes of concern to the international community as a whole." This must surely have some form of deterrent effect upon those contemplating acts of mass violence.

**CIVIL SOCIETY, NGOs,
AND THE INTERNATIONAL
CRIMINAL COURT**

INTERNATIONAL ADVOCACY NETWORKS AND THE INTERNATIONAL CRIMINAL COURT

VINCENT M. DEL BUONO*

This afternoon I have been asked to look at the specific role that transnational activist networks and one in particular, Amnesty International, played in the creation of the Court. I will do so and then speculate on the role that such activists networks might play when the Court begins operating.

One of the most important phenomena of the last 50 years has been the exponential growth of international networks of citizen activists. World Wildlife Fund¹ with its 4.7 million members and supporters, Amnesty International² and Greenpeace³ are the largest of these citizen-based networks but there are tens of thousands of smaller ones as well. In addition to these organizations whose primary purpose has been advocacy, several large international non-governmental organizations such as Oxfam International,⁴ Save the Children,⁵ and Action Aid⁶ whose initial focus was service delivery and development have increasingly taken on an important advocacy role.

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¹ <http://www.panda.org/>

² <http://www.amnesty.org/>

³ <http://www.greenpeace.org/>

⁴ <http://www.oxfam.org/>

⁵ <http://www.savethechildren.org>

⁶ <http://www.actionaid.org/>

THE EMERGENCE OF TRANSNATIONAL POLITICS

In tandem with the globalization of the economy and politics, there has also been a “globalization” of civil society and a spectacular growth of transnational advocacy networks founded upon shared principled ideas or values. Globalization has resulted in the exponential growth of multiple channels of contact among societies one result of which has been a blurring of domestic and international politics.⁷ A casualty of this blurring has been the concept of national sovereignty – one of the key tenets of the international order of the last 500 years. The shared set of understandings, expectations and practices about state authority which underpinned the concept of “national sovereignty” have been and continue to be attenuated by that amalgam of impulses and forces which collectively are characterized as globalization. The expansion of human rights law and policy in the period following World War II is one example of a conscious, collective attempt to modify this set of shared norms and practices.

TRANSNATIONAL ADVOCACY NETWORKS

Transnational advocacy networks have been and continue to be key in the development of new ways of thinking and new institutions. They invariably consist of a series of actors working internationally on an issue bound together by shared values, a common discourse, and dense exchanges of information and services.⁸ Such networks often include international and domestic non-governmental research and advocacy organizations, local social movements, foundations, media, churches, trade unions, consumer organizations, intellectuals, parts of regional and international intergovernmental organizations and executive and/or parliamentary branches of governments.⁹

Activist networks are usually driven by values rather than by material concerns or professional norms.¹⁰ They are organized to promote causes, principled ideas, and norms and they often involve individuals advocating policy changes that cannot be easily linked to a rationalist understanding of interests. Activists in networks try not only to influence policy outcomes but also to transform the nature of the debate itself.¹¹ They often reach beyond policy change to advocate and

⁷ The discussion of transnational advocacy networks which follows is taken from Margaret E. Keck and Kathryn Sikkink's *Activists Beyond Borders, Advocacy Networks in International Politics*, 1998, Cornell University Press.

⁸ Keck and Sikkink, p. 2.

⁹ *Ibid*, p. 9.

¹⁰ *Ibid*, p. 2.

¹¹ *Id.*

instigate changes in the institutional and principled basis of international interaction. They themselves are political spaces in which differently situated actors negotiate – formally or informally – the social, cultural, and political meanings of their joint enterprise.¹²

As political entrepreneurs, they mobilize resources like information and membership and show a sophisticated awareness of the political opportunity structure within which they operate.¹³ Issues that have a strong right and wrong context are most amenable to advocacy networking because they arouse strong feelings, allow networks to recruit volunteers and activists, and to provide meaning for these volunteer activities.

What has been novel about the new transnational advocacy networks has been their ability to mobilize information strategically to create new issues and categories and to persuade, pressure, and gain leverage over much more powerful organizations and governments. They usually operate in issues areas characterized by high value content and informational uncertainty. And at their core, is information exchange.¹⁴ Groups in networks create categories or frames within which to generate and organize information on which to base campaigns. Their ability to generate information quickly and accurately and to deploy it effectively is their most valuable currency; it is also central to their identity.

Problems whose causes can be assigned to the deliberate (intentional) actions of identifiable individuals are amenable to advocacy network strategies in ways that problems whose causes are irredeemably structural are not. The real creativity of advocacy networks has been in finding intentionalist frames within which to address some elements of structural problems.¹⁵ Issues involving physical harm to vulnerable or innocent individuals appear particularly compelling. Torture and disappearances have been more tractable than some other human rights issues, and protesting torture of political prisoners has been more effective than protesting torture of common criminals or capital punishment.¹⁶

Human rights organizations such as Amnesty International have developed a methodology which promotes change by reporting facts. To be credible, the information produced must be reliable and well documented. To gain attention, it must be timely and dramatic.¹⁷ Information is repackaged and interpreted in a

¹² *Ibid.*, p. 3.

¹³ *Ibid.*, p.31

¹⁴ *Ibid.*, p.2

¹⁵ *Ibid.*, p.27

¹⁶ *Ibid.*, p.27

¹⁷ *Ibid.*, p.19

dramatic way designed to promote action.¹⁸ Without individual cases, activists cannot motivate people to seek changed politics. An effective frame must show that a given state of affairs is neither natural nor accidental, identify the responsible party or parties and propose credible solutions.¹⁹ Aims require clear, powerful messages that appeal to shared principles which often have more impact on state policy than advice of technical experts.

Strategies aim to use information and beliefs to motivate political action and to use leverage to gain the support of more powerful institutions. Influence is possible because the actors in these networks are simultaneously helping to define the issue area, convince target audiences that the problems thus defined are soluble, prescribe solutions and monitor their implementation.²⁰

Transnational networks normally involve a small number of activists from the organizations and institutions involved in a given campaign or advocacy role. They operate best when they are dense, with many actors, strong connections among groups in the network, and reliable information flows.²¹ Non-state actors gain influence by serving as alternative sources of information.²² They use the power of their information, ideas and strategies to alter the information and value contexts within which states make policies. Persuasion often involves not just reasoning with opponents, but also bringing pressure, arm-twisting, encouraging sanctions, and shaming.²³

Networks need to pressure and persuade more powerful actors.²⁴ Networks influence discursive positions when they help persuade states and international organizations to support international declarations or to change stated domestic positions. They promote norm implementation by pressuring target actors to adopt new policies, and by monitoring compliance with international standards. Target actors must be vulnerable either to material incentives or to sanctions from outside actors, or they must be sensitive to pressure because of gaps between stated commitments and practice. Vulnerability arises both from the availability of leverage and the target's sensitivity to leverage. If either is missing, a campaign

¹⁸ *Ibid.*, p. 21.

¹⁹ *Ibid.*, p. 19.

²⁰ *Ibid.*, p. 30.

²¹ *Ibid.*, p. 28.

²² *Ibid.*, p. 19.

²³ *Ibid.*, p. 16.

²⁴ *Ibid.*, p. 23.

may fail. Countries that are most susceptible to network pressures are those that aspire to a normative community of nations.²⁵

By leveraging more powerful institutions, weak groups gain influence far beyond their ability to influence state practice directly. The identification of material or moral leverage is a crucial strategic step in network campaigns.²⁶ Although NGO influence often depends on securing powerful allies, their credibility still depends in part on their ability to mobilize their own members and affect public opinion via the media.²⁷

ADVOCACY NETWORKS, AMNESTY INTERNATIONAL, AND THE CREATION OF THE INTERNATIONAL CRIMINAL COURT

Transnational advocacy networks were crucial in the “road to Rome” which resulted in the Rome Statute of the International Criminal Court on July 17, 1998.²⁸ Without them and their constant pressure it is unlikely that the statute would have ever been adopted or at least been negotiated and adopted in such a short time.

The process of the creation of the International Criminal Court was an impressive demonstration of how a transnational advocacy network that had come together to achieve a specific goal, the creation of the Court, succeeded far more dramatically and quickly than anyone had expected.²⁹ The complete story of the role that non-governmental organizations played in the creation of the Court is being told by many.³⁰ Two who are doing so are my fellow presenters today, William R. Pace, Coordinator of the NGO coalition for an International Criminal Court and Secretary General of the World Federalist Movement,³¹ and Bruce Broomhall, Senior Coordinator with the Lawyers Committee for Human Rights.³²

²⁵ *Ibid.*, p. 29.

²⁶ *Ibid.*, p. 23.

²⁷ *Id.*

²⁸ For a compilation of Resources in Print and Electronic Format on the International Criminal Court in English see: Lyonette Louis-Jacques’ at <http://www.lib.uchicago.edu/~llou/icc.html>

²⁹ For a rather peevisish account of the influence of NGOs on the development of the Court see *Non-Governmental Organizations: The Pressure From Below* by William F. Jasper, http://www.thenewamerican.com/tna/1998/vo14no18/vo14no18_ngo.htm

³⁰ See Fanny Benedetti. and John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference*, (1999) 5 *Global Governance*, 1

³¹ <http://www.worldfederalist.org/>

³² <http://www.lchr.org/home.htm>

Many NGOs played an important role on the “road to Rome” working within a coalition of NGOs³³ established on February 25, 1995.³⁴ The Coalition brings together a broad-based network of over 1,000 NGOs, international law experts and other civil society groups. Its multi-track approach – promoting education and awareness of the ICC and the Rome Statute at the national, regional and global level; supporting the successful completion of the mandate of the Preparatory Commission and facilitating NGO involvement in the process; promoting the universal acceptance and ratification of the Rome Statute, including the adoption of comprehensive national implementing legislation following ratification; and expanding and strengthening the Coalition’s global network – has been enormously successful.

This Centre did its part by organizing an important conference³⁵ in Vancouver in March of 1993 at which many of the key actors involved in the discussing competing draft texts for the creation of a war crimes tribunal for the former Yugoslavia were able to meet and resolved key differences. The Centre, under Dan Prefontaine’s³⁶ leadership, also contributed its own position paper in 1996 on the creation of the Court,³⁷ participated actively in the process³⁸ and is

³³ <http://www.igc.org/icc/>

³⁴ William R. Pace and Mark Thieroff, “Participation of Non-Governmental Organizations” in “The International Criminal Court: The Making of the Rome Statute” edited by Roy S. Lee, Kluwer Law International 1999, Chapter 13, pp 391-399 at p. 391: “On February 25, 1995, a small group of NGOs monitoring the United Nations General Assembly debate on the International Law Commission’s Draft Statute for an international criminal court met in New York and formed the NGO Coalition for an International Criminal Court (CICC, or “the Coalition”). The main purpose of the Coalition was to advocate the establishment of an effective and just international criminal court. The Coalition established an informal steering committee comprised largely of groups involved in these earliest stages of co-operation, including Amnesty International, Federation Internationale des Ligues des Droits de l’Homme, Human Rights Watch, the international Commission of Jurists, the Lawyers Committee for Human Rights, No peace without Justice, Parliamentarians for Global Action and the World Federalist Movement.” The Coalition has maintained a website: <http://www.igc.org/icc/> and publishes *The International Criminal Court Monitor Online*, <http://www.igc.org/icc/html/monitor.htm> as its electronic journal featuring articles and perspectives worldwide.

³⁵ <http://137.82.153.100/Reports/TRIBUNAL.rtf>. A number of those who attended that conference were to play leading roles in the formulation of the Rome statute. Among these was Hans Corell who was appointed UN Legal Advisor later in 1993; Cherif Bassiouni who was to chair the drafting committee at the Rome Conference, Christopher Hall who became Amnesty International’s expert on the ICC, Philippe Kirsch who was the chair of the Plenary at the Rome Conference although he did not attend was instrumental in the preparations of the March 1993 meeting. Mr. Justice Karibi-Whyte of Nigeria was elected as a judge of the International Criminal Tribunal in 1993.

³⁶ Director and Chief Executive Officer of the Centre from 1994 to 2001.

³⁷ <http://137.82.153.100/Reports/propoicc.rtf>

³⁸ See Annual reports at <http://www.icclr.law.ubc.ca/html/publications.htm>

now involved in a major project to provide assistance to those countries desirous of ratifying and implementing the International Criminal Court Treaty.³⁹

One of the other NGOs which has played and continues to play a part in the NGO coalition is Amnesty International, the largest human rights organization in the world. Amnesty International participated from the beginning in the establishment of the court. It was the only NGO at the March 1993 Vancouver conference and was one of the founding members of the NGO coalition in February 1995. After the United Nations General Assembly decided on December 11, 1995 to set up a Preparatory Committee on the Establishment of an International Criminal Court, it participated in all of the sessions of that Preparatory Committee. One of the hallmarks of the sessions of the Preparatory Committee was the generally excellent working relationship between non-governmental organizations and government delegations.⁴⁰

From the first session of the Preparatory Committee, NGOs supplied delegations with extensive commentary⁴¹ on the International Law Commission's Draft Statute which had been reported out to the Sixth Committee and then General Assembly in 1994.⁴² Amnesty International⁴³ as well as other NGOs presented

³⁹ <http://www.icclr.law.ubc.ca/html/icc.htm>

⁴⁰ C.K. Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, (1997) 91 *The American Journal of International Law*, 177 at 183: "Almost all plenary meetings, as well as the informal working group on general principles of criminal law were open." Also Benedetti and Washburn at p. 25 "Governments and the team from the [UN] Office of Legal Affairs came to accept NGOs as indispensable consultants and worthwhile advocates. The CICC and its members attained full legitimacy and great, sometimes determinative, influence as brokers of solutions to impasses, as experts and even as confidants. As the coalition's leaders had planned from the beginning, a powerful and vivid precedent had been set for the role and presence of NGOs at future meeting convened by the General Assembly.

NGOs in turn had learned to accept a great deal in the institutional culture and style of international treaty conferences, which many of them had been previously inclined to ignore. This included matters of procedure, timing, access to documents, decorum and even dress. Without yielding their often justified suspicion of governments, NGOs came to accept that national positions, however obstructive, frequently have specific genuine causes, better addressed by dialogue than by simple condemnation."

⁴¹ See C.K. Hall, *ibid* where in footnote 20 he cites some of the papers produced for the first session.

⁴² Report of the International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. No. 10. at 44, UN Doc. A/49/10 (1994).

⁴³ The Amnesty International position papers all under the general title of THE INTERNATIONAL CRIMINAL COURT: Making the right choices are: Part I, Defining the crimes and permissible defences and initiating a prosecution, AI Index: IOR40/01/97; Part II, Organizing the court and guaranteeing a fair trial, AI Index: IOR 40/11/97; <http://www.web.amnesty.org/ai.nsf/index/IO40011997>; Part III, Ensuring effective state co-operation, AI Index IOR 40/13/97; Part IV, Establishing and financing the court and final clauses, AI Index IOR 40/04/98; Part V, Recommendations to the diplomatic conference, AI Index IOR 40/10/98. Also *Ensuring justice for Women*, AI-index: IOR 40/006/1998,

further position papers,⁴⁴ in some cases quite extensive, to each of the subsequent sessions of the Preparatory Committee.

Amnesty International was a leading member of the NGO Coalition at the 1998 Rome conference. Benedetti and Washburn stated that the NGO Coalition was well prepared and organized for the June 1998 diplomatic conference of plenipotentiaries which the General Assembly had approved on December 16, 1996.⁴⁵ For the conference, the Coalition designed a new organization of work setting up 13 teams covering each part of the statute. On July 4, Amnesty International organized a major street event during the conference – “All Fall Down” (Tutti Giù Per Terra) – with the aim of reminding government representatives gathered in Rome of their duty to establish an independent, effective and just court. “All Fall Down” attracted thousands of people from all over Italy and elsewhere who gather on Via Fori Imperiali in Rome and laid down on the ground in order to represent victims of human rights violations all over the world.⁴⁶

Throughout the conference,

[t]he NGO Coalition served as a formidable, disciplined, and omni-present ally for the bureau, the Like-Minded Group [of States] and the Secretariat. Its actions set a new standard and precedent for NGO effectiveness, both at further conferences and almost certainly in the General Assembly and elsewhere in the UN. Because the coalition’s solidarity accommodated a considerable range of specific positions within a general commitment to the international criminal court, this kind of NGO mobilization may recur more readily than any other feature of the CICC. In particular, NGOs demonstrated that they could deal expertly and responsibly with the sorts of questions in the domain of peace and security that the international criminal court will affect and confront.⁴⁷

http://library.amnesty.it/aidoc_everything.nsf/Index/IOR400061998, 16 *fundamental principles for a just, fair and effective international criminal court*, AI-index: IOR 40/012/1998, <http://www.web.amnesty.org/ai.nsf/index/IOR400121998>

⁴⁴ For a list of some of the other NGO position papers prepared for the sessions of the Preparatory Committee, see C.K. Hall, (1998) 92 *The American Journal of International Law*, 125, ft. 7; and 339, ft. 47.

⁴⁵ Benedetti and Washburn, 32

⁴⁶ See <http://www.amnesty.it/news/1998/33jul98.htm>, also <http://www.amnesty.it/campaign/icc/en/>

⁴⁷ *Ibid.*, 33

continued

FOLLOWING THE ROME CONFERENCE

Following the Rome conference,⁴⁸ Amnesty International set up its International Justice Project to take forward its long-term and continuing strategy against impunity. The Project's multiple aims and objectives were outlined in some detail in the July 1999 paper, Membership Action Circular: Strategy Paper for Campaigning on the International Criminal Court.⁴⁹ The number and breadth of the objectives demonstrates the sophistication and resources which civil society can bring to bear on these issues – far more resources than many foreign and justice ministries, especially those in small states, can dedicate to them. A Ratification Kit prepared by the Project was issued in August 2000 in English

⁴⁸ THE INTERNATIONAL CRIMINAL COURT: *Fundamental principles concerning the elements of genocide*, February 1999 AI Index: IOR 40/01/99, <http://www.igc.org/icc/html/aielements.html>, *Procedural Issues at the third session of the Preparatory Commission*, IOR 40/004/1999, 01/12/1999, <http://www.web.amnesty.org/ai.nsf/index/IO400041999>, Fact sheet 5, Prosecuting war crimes, AI-index: IOR 40/006/2000, 01/08/2000, <http://web.amnesty.org/ai.nsf/print/IO400062000>, Fact sheet 7, Ensuring justice for women, AI-index: IOR 40/008 /2000, <http://web.amnesty.org/ai.nsf/Index/IO400082000>

⁴⁹ AI Index: IOR 40/13/99 With regard to the International Criminal Court, the aims are to:

Phase 1: Press for all governments to sign and ratify the Rome Statute as soon as possible to ensure entry into force at the earliest date without opt-out declarations under Article 124 or special agreements pursuant to Article 98 not to surrender nationals of non-states parties.

Phase 2: Press for all states which ratify the Rome Statute to adopt effective implementing legislation. A *Checklist for Effective Implementation*, July 2000, has been prepared by the Project.

Phase 3: Ensure that the Preparatory Commission for the International Criminal Court and the Assembly of States Parties do not undermine or weaken the Rome Statute.

Phase 4: Pressing states to provide the ICC with all the resources it needs.

Phase 5: Pressing states to ensure the nomination and selection of qualified persons as judges, prosecutor and staff.

Phase 6: Pressing the Prosecutor, Registrar and Chambers to implement the Rome Statute consistently with its object and purpose.

Phase 7: Proposing any necessary amendments to the Rome Statute at the first Review Conference.

Phase 8: Pressing states to cooperate fully and promptly with the ICC and the Assembly of States Parties to take effective action when they do not.

As to the Yugoslavia and Rwanda Tribunals, the aims and objectives are:

Phase 1: Continuing to press states to enact effective cooperation legislation concerning the Yugoslavia and Rwanda Tribunals.

Phase 2: Pressing the Yugoslavia and Rwanda Tribunals to interpret their Statutes and Rules of Evidence and Procedure in a manner consistent with other international standards.

continued

(to be issued later in Arabic, French, Portuguese and Spanish) to enable activists to lobby their own and other governments.⁵⁰

THE POSSIBLE ROLE OF NGOS UNDER THE ROME STATUTE

The Rome Statute makes explicit reference to non-governmental organizations in only two articles, 15 (2) and 44 (2) of the Statute. Also, Articles 73, 75, 79, and 116 would allow them to play a role in the operations of the Court.

Article 15 deals with the Prosecutor. Paragraph 1 provides that the Prosecutor “may initiate investigations proprio moto” on the basis of information on crimes

With regard to expanding the scope of universal jurisdiction, the objectives are:

Phase 1: Urging all states to enact or amend legislation providing for universal jurisdiction over crimes under international law.

Phase 2: Establishing a database and website on universal jurisdiction in cooperation with Dutch section, Dutch universities and other NGOs.

Phase 3: Urging states which do exercise universal jurisdiction to do so in a manner which is consistent with international law and standards.

With regard to extradition and mutual legal assistance, the objectives are:

Phase 1: Identifying flaws in existing system of extradition and mutual legal assistance regime with respect to crimes under international law.

Phase 2: Recommending adoption of new or amended treaties and national legislation.

Phase 3: Calling upon states to ensure that they fulfil their obligations prosecute or extradite suspects, where warranted, and to cooperate with other states investigating or prosecuting suspects.

With regard to victim reparations, the objectives are:

Phase 1: Ensuring the incorporation of effective provisions in the proposed Hague Convention on International Jurisdiction and the Effects of Judgments in Civil and Commercial Matters.

Phase 2: Calling upon states to incorporate effective procedures for implementing the Rome Statute provisions concerning reparations in ICC implementing legislation and to incorporate such procedures for cases originating in national courts.

Phase 3: Identifying strengths and weaknesses in national legislation concerning reparations to victims.

Phase 4: Recommending changes in national legislation concerning reparations.

Phase 5: Recommending to the ICC the adoption of effective principles on reparations.

⁵⁰ The Ratification Kit is available from Amnesty International by writing to Jonathan O’Donohue at jodonohu@amnesty.org. The Kit itself is not available on-line although certain facts sheets which are components of it are: 1 – Introduction to the ICC; 2 – The Case for Ratification; 3 – Prosecuting the Crime of Genocide; 4 – Prosecuting Crimes Against Humanity; 5 Prosecuting War Crimes; 6 – Ensuring Justice for Victims; 7 – Ensuring Justice for Women; 8 – Ensuring Justice for Children; 9 – Fair Trial Guarantees; and 10 – State Cooperation with the ICC. The most convenient place to find them is www.amnestyusa.org/icc/.

within the jurisdiction of the court. It was one of the most hard-fought provisions of the Statute.⁵¹

Paragraph 2 provides that the Prosecutor in analyzing the seriousness of the information received “may seek additional information from States, organs of the United Nations, inter-governmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.”

Although paragraph 1 does not explicitly so state, clearly one of the primary sources of such information could be one or more non-governmental organizations. Article 15 (2) presents non-governmental organizations with significant opportunity to ensure that those who have committed war crimes, crimes against humanity and genocide are brought to justice. Non-governmental organizations working in the human rights field may have to rethink their research methodologies in order to take advantage of these opportunities. This point is explored further below.

The second article in the Statute that makes explicit reference to non-governmental organizations is 44. Paragraph 4 states that the “Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by State Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court.”

Article 73 which deals with third-party information or documents provides that “If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information.

Article 75 (3) which deals with reparations to victims states that “Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

Article 79 provides for the creation of a Trust Fund for victims and their families. Anyone may contribute to the Fund including non-governmental organizations as anyone “Governments, international organizations, individuals, corporations and other entities” under Article 116 may make voluntary contributions to the work of the Court.

WHAT IS NEEDED TO BRING VIOLATORS TO JUSTICE

The development of the International Criminal Court has been fed by a growing determination on the part of the international community that atroci-

⁵¹ See C.K. Hall, (1997) 91 *American Journal of International Law*, 177 at 182

ties such as those which occurred in the former Yugoslavia and the genocide that occurred in Rwanda should not go unpunished. The creation of ad hoc criminal tribunals in 1993 (ex-Yugoslavia) and 1995 (Rwanda) was one manifestation of this determination. The extension of the authority of national courts over crimes committed outside of their territory under the doctrine of universal jurisdiction has been another.

Since 1993, many countries with Belgium in the lead have extended the jurisdiction of their national courts so that prosecutions could be instituted for war crimes, crimes against humanity and genocide on the basis of universal jurisdiction.⁵² Canada, for example, enacted in June 2000, the *Crimes Against Humanity and War Crimes Act, An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts*.⁵³ Section 6 of that act provides that: "(1) Every person who, either before or after the coming into force of this section, commits outside Canada (a) genocide, (b) a crime against humanity, or (c) a war crime, is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8."

The convictions yesterday (June 8, 2001) of Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango, and Julienne Mukabutera by the Brussels 'Cour d'Assises' for war crimes committed during the 1994 Rwanda genocide have been heralded as an historic watershed in the expansion of the use of universal jurisdiction.⁵⁴

Paragraph 10 of the Preamble and Article 1 of the of the Rome Statute provide that the jurisdiction of the International Criminal Court "shall be complimentary to national criminal jurisdictions." The principle of "complimentarity" means that the International Criminal Court will not determine that a case "is admissible" (assume jurisdiction over a case) where according to Article 17 (1)(a) of the Statute, "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." The Statute also provides in Article 18 that

⁵² Usually there would have had to have been a substantial connection with a country before that country's courts could have exercised jurisdiction over a crime – either the crime was committed in whole or in part in the country or the victim or the perpetrator was a national of that country or some other vital national interest was affected.

⁵³ SC, 2000, c. 24

⁵⁴ AI's International Justice Project has undertaken a study which indicates that about 120 states have legislation providing for universal jurisdiction over war crimes or other crimes under international law, such as crimes against humanity, genocide and torture.

(1) Where a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor initiates an investigation pursuant to articles 13(c) and 15, the Prosecutor shall notify all State Parties and those States, which taking account of the information available, would normally exercise jurisdiction over the crimes concerned. ... (2) Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others with its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States ...

The principle of “complementarity” means that one, as a general rule, should look first to national courts which have jurisdiction as the appropriate locus to initiate investigations and, if sufficient evidence is found, prosecutions of genocide, crimes against humanity and war crimes.

Given the number of countries which have adopted or are adopting universal jurisdiction as the basis for the exercise by their courts of jurisdiction over genocide, crimes against humanity or war crimes, individual citizens wishing to cause an investigation to be initiated into the commission of such a crime will be able to do so in a large number of countries or, when the International Criminal Court is established, by going to its Prosecutor if no State is willing or able to carry out the investigation or prosecution.

This possibility of multiple forums for investigation and prosecutions presents enormous opportunities for human rights organizations and others to ensure that those who commit genocide, crimes against humanity and war crimes answer for their actions in a court of law. However, the mere fact that legislation is in place does not guarantee that those who have committed war crimes, crimes against humanity, or genocide will be successfully prosecuted. What is needed in every case is sufficient evidence to meet the legal standard needed for a criminal conviction.

One of the unanswered questions to date is who will assemble evidence sufficient to present to a national prosecutor or the ICC’s Prosecutor to trigger an investigation. Article 15 (1) provides that “the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.” How will the Prosecutor get this information for as it was recognized during the meeting of the Preparatory Committee “since the ICC would not have its own police force, its effectiveness in gathering evidence and securing the presence of suspects and accused would largely depend on the co-operation of national institutions.”⁵⁵

⁵⁵ C.K. Hall, (1997) 91 *American Journal of International Law* 177 at 182

Should non-governmental organizations organize themselves to gather and assemble such information? Now, non-governmental organizations in the field of human rights gather information, much of it individual 'testimony', of war crimes, crimes against humanity and genocides. On an ad hoc basis, they also work with victims to present that information to prosecutors hoping to trigger an investigation or prosecution. The Pinochet⁵⁶ case is an excellent example. However, it is important to remember that prior to Pinochet the large human rights organizations such as Amnesty did not gather information on individual human rights violations with the primary purpose of bring perpetrators to justice (that laudable goal was only a dim possibility before Pinochet) but rather to enable their activists to campaign to prevent the continuation or repetition of the violations.

The Pinochet⁵⁷ case has changed the calculus forever and the major non-governmental organizations, such as Amnesty International, which instigated this profound change are now having to rethink their role, their priorities, and their methodology in its wake because of the unprecedented opportunities now to make significant inroads against impunity internationally. The laws are in place or are being put in place.⁵⁸ The political will, although sometimes hesitant, also exists in a large number of countries. What is needed to deter would-be violators

⁵⁶ The non-governmental groups which participated in litigation during one or more stages of the Pinochet case were: Amnesty International, Human Rights Watch, the Redress Trust, the Medical Foundation for the Care of Victims of Torture, the Association of the Relatives of Disappeared Persons and Justicia. A much larger number of non-governmental groups both inside and outside of Chile had spend time and resources documenting the violations and assisting victims and their families.

⁵⁷ The High Court's 28 October 1998 decision in the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum Re; Augusto Pinochet Ugarte and in the matter of an application for leave to move for Judicial Review between the Queen v. (1) NICHOLAS EVANS (Metropolitan Stipendiary Magistrate), (2) RONALD BARTLE (Metropolitan Stipendiary Magistrate), (3) The Secretary of State for the Home Department, *Ex parte AUGUSTO PINOCHET UGARTE* can be found at www.diana.law.yale.edu/diana/db/pinochet.html. The House of Lords' three decisions in *Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet* (on appeal from a Divisional Court of the Queen's Bench Division) and *Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet* (on appeal from a Divisional Court of the Queen's Bench Division) can be found at: can be found at: first decision, www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd981125/pinoo1.htm, that decision was vacated by *In Re Pinochet*, www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990115/pinoo1.htm; and the case redecided: www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm

⁵⁸ The laws are not just criminal laws but also immigration laws which bar those suspected of war crimes, crimes against humanity and genocide to enter a country. See for example Section 19 of the Immigration Act, RS 1985, c. I-2 of Canada which states that the following categories of persons are inadmissible:

(j) persons who there are reasonable grounds to believe have committed an offence referred to in any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*; ...

continued

are international arrangements, mechanisms, or institutions to ensure that there is a high probability that those who commit war crimes, crimes against humanity and genocide are detected and apprehended.

Human rights organizations have a critical role in the creation of some arrangement, mechanism, or institution to pool the information on individual violations and violators. This arrangement or mechanism should provide for the long-term safe-keeping of the information so that it can be presented at an appropriate time to a national prosecutor or the ICC's Prosecutor. The mechanism might have a role in determining the choice of forum where to best present the information given the large number of possibilities with national courts and the ICC. Human rights organizations will also have to interact with national police and other investigative agencies such as immigration investigators who are also gathering evidence of war crimes, crimes against humanity and genocide committed outside their borders.⁵⁹ Any number of models for pooling information and deciding its possible uses should be looked at. One, for instance, is the Cambodia Genocide Project at Yale University⁶⁰ whose scale and cost suggests what dimensions such an arrangements or mechanism might take.

CONCLUSION

The creation of the International Criminal Tribunals, the International Criminal Court and the Pinochet case have together transformed criminal law

(l) persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations, or any act or omission that would be an offence under any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.

Meaning of "senior members of or senior officials in the service of a government"

(1.1) For the purposes of paragraph (1)(l), "senior members of or senior officials in the service of a government" means persons who, by virtue of the position they hold or have held, are or were able to exert a significant influence on the exercise of government power and, without limiting its generality, includes

- (a) heads of state or government;
- (b) members of the cabinet or governing council;
- (c) senior advisors to persons described in paragraph (a) or (b);
- (d) senior members of the public service;
- (e) senior members of the military and of the intelligence and internal security apparatus;
- (f) ambassadors and senior diplomatic officials; and
- (g) members of the judiciary.

⁵⁹ See for instance the Overview of Program Operations in Annual Report, 2000-2001, of Canada's War Crimes Program, www.cic.gc.ca/english/pub/war2001.html#overview

⁶⁰ www.yale.edu/cgp/

and criminal justice internationally forever. Those who commit war crimes, crimes against humanity and genocide can no longer rely on considerations of national sovereignty to evade responsibility for their actions. Civil society which was so instrumental in bringing about this transformation is now having to transform how it operates in order to ensure that all those who commit war crimes, crimes against humanity and genocide are brought to justice.

NGOs, THE ICC, AND THE FUTURE OF GLOBAL JUSTICE

BRUCE BROOMHALL*

Since this conference is meant to be a celebration of the International Centre for Criminal Law Reform and Criminal Justice Policy, I want to start a personal aside. It's no coincidence that the Centre is based at a Faculty of Law, and for people like myself that's a fortunate thing. I started volunteering for the Centre in the second year of my Bachelor of Laws program at the University of British Columbia in 1995. Professor Peter Burns introduced me to transnational and international criminal law as a field, Dan Prefontaine put me to work on the International Criminal Court, and before long I was participating on behalf of the Centre as its junior delegate at the Rome Diplomatic Conference (alongside Bill Schabas). That was the start of the long path that has taken me into international criminal legal work on a professional basis. As a proud product of the Centre, I have to pay tribute to the decisive influence such an institution can have in guiding students into challenging, worthwhile and somewhat unconventional paths.

Now to the subject of this panel—the role of non-governmental players in the establishment and functioning of the ICC. Let me broaden that out. I'd like to talk about the civil society element in the workings of international justice in general. International justice is something we should think of as a system, and while the ICC might be its cornerstone, it won't be the whole story. I'll lead with an example.

In the last week, almost unnoticed in the North American press, the case against Chilean General Augusto Pinochet entangled former U.S. Secretary of State Henry Kissinger in its web of legal procedures in both Europe and Latin America.

As a judge in Chile ordered its former President to submit to fingerprinting and mugshot photos, another judge, in Argentina, investigating other deaths linked to Pinochet and 'Operation Condor' (a coordinated policy to harass and

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'disappear' dissidents in 1970s Latin America), announced that he would probably be seeking the appearance of Henry Kissinger—possibly as a suspect. At the same time, a judge in Paris, investigating the deaths of French nationals under Pinochet's regime, sent officials to the Ritz Hotel to request that one of its guests—the same Henry Kissinger—appear at his chambers the next morning to answer questions about U.S. involvement in Chile 30 years ago. When the manager of the Ritz finished translating the judge's request to his guest, Dr. Kissinger cited longstanding obligations elsewhere. He flew to Italy the next morning.

The notion that courts outside the U.S. might be able to compel Dr. Kissinger to testify is sure to cause alarm in official quarters there. On one level, Kissinger has been swept-up in a growing international demand for justice by victims and survivors of the Pinochet regime—that is, by a long-term cross-border effort by NGOs. But more broadly, these actions are part of a new global process aimed at setting rules of the road for a system of international justice to establish accountability for gross violations in Chile, Cambodia, Sierra Leone or elsewhere. The heart of the process is the effort to lay a legal foundation for a process that will make gross abuses of human rights—and the decades of acrimony and counter-violence they breed—less common in this century than they were in the last.

Substantial global consensus already exists that the most outrageous human rights crimes, including genocide, crimes against humanity and war crimes, can no longer simply be swept under the rug. There is also broad recognition that there is a necessary role for international courts, like the current tribunals examining crimes in the former Yugoslavia and Rwanda, as well as for national courts. National courts where the crimes took place are generally the preferred jurisdictions to try these cases. But in many places, courts are unwilling or unable to put the worst violators on trial. In Yugoslavia, for example, officials continue to wrestle with the case against Slobodan Milosevic, while in Cambodia, persistent international pressure has still not led the government to take decisive action to hold leaders of the Khmer Rouge accountable for the 'Killing Fields' atrocities of 1975-1979.

The paralysis of national authorities in these and many other countries has fueled the development of universal jurisdiction, the legal principle that haunts General Pinochet. Universal jurisdiction brought Adolph Eichmann to trial in the 1960s in Jerusalem for his part in the Nazi Holocaust. Only two days ago, a jury of twelve Belgians convicted two Rwandan nuns for their part in the slaughter of thousands of people who had sought shelter with the church. In West Africa, a court in Senegal interrupted the peaceful exile of Hissan Habré to hear the case of torture brought against him by victims of his regime in the Saharan state of Chad during the 1980s. The case was dismissed only because the necessary laws were not in place at the time when the crimes took place. Right now, countries all over the world are now in the process of passing these laws as they lay the

foundations for the ICC. With the new laws in place—and often applying to crimes that take place anywhere in the world—future practice is set to look very different from what it has been. Universal jurisdiction will be a way of ensuring that courts in other countries take action when national legal systems prove ineffective in rendering justice.

At the center of this effort to build a system of international accountability is this new International Criminal Court. The Court's statute was adopted in Rome in 1998, and the treaty has now been ratified by 32 countries. When a total of 60 governments ratify the treaty, probably within two years time, the Court will prepare for active deliberations.

Will this change things? If it does, it won't be because the ICC will have worldwide jurisdiction and robust coercive powers. It's initial jurisdiction will be somewhat patchwork—confined to the territory and nationals of states parties—and it will rely on cooperation from national authorities to enforce its orders, without even the Security Council to back it up (at least until the U.S. softens its stance). And it won't be because the ICC will have a tremendous capacity to hear cases. With a (generous) projected budget of some \$100m a year, and judging by the models of the Yugoslav and Rwandan tribunals, we're talking about a couple of dozen cases a year, at most. Yet despite these limits, the ICC will provide an essential platform for the mobilization of national actors in the interests of accountability, and above all through civil society mobilization.

This is because the ICC Prosecutor will be able to initiate investigations based on information from any source, giving non-governmental actors an incentive to master the ICC's evidentiary standards and admissibility procedures, in order to use the Court as a lever to move national authorities to action. It is also because the ICC will act only where national authorities do not, and the process of law reform that this has spawned (leading to it's first example in Canada's Crimes Against Humanity and War Crimes Act of last year) is providing a vehicle through which national and regional players are getting mobilized behind law reforms that will have a real impact beyond the effect of the ICC. Through this process of law reform, NGOs and government officials are beginning to develop relationships, NGOs are enhancing their expertise in both national and international law, and international networks (hoping to utilize universal jurisdiction) are crystallizing. Whether the jurisdiction being exercised is territorial or universal, or that of the ICC, its effective exercise will depend in many instances on the initiative and expertise of non-governmental actors working in close coordination with government officials. Fundamental challenges remain, but that is precisely what NGOs are becoming invaluable for. The way forward will require foresight, coordination, capacity building (especially in the so-called 'Global South') and a commitment to the grueling work of education, resource development and legal problem-solving.

I mentioned the United States. Unfortunately, the debate about the ICC in the U.S. has been wildly distorted. Americans have been told, for example, that the new court will prosecute Americans anywhere, anytime, even if the U.S. doesn't ratify the treaty; that the U.S. will have to seek ICC permission before undertaking military operations, even under UN mandate; that unaccountable international judges will run a 'kangaroo court' for every anti-American agenda that comes along. None of this is true.

The ICC's narrow jurisdiction, the principle of complementarity (which leaves jurisdiction to national courts so long as there is both a capacity and willingness to address these issues), and the guarantees of due process and impartiality built into the Statute, are strong enough to have persuaded all of the U.S.'s NATO allies (except for Turkey) to feel comfortable signing on. Far from opposing the Court, the U.S. should engage in the ICC process to clarify its concerns, and to prepare for the day when it cooperates with the Court to bring a future Pol Pot or Idi Amin to justice. The adoption of such a stance may be a long way off, but the policy advantages for the United States (in assisting transitions to democracy, in strengthening the rule of law, in enhancing the protection of peacekeepers) are real enough that some confidence is warranted.

Stepping back again, the overall effort should be to move towards a situation in which the worst acts are prevented, deterred and dealt with rationally and with fair, legal process. We need more effective international systems to ensure that future Holocausts, Killing Fields and gassing of villagers do not happen. This will be infinitely better than the trial by media and political theatre that often stands in for real justice today. Inevitably we must also find ways for addressing the injustices of the past. The question whether Dr. Kissinger is in court or in the Paris Ritz may be significant, but in the long run it won't be more than a footnote in this much bigger, much more important story.

**CANADA'S ROLE
IN THE IMPLEMENTATION
OF THE ROME STATUTE**

THE ROAD FROM ROME TO THE HAGUE: THE INTERNATIONAL CRIMINAL COURT STATUTE TODAY

MICHAEL R. LEIR*

INTRODUCTION

The international community is at a critical juncture in the establishment of the International Criminal Court. Thirty-two countries have ratified the Rome Statute, bringing us past the halfway point of the 60 ratifications required for entry into force. Other countries have begun the process that will lead to ratification either this year or next.¹ With this momentum, the Rome Statute could enter into effect within the next 24 months.

The purpose of my presentation is to review briefly where we are today, to identify some of the lessons learned at Rome, and to remind ourselves of their importance as we strive to complete the final stage of the journey from Rome to The Hague. I will also identify some of the activities Canada is undertaking to smooth the path to the Hague.

BRIEF HISTORY OF THE NEGOTIATIONS

The ICC was itself well over 50 years in the making. The Cold War paralyzed work on a permanent criminal court, but the early 1990s saw progress on the issue. The International Law Commission was asked to create a draft ICC Statute, and that draft Statute was examined in 1995 by an Ad Hoc Committee of States. From 1996 to 1998, a Preparatory Committee substantially added to and changed the draft, and its report was used as the basis for discussion at the 1998 Rome Conference.

The Preparatory Committee left a large volume of work to be done in Rome. There were almost 1,700 brackets in the report. These disagreements concerned fundamental conceptions of what the Court should look like, the crimes that

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¹ For example, several European Union, Latin American and West African states.

should be included in the Statute, the independence of the Prosecutor and the jurisdiction of the Court – to name but a few.

Negotiation requires compromise, and the final outcome depends a great deal on several factors, most especially the strength and will of the States negotiating. In this regard, the Like-Minded Group played an important role. This group was created by those States committed to the creation of a strong and effective ICC. It was chaired by Canada. By the time of the Diplomatic Conference, the Group had grown to include over 60 countries. Its presence ensured that certain crucial areas of the Statute were progressive and reflective of current international human rights and humanitarian law. This, coupled with the work of the NGO Coalition for an ICC, was critical to the positive outcome of the Diplomatic Conference.

The Statute reflects the need to reconcile very different positions – from the Like-Minded Group, to the permanent members of the Security Council, to the Non-Aligned Movement, to the Arab group. It could never be a document that satisfied all. However, it did turn out to be an institution that is both strong and strikes the right balance so as to satisfy many.

THE PREPARATORY COMMISSION

The negotiations did not end in Rome. The ICC cannot become operational solely on the basis of the Statute. The Statute must be supplemented with documents that describe how the Court will operate within the host state – the Netherlands, how the Court will interact with the UN, and the procedures that will be followed by the Court’s officials. Following the Rome Conference, a Preparatory Commission was created to discuss these issues. This is a classic example of “the Devil being in the detail.”

Last June, two key documents – the Court’s Rules of Procedure and Evidence, and its Elements of Crimes – were adopted by *consensus*. States are currently negotiating the Financial Rules and Regulations, the Relationship Agreement between the UN and the ICC, the Agreement on Privileges and Immunities of ICC, and other issues crucial to the Court’s operation and independence. The next Preparatory Commission will take place in September. I suspect that, at this PrepCom, negotiations will conclude on many of the documents and States will turn their minds to the important task of preparing for the Court’s creation.

RATIFICATIONS AND ENTRY-INTO-FORCE

In 1998, some pessimists predicted that the ICC Statute would never obtain 60 ratifications, while many optimists spoke of up to a decade or more passing before entry into force. The facts have been otherwise. In just three years following its adoption – 32 have ratified. We now face the real possibility of a 60th ratification within the next 24 months.

Almost one year ago, Canada, as a leader, adopted its own ICC implementing legislation – the *Crimes Against Humanity and War Crimes Act*, which will be discussed by our next speaker. Other countries have also adopted comprehensive implementing legislation. Many countries are in the drafting stage.

The first set of challenges for the International Community is to ensure that all States, in adopting legislation, fulfil domestically the obligations set out in the Statute. Otherwise the Court could run into difficulties once it seeks assistance to begin its first investigation. In the coming year, governments and NGOs must focus on assisting other States to ensure that they are in a position to cooperate with the ICC.

The second set of challenges deals with the Court's operation. It will be critical that States consider what is needed for a smooth transition from the 60th ratification to actual operation of the Court. With proper planning, the teething problems that will be faced by the Court can be smoothed out efficiently and effectively. Therefore, thought must be given to issues such as when to hold the first meeting of the Assembly of States Parties, the agenda for the first Assembly meeting, how the negotiations on the crime of aggression will continue if they are not completed by entry-into-force, and how the judges and the Prosecutor will be elected – to highlight but a few.

LESSONS LEARNED FROM ROME

If these are the two sets of challenges remaining, how will we move to achieve these objectives? Fortunately, the experience gained in reaching this point will stand us in good stead in the months ahead. The way forward requires the same degree of attention and effort that was seen in the past. I will identify six lessons from Rome that I believe are relevant.

One lesson learned is that leadership is critical to ensuring that the Court becomes an effectively functioning reality. This leadership must come from the highest political levels. For Canada, our Prime Minister, Minister of Foreign Affairs and Minister of Justice are solidly behind the ICC. They promote the Court at every opportunity, whether in a bilateral or multilateral context. Other countries must be as engaged at the same senior levels to provide political direction.

A second lesson learned is the importance of working within networks of supporters with an equal degree of commitment as Canada's. The Like-Minded Group of states served this function before and at the Rome Conference. The Group's common positions helped the negotiations stay on course. Coordination and information-sharing within the Group were crucial to ensuring that, when faced with positions that were intended to block progress, the position of the

Like-Minded Group often prevailed. Our partnership must continue as we plan for the 60th ratification and beyond.

A third lesson was how critical was the network of like-minded supporters provided by the NGO Coalition for an ICC. The Coalition, composed of over 1,000 NGOs supportive of the creation of the Court, contributed greatly to the success of the Rome Conference. The extraordinary activity of the Coalition continues to be vital. The Coalition, like states, is focusing its efforts in two directions: first, on ensuring that the international negotiations and ratifications continue smoothly and, second, on undertaking outreach on ratification and implementation in all areas of the world.

A fourth lesson is that, in order to succeed, the Court will need supporters from all over the world. 139 States have signed the ICC Statute – 19 more than had originally voted in favour of adopting the Statute in 1998. The signatories represent a range of States from all legal traditions. These signatures should be translated into ratifications. It is also crucially important to ensure that States with ongoing armed conflicts, or states recently emerging from armed conflicts, join the Court. At the moment, we have ratifications from States such as Sierra Leone, Croatia and Fiji. This is a good start, but we need to ensure that more conflict and post-conflict countries are represented in the Assembly of States Parties.

The fifth lesson learned is not to be exclusionary. A world court needs global support. The approach at Rome of being flexible while maintaining the integrity of the court allowed countries with concerns as varied as the United States, Israel, Russia and Iran to sign the Rome Statute. In looking ahead, the door should be kept open.

This includes continuing to monitor the developments within the United States. The United States signed the Statute in December, but President Clinton recommended that the Statute *not* be considered for ratification. The new administration has not yet articulated its policy on the ICC. It will be important to keep the dialogue going with the United States, in order to ensure that the new administration knows, first, of the depth of support for the ICC, and, second, that many of the concerns expressed in the past by the US have already been addressed within the Rome Statute, and other documents. The new US policy on the ICC should not be formed in a vacuum.

A final lesson learned from Rome is that some governments, especially of small states with over-stretched foreign or justice ministries, need technical assistance. It is easy for those who have not been following the ICC process (and even those who have!) to become overwhelmed by the complexities of the Statute. Some countries have paused in their implementation for the simple reason that they do not have the time or people to do so. These are the countries that benefit

from technical assistance from states, which have already implemented the ICC, and from NGOs with expertise on implementation.

THE WAY FORWARD

Canada, for its part, will continue its campaign to encourage States to ratify the Rome Statute and to implement the Statute into their domestic laws. Over the last year, Canada has worked in partnership with NGOs and intergovernmental organizations to hold ICC implementation workshops worldwide in the Caribbean, Latin America, South Pacific, West Africa and the Middle East. One of our most frequent partners is the ICC Technical Assistance Program which Daniel Prefontaine will describe. For example, the ICC Technical Assistance Program and the Government of Canada co-sponsored just 10 days ago a successful ICC workshop in Namibia for 11 countries of the Southern African Development Community.

This year, Canada will continue to provide assistance to countries on implementation, in collaboration with partners such as the International Centre. We will focus on areas of the world that are currently under-represented in the list of those who have ratified the ICC Statute, especially Asia, Eastern Europe and Southern and Eastern Africa.

We will expand our efforts on public outreach in Canada and abroad. Again, it will be important to work closely with Canadian NGOs on this. We are in the process of revising and expanding our ICC website, and we plan to hold an event with Canadian youth to explore issues of accountability and justice during and after conflicts.

And finally, Canada will continue to work with like-minded countries and NGOs to advance the process toward a smooth entry-into-force and transition into operation of the Court. Canada's approach is designed to take advantage of state-to-state opportunities to promote the ICC, as well as to complement the ongoing work of the Coalition for an ICC and its constituent non-governmental organizations.

CONCLUSION: THE ROAD FROM ROME TO THE HAGUE

The Road from Rome to The Hague is proving much shorter than anyone imagined back in 1998. This shorter road is a result of a greater awareness and acceptance of the ICC Statute, and of the determined commitment of countries and NGOs that want to see this Court established – but a shorter road has as many challenges and demands as much effort to maintain this important momentum.

In the coming months, States and NGOs will be working together to encourage ratifications or accessions. As well, with an eye on the need to ensure that

the Court works well from the beginning, both will also focus on ensuring that States implement their obligations to the Court within their domestic laws.

Each step must be thought through and planned, so the Court is a success from the moment the 60th instrument of ratification is deposited at the United Nations. Canada is working hard to achieve this. By using the lessons learned in moving the international community this far, we should be able to complete the journey from the negotiation of a Court in Rome to its full-fledged operation in The Hague.

CANADIAN LEGISLATION AGAINST CRIMES AGAINST HUMANITY AND WAR CRIMES

MORRIS ROSENBERG*

INTRODUCTION

Before I address the Canadian *Crimes Against Humanity and War Crimes Act*, I'd like to briefly retrace the path that got us there. I'll start by acknowledging that the path that leads to the Canadian legislation begins with the Universal Declaration of Human Rights.¹ The Universal Declaration trumpeted a common standard of human rights and fundamental freedoms for all nations and peoples of the world. The first paragraph of the Preamble of the Universal Declaration of Human Rights observed that the recognition of the "inherent dignity" and "the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

Sadly, notwithstanding the vision of John Humphrey, the Canadian who was the leading proponent and architect of the Universal Declaration of Human Rights, the world in the years following 1948 was to bear witness to further acts of genocide and mass killing in Cambodia, the former Yugoslavia, Rwanda, and elsewhere.

INTERNATIONAL ACTIVITY

For forty years following the Universal Declaration of Human Rights, little progress was made in producing the fruit of a global criminal law system from the seeds planted in Nuremberg. But then, triggered by the horrendous atrocities committed in the former Yugoslavia and in Rwanda, and freed from the shackles

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¹ *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly pursuant to resolution 217 A (III) of 10 December 1948, at <http://www.un.org/Overview/rights.html>, (visited June 18, 2001).

of the cold war, the United Nations Security Council established, in amazingly quick succession, the two *ad hoc* Tribunals for Yugoslavia² and Rwanda.³

This precipitated a leap forward in international criminal law. The functioning of the tribunals required the drafting by the United Nations Security Council of definitions of genocide, crimes against humanity and war crimes. The tribunals, in exercising their powers, have produced case law that fleshes out these definitions, adding depth and meaning to the words of their Statutes. Nevertheless, these two tribunals have mandates limited by geographic area and, particularly in the case of the Rwanda Tribunal, by time.

Due to these limitations, the international community agreed that an international tribunal and system of justice, recognized and supported by the vast majority of States, were required to try atrocities committed anywhere in the world. This tribunal and system of justice would counter the climate and attitude of impunity which appeared to surround the commission of such crimes. The preparatory meetings leading up to, and the negotiations in Rome, produced that global achievement. Ambassador Philippe Kirsch of Canada served as chair of the pivotal Committee of the Whole at the Rome Conference, bringing it to a successful conclusion.

On July 18, 1998, at the ceremony marking the adoption of the Rome Statute of the International Criminal Court,⁴ UN Secretary General Kofi Annan observed that “the establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.”⁵

The adoption of the Rome Statute marked a defining moment for the United Nations in the effort to establish an international criminal law system designed to bring to justice those persons who participate in the commission of genocide, crimes against humanity and war crimes. The International Criminal Court,

² *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991*, UN Doc. S/25704, adopted 25 May 1993, UN Doc./ReS/827 (1993), at www.un.org/icty/basic/statut/stat2000_con.htm (visited May 24, 2001).

³ *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda between 1 January 1994 and 31 December 1994, adopted 8 November 1994*, UN Doc. S/RES/955 (1994) at www.ictc.org (visited May 24, 2001).

⁴ *Rome Statute of the International Criminal Court*, as adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998 and as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999 (UN Doc. A/Conf. 183/9, 1998) at www.un.org/law/icc/statute/rome fra.htm (visited May 24, 2001) (hereinafter “Rome Statute”).

⁵ www.un.org/News/Press/docs/1998/19980720.12890.html

once established, will be instrumental in giving practical effect to the Universal Declaration of Human Rights.

However, no matter how permanent or precedent setting, one single court would be unable for practical reasons to hear all of the cases flowing from the many areas of concern throughout the world. As a result of this, and the recognition that criminal law is traditionally an area within the jurisdiction of sovereign States, the Statute was built on the underlying principle of complementarity; that is, States would be primarily responsible for enforcing the laws defined by the Statute, with the International Criminal Court having jurisdiction in the event that the responsible State was genuinely unable or unwilling to fulfil its obligations.⁶

DOMESTIC ACTIVITY

Long before the adoption of the Rome Statute, domestic measures had been taken in Canada in an effort to bring to justice those who participate in the commission of war crimes and crimes against humanity. For example, on 30 December 1986, Justice Jules Deschênes released his *Report of the Commission of Inquiry on War Criminals*.

Upon the recommendations of that Report, in 1987 Canada amended its *Criminal Code*, *Immigration Act* and *Citizenship Act* as part of a multi-faceted approach to address the concern that individuals present in Canada had participated in the commission of crimes against humanity and war crimes. As many of you are aware, the 1994 decision of the Supreme Court of Canada in *R. v. Finta*⁷ established an extremely high evidentiary threshold for a criminal conviction under that 1987 legislation. Consequently, our focus within Canada thereafter turned to the use of the remedies of deportation, revocation of citizenship and extradition to deal with alleged war criminals present in Canada.

NEW CANADIAN LEGISLATION

Bill C-19, the proposed *Crimes Against Humanity Act*, was introduced in the Canadian House of Commons on December 10, 1999, the 51st anniversary of the Universal Declaration of Human Rights. This was no coincidence. It was felt that International Human Rights Day was the best occasion for the introduction of this legislation, given the belief that the International Criminal Court, once established, would help to end the culture of impunity that has allowed persons

⁶ *Rome Statute*, Preamble, Art. 1, 17, *supra* note 4. See among the many publications on this issue: Scharf, M.P. *The Draft Statute for an International Criminal Court* in Bassiouni, M.C. ed., *International Criminal Law*, 2nd ed., (hereinafter Bassiouni, ICL) Vol. III, 637 at 650-652.

⁷ *R. v. Finta*, [1994] 1 S.C.R. 701, 28 C.R. (4th) 265.

who have participated in the commission of genocide, crimes against humanity and war crimes to escape justice.

With the coming into force of Bill C-19 on October 23, 2000, Canada became one of the first countries in the world to have in place such comprehensive legislation. Canada's *Crimes Against Humanity and War Crimes Act*⁸ was designed to serve two purposes. The first was to implement the Rome Statute through the establishment of a domestic criminal and administrative regime to complement the International Criminal Court and to permit Canada to assist and cooperate with the Court. The second purpose was to strengthen Canada's legislative foundation for the prosecution of genocide, crimes against humanity and war crimes in furtherance of our policy that Canada will not become a safe haven for perpetrators of these crimes.

GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES

The Act created and redefined in Canada new offences of genocide, crimes against humanity and war crimes.⁹ The accused may be prosecuted in Canada for these crimes or may be surrendered to the International Criminal Court for trial. In accord with the Rome Statute, these crimes apply forward in time from the coming into force of the Act. Consistent with our policy, however, the Act also ensures that those involved in the commission of these crimes outside Canada, regardless of when those events occurred, can also be brought to justice.

In defining genocide, crimes against humanity and war crimes, and in establishing Canadian jurisdiction over these offences, we have chosen, as a general approach, to go beyond the Rome Statute. We have therefore defined the offences broadly, by reference to the customary or conventional international law applicable at the time and place of the commission of the offences.

At the same time, the Act specifies, for greater certainty, that the crimes as described in the Rome Statute were, as of July 17, 1998, crimes according to customary international law, and may have been crimes according to customary international law before that date.¹⁰ These provisions were included to make it clear that Canada has implemented into our domestic criminal legislation the Rome Statute crimes of genocide, crimes against humanity and war crimes.

The Act also specifies that, for the purposes of Canadian criminal law, the Rome Statute does not freeze the development of international law, and that Canadian prosecutors are therefore not limited to prosecuting only the crimes as

⁸ *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

⁹ *Ibid.*, s.4 and 6.

¹⁰ *Ibid.*, ss. 4(4) and 6(4).

defined in the Rome Statute.¹¹ This is important, as the definition of these crimes may grow as international law develops in the future.

Generally consistent with the approach taken by Canada in its 1987 legislation, Canada may exercise jurisdiction over these offences (and over the breach of responsibility offence) when committed outside Canada on the basis of an enlarged application of the active and passive personality principles based on the nationality of the offender or the victim; and also on the basis of a limited universal jurisdiction principle.¹²

The Act removes some previous requirements in respect of the application of the universal jurisdiction principle, but retains the requirement that the person needs to be present in Canada following the commission of the offence. The rationale for this enlarged mandate is the universal condemnation of the conduct as criminal and the fact that the alleged perpetrator creates the required nexus to Canada at the time he or she enters our country.

BREACH OF RESPONSIBILITY

The Rome Statute expands the liability for the commission of genocide, crimes against humanity and war crimes to include commanders – whether military, paramilitary or civilian, including Heads of State – who fail to prevent or punish crimes committed by subordinates, when they knew or should have known about these crimes. Under the Statute, failure of command responsibility is deemed to be actual participation in the offence. The person in authority is, therefore, charged with the actual offence.¹³

Canada faced the challenge of implementing the notion of command responsibility in its domestic law in a manner consistent with the *Canadian Charter of Rights and Freedoms*.¹⁴ Having regard to the jurisprudence of the Supreme Court of Canada,¹⁵ and bearing in mind the stigma and punishment attached to a conviction for genocide, crimes against humanity and war crimes, it was considered advisable to create a specific offence of breach of responsibility and to replace the negligence *mens rea* or “should have known” standard, applicable to military commanders, with a criminal negligence standard (i.e., wanton or reckless disregard for the lives and safety of other persons).

¹¹ *Ibid.*

¹² *Ibid.*, s.8.

¹³ *Rome Statute*, *supra* note 4, Art. 28.

¹⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitutional Act*, 1982, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c.II, s.7(g).

¹⁵ *R.v. Vaillancourt*, [1987] 2 S.C.R. 636.

With the creation in the Act of the distinct new offence of breach of command responsibility, now in Canada, military commanders and people in authority can be liable for the specific offence of breaching their responsibility to exercise control over their subordinates in the event that their subordinates participate in the commission of genocide, crimes against humanity or war crimes.¹⁶

Given that many of the fighting forces in the former Yugoslavia were police units, and as a result of the experience we have developed in investigating World War II allegations, we also expanded the concept of military commander in the Act to include police commanders.¹⁷

DEFENCES

The Act makes it clear that an accused is entitled to rely upon any justification, excuse or defence available under the laws of Canada or under international law either at the time of the commission of the offence or at the time of the proceedings.¹⁸

The Act, however, contains specific guidance on the application of some available defences based on long-standing international law.

It stipulates that an accused is not entitled to rely on the defence of obedience to the law in force at the time and in the place of the commission of the offence.¹⁹

In addition, an accused would not have recourse to the defence of obedience to superior orders, unless the accused was under a legal obligation to obey those orders, the accused did not know the order was unlawful, and the order was not manifestly unlawful.²⁰ To clarify this last issue, and to be consistent with Article 33(2) of the Rome Statute, the Act also states that orders to commit genocide or crimes against humanity are manifestly unlawful.²¹

As a further clarification, our Act provides that the defence of superior orders, which would only apply to war crimes, cannot be based on a belief that the order was lawful where the accused's belief was based on information about an identifiable group of persons that encouraged the commission of inhumane acts or omissions against the group.²² To permit this defence to be raised, when

¹⁶ *Crimes Against Humanity and War Crimes Act*, *supra* note 8, s.5 and 7.

¹⁷ *Ibid.*, ss: 5(4) and 7(6).

¹⁸ *Ibid.*, s. 11.

¹⁹ *Ibid.*, s. 13.

²⁰ *Ibid.*, ss. 14 (1).

²¹ *Ibid.*, ss. 14 (2).

²² *Ibid.*, ss. 14 (3).

it is based on hate propaganda, would excuse the very evil which the offence seeks to prohibit or punish. Propaganda characterizing any identifiable group as deserving of inhumane treatment cannot be allowed to justify that which cannot otherwise be justified.

As well, it would not be possible for the accused, in certain situations, to rely on the special pleas of *autrefois acquit*, *autrefois convict* or pardon in respect of these crimes. These pleas may not be used if the accused was tried in a court of a foreign state or territory and the proceedings in that court were for the purpose of shielding the person from criminal responsibility, or were conducted in a manner that was not in accordance with norms of due process recognized by international law and inconsistent with an intent to bring the person to justice.²³

OTHER MATTERS

The *Crimes Against Humanity and War Crimes Act* is a rich statute covering a broad range of areas of law and policy, many of which go beyond the Rome Statute and its requirements. Given the time constraints, I have been able only to touch upon a few of those areas.

I would like, however, to highlight some of the other important issues which have been addressed legislatively:

- The Act creates a new offence of possession of the proceeds of crime obtained through the commission of the offences created by the Act, as well as the laundering of property or proceeds obtained through the commission of these offences. These proceeds can be seized, restrained or forfeited in much the same way as proceeds from other criminal offences committed in Canada;²⁴
- Sections 30 and 31 of the Act establish the Crimes Against Humanity Fund, which is designed to channel funds obtained through the enforcement of the Act as well as orders of the International Criminal Court enforced in Canada, to the International Criminal Court Trust Fund, victims of offences under our Act or the Rome Statute, and their families;
- *The Witness Protection Program Act*²⁵ has been amended to provide that witnesses involved in International Criminal Court or tribunal activities may be admitted to the program;

²³ *Ibid.*, ss. 12 (2).

²⁴ *Ibid.*, s. 27 and 28.

²⁵ S.C. 1996, c. 15, as amended by the *Crimes Against Humanity and War Crimes Act*, *supra* note 8, s. 71 to 75.

- The extradition process has been modified and streamlined to allow for surrender to the International Criminal Court;²⁶
- *The Extradition Act*²⁷ has also been amended to ensure that a person who is the subject of a request for surrender by the International Criminal Court, or by any other international tribunal established by resolution of the United Nations Security Council, cannot claim diplomatic or sovereign immunity;²⁸ and
- *The Mutual Legal Assistance in Criminal Matters Act*²⁹ has been amended to facilitate the provision of a wide range of assistance to International Criminal Court investigators. Assistance could deal with matters ranging from the collection of evidence, to identifying persons, to freezing or seizing proceeds of crimes to providing reparations to victims.³⁰

CONCLUSION

The new Act represents a balance between the Canadian values of justice, fairness and the rule of law, and the need to prosecute persons who participate in the commission of the crimes of genocide, crimes against humanity and war crimes, as well as those people in authority who fail to fulfil their obligations as commanders to prevent the commission of these crimes by their subordinates. It provides specifically for the protection of the rights of the accused, while at the same time adjusting to the reality of modern international criminal law.

At the beginning of my speech, I referred to the Universal Declaration of Human Rights and I would like to refer to it again in closing.

Article 28 of the Universal Declaration of Human Rights reads: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”³¹ Both the Rome Statute, and the domestic legislation enacted by Canada, are strong tools to establish this social and international order, and thus contribute to making these rights and freedoms a reality.

²⁶ *Crimes Against Humanity and War Crimes’ Act*, *supra* note 8, s. 47 – 53.

²⁷ *The Extradition Act*, S.C. 1999, c. 18.

²⁸ *Crimes Against Humanity And War Crimes Act*, *supra* note 8, s. 48.

²⁹ *The Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th supp).

³⁰ *Crimes Against Humanity and War Crimes Act*, *supra* note 8, s. 56-69.

³¹ *supra* note 1.

THE ROLE OF THE INTERNATIONAL CENTRE IN THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT

DANIEL C. PRÉFONTAINE, Q.C. AND GUY GAGNIER*

History confirms that the Twentieth Century has seen some of the worst atrocities in the history of humankind, accounting for more than eighty six million civilian deaths in over 250 conflicts in the past fifty years alone.¹ Consequently and especially since the First World War, the international community has resolutely decided to take action by ambitiously pursuing the establishment of a permanent tribunal with the power to bring to justice individuals who commit the most grave and heinous crimes known to humankind – war crimes, crimes against humanity and genocide.

In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have

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¹ Excerpt from the Department of Foreign Affairs and International Trade (Canada)'s website. For reference, see www.icc.gc.ca.

rights, and that those who violate those rights will be punished.²
– Kofi Annan, *United Nations Secretary-General*

In its role as the only Canadian institute officially affiliated with the United Nations, the International Centre for Criminal Law Reform and Criminal Justice Policy has prioritised this goal too. Since its inception in 1991, the Centre has continued to support research and program activities dealing with international criminal court issues and the ultimate creation of an International Criminal Court. Equally reflective of Canada's historical and continuing human security agenda, the Centre's general mission is the promotion of democratic principles, the rule of law and respect for human rights in criminal law and the administration of criminal justice, domestically, regionally and globally. By striving to improve the quality of justice through the reform of criminal law, policy and practice, ICCLR continues to support and actively contribute to our country's history of international humanitarian assistance and peacebuilding endeavours, with the resultant establishment of the International Criminal Court.

THE CENTRE'S EFFORTS IN SUPPORTING THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT

Since 1992, the Centre has been and continues to be actively committed to supporting global efforts in combating international crimes and prioritising the creation of a permanent, effective and just international criminal tribunal. In March of 1993, ICCLR organised and sponsored *The International Meeting of Experts on the Establishment of an International Criminal Court*, with more than seventy leading criminal and international law experts from thirty countries converging on Vancouver for this five-day meeting. Consequently, the final report was transmitted to the United Nations Legal Office in New York and was used extensively in the design of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia, as noted in the May 1993 Secretary General's Report.

In the ensuing years, the Centre continued to develop its expansive collection of substantive and comprehensive ICC-related papers while participating in many negotiating conferences, including several United Nations *ad hoc* Committee meetings for the Establishment of an International Criminal Court in 1995 and Preparatory Committee meetings from 1996 to 1998. In 1998, the Centre delegated representatives to Rome for the five-week United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court.

² Fifty-second session of the General Assembly of the United Nations, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, subsequently held in Rome, Italy, from 15 June to 17 July 1998, "to finalize and adopt a convention on the establishment of an international criminal court."

Of course, this landmark conference ultimately led to an overwhelming vote in favour of the adoption of a convention on the establishment of an international criminal court. Building on the momentum created in Rome, the United Nations has since held periodic meetings of the Preparatory Commission for the Court to focus on a number of proposals for the operation of the Court and the elements of crimes under its jurisdiction, with the Centre partaking in all seven meetings thus far.³

In 2000, the International Centre for Criminal Law Reform and Criminal Justice Policy, in co-operation with Rights & Democracy – the International Centre for Human Rights and Democratic Development (R&D) in Montréal, and with the financial assistance of the Department of Foreign Affairs and International Trade and the Department of Justice, developed a *Manual for the Ratification and Implementation of the Rome Statute*. This widely used Manual provides details on the obligations of States Parties to the ICC Statute, and guidance as to how a State might implement each obligation into its national legal system. The English version of the Manual was successfully launched at the Preparatory Commission meeting for the ICC in June 2000, and is now also available in French, Spanish, Portuguese, Russian and Arabic.

In addition, a major thrust has been undertaken in organizing regional workshops to promote the expeditious establishment of a just and permanent International Criminal Court, and to assist countries in the development of legislation and administrative procedures to support the ICC when it comes into existence. The International Criminal Court Technical Assistance Program is a joint partnership between the Centre, Rights & Democracy, the Canadian Network for the International Criminal Court under the aegis of the World Federalists of Canada, and the Institute for Media, Policy and Civil Society. This component has been dually supported by the Canadian International Development Agency and the Department of Justice, with in-kind contributions of expert personnel to each workshop by both the Department of Foreign Affairs and International Trade and the Department of Justice. It will provide five regional workshops, each comprised of three sub-workshops to promote legal technical assistance, civil society collaboration and media awareness and training. In the process, ICCLR has built on and/or established vital co-operative partnerships with the Pacific Islands Law Officers Meeting and the Pacific Islands Forum, the Government of the Republic of Cameroon, the United Nations Latin American Institute for Crime Prevention and the Treatment of Offenders, the Government of Jamaica through its Ministry of National Security and Justice, Parliamentarians for Global Action, the Government of the Republic of Namibia

³ Excerpt from the United Nations' website on the International Criminal Court. Current as of 4 June 2001. For reference, see www.un.org/law.

through its Parliament and its Ministry of Justice, the NGO Coalition for an International Criminal Court, and many other sub-regional and international non-governmental organisations.

By the end of May 2001, four regional workshops will have been held: one for the Pacific Islands (Cook Islands/New Zealand, October 2000), a second for Francophonie States of Central Africa (Cameroon, February 2001), a third for the Caribbean (Jamaica, May 2001) and a fourth for Southern Africa (Namibia, May 2001). Cumulatively through these four workshops, the three pillars (government, civil society and media) will have combined to directly sensitize and provide training and assistance to approximately 400 delegates from 55 countries. The fifth and final regional workshop is still to be confirmed, with possibilities for (i) Francophonie States of Western Africa, (ii) Francophonie States of the Indian Ocean, Eastern and Northern Africa, and (iii) in Asia.

The Centre is also in the process of publishing further materials to assist States with the process of ensuring that the ICC will be as effective as possible. At the moment, these supplementary materials are in various stages of development and include: a Checklist of State Obligations under the Rome Statute, supplements on the ICC Rules of Procedure and Evidence and the ICC Elements of Crime, several comprehensive guides to the relationship agreement between the Court, the draft agreement on the privileges and immunities of the Court, the general principles of Criminal Law under the Rome Statute (and implications for national legal systems), the draft agreement on financial regulations of the Court, and the draft agreement on the Rules of Procedure of the Assembly of State parties, introductions to the draft Headquarters agreement between the Court and the Host State and the draft First Year budget for the Court, and finally a substantive analysis of ICC implementing legislations models.

CONCLUSION

It is vital to maintain the universality of the ICC regime and thus the integrity of the Rome Statute, by ensuring that every State is encouraged to promptly become a Party to the Rome Statute. It is the only way of ensuring that all perpetrators of genocide, crimes against humanity, war crimes (and crimes of aggression) are brought to justice. The worldwide movement towards its creation is tremendous and concerted, as exemplified by the on-going efforts of a broad-based network of over one thousand non-governmental organisations associated with the Coalition for an International Criminal Court. Again, through the Centre's ICC Technical Assistance Program and with the aid and contribution of other Canadian and international non-governmental organisations, sub-regional networks are being created and the ideal of an International Criminal Court is prevailing beyond cultures, borders and classes. This program is unique in that

it not only reaches and engages members of national legislatures, senior legal experts and venerable academics, but that it also involves and affects university students in Gaborone, community leaders in Port of Spain, journalists in Buenos Aires, women's rights groups in Dakar and jurists in Bangkok. With the esteemed leadership and continuing support of the Government of Canada through invaluable partnerships with the Canadian International Development Agency, the Department of Foreign Affairs and International Trade and the Department of Justice, the International Centre for Criminal Law Reform and Criminal Justice Policy intends to actively pursue this dossier until the International Criminal Court becomes a reality.



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