Peace and Justice at the International Criminal Court

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A Court of Last Resort

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Preface

There are times when those who work in the Academy or in public service who focus on justice and human rights may have doubts that human progress is possible given the horrors that the world has witnessed in the last century and the first decade of the 21st Century. This was certainly the case for this author after close to two decades of academic and professional work in the fields of international human rights, justice and law. Then came along the opportunity to experience first hand the work of those in the international arena who devote, not only their professional lives, but also much of their personal lives to building a global institution the primary function of which is to promote peace and justice among our human family. The institution was the International Criminal Court the historic establishment of which is the culmination of centuries of humanity's desire to promote the idea that sustainable peace is only possible in the absence of impunity, as the first chapter of this work will discuss.

It was at the end of 2008 that I readily accepted an invitation to be a Visiting Professional at the International Criminal Court in The Hague during the spring and summer of 2009. I opted for a position in the Legal Advisory Section of the Office of the Prosecutor. This choice was deliberate because I wished to understand how the early investigations and prosecutions were being shaped by the Office of the Prosecutor and, in particular, by the Chief Prosecutor, Luis Moreno-Ocampo.

The experience was immensely enriching as it made me realize that theoretical perspectives of the relationship between the search for peace and the thirst for justice in the intense conflict zones of our world must be tempered with the actual facts on the ground and the reality that the truth lies somewhere between extreme positions on whether peace trumps justice or justice trumps peace.

As the discussion on the conflict in Northern Uganda reveals in Chapter 3 of this book, the solution may be neither a peaceful settlement nor justice fulfilled, but instead may lie only a military endgame. In the spring and summer of 2009, I also learned that the interplay between desired prosecutorial strategies and ultimate judicial outcomes is hugely complex and rarely predicable, given the great challenges of a permanent international criminal tribunal in gathering evidence, producing and protecting witnesses, creating or building upon new modes of criminal liability while

attempting to reconcile civil and common law methods of prosecution and judicial decision making.

Given the enormous complexity of the historic challenge laid before the International Criminal Court to combat impunity for the most serious crimes known to humanity and to promote the cause of international justice, there is fertile ground for the armchair critics to throw unexamined barbs at the Court and its officials. The impact of such critiques could undermine the critical support from the international community needed for the future strengthening of the Court and could even imperil its legitimacy. For this reason, this work has attempted to examine the main critics and present contrary perspectives based on what was experienced first hand while at the Court. In particular, the criticism that the Court has imperiled peace in Sudan in its drive to impose accountability on high officials, including the President, has the potential to cause, in my view, unjustified undermining of the Court. This is the focus of Chapter 2.

However, it is also acknowledged that those who are immersed in the daily challenges and complexities involved in the work of the Court should not lightly cast aside legitimate critiques of the Court or its officials. There is no global institution that is perfect. Certainly, given the fact that this historic global institution is in its infancy, it would be unreasonable for there not to be room for improvement and mistakes to be rectified. It also became clear that the global fight against impunity as regards the most serious of international crimes cannot be fought alone by the Court. The co-combatants must be the entire international community and global civil society along with regional and multilateral organizations. To leave this global fight only to the International Court is to program it for failure, as Chapter 4 of this work discusses.

The genesis of the work therefore comes from the linking of decades of theoretical perspectives with the exigencies of real world facts and practical applications of international humanitarian and criminal laws constitutionalized in the Rome Statute of the International Criminal Court. The result is a work that denies that there is a zero sum game between peace and justice. That type of analysis is the preserve of the armchair critic. Nevertheless, the final chapter of this work identifies the potential threats to the future of the Court and how they can be dealt with.

It is up to the international community together with regional and multilateral organizations to help the International Criminal Court become an instrument for both peace and justice. Adapting the wisdom of Martin Luther King – a denial of justice anywhere is a threat to peace and justice everywhere.

Professor Errol P. Mendes
Ottawa. December 21. 2009

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In addition, mention must be made of the wonderful Australian couple, Greg and Glenda Lewin, who shared their house, their friends and generous hospitality while in The Hague and reinforced my belief in the inherent goodness and kinship of humanity regardless of country or race.

I would also like to thank my excellent research assistant, Michelle Lutfy, a most promising international law and international relations student, for assisting with the research and editing of the book. Likewise, I would also like to acknowledge the professionalism of Tara Gorvine, the Acquisitions Editor of Edward Elgar Publishing Inc. who helped greatly with the shaping of the contents of this book.

Finally, the greatest acknowledgment goes to my family and in particular my spouse, Sharon Lefroy, without whose support and patience this book would not have materialized, nor indeed would I have had the ability to take time off from family obligations to match theory with practice.

1 The Court as offspring of centuries of peace with justice

1. JUSTICE MAY BE BRED IN THE BONES OF HUMANKIND BUT PROGRESS IS SLOW

The International Criminal Court, which came into operation on July 1, 2002, is the offspring of more than five centuries of humanity struggling to link peace with justice. For that reason it is absurd to pit the Court at the centre of a peace versus justice dilemma.

This first chapter will discuss how the lessons of history demonstrate the link between the fight against impunity and the prevention of the most serious international crimes. However, as Chapter 4 will discuss, the concept of prevention discussed in this work does not involve the traditional concepts of specific and general deterrence, but offers up the alternative view of prevention as the creation of a global moral and legal culture that promotes the outlawing of impunity and the accordance of pariah status for those who fall outside this evolving global culture.

Even before the modern era of nations and positive domestic and international laws, we have seen in the slow progress of humankind a persistent view that even in the bloodlust of war, there had to be limits to what constitutes a legitimate war and what men in arms could do to both combatants and those not in the furor of battle. The concepts of justice in or for war termed '*ius in bello*' and '*ius ad bello*' can be traced to ancient Greek and Roman philosophers and to the teachings in the Old Testament and transformed again in the natural law teachings of Saint Augustine regarding what constitutes a '*just war*'.[1]

In this evolution of principles of just war or justice in war, through the pre-modern era, the progress of human justice seemed to demand that those who engaged in the violence of war or armed conflict had to observe evolving common standards of humanity, if any semblance of a return to peace was to endure after the violent combat ended and in the interests of a sustainable peace. One of the earliest recorded trials and punishments in Europe meted out by a local tribunal constituted by representatives of the Holy Roman Empire for crimes committed during the occupation of the town of Breisach was that of Peter von Hagenbach who was

executed on conviction of war crimes in 1474. The trial and punishment, while significant, may also have been used to cover the responsibility of von Hagenbach's superior, the Duke of Burgundy, whose orders he was following.

In the context of more recent history, it should not be forgotten that the International Criminal Court (ICC) is a creation of international law, which itself is a product of the desire of humanity to link the desire for peace and security with universal concepts of justice.

One of the earliest architects of international law, Hugo Grotius, in the early part of the 17th Century linked the right of states to use violence only for defensive purposes and the notion that those who waged war with illegal or wrongful intent would have to be held accountable for their actions. At the earliest stages of the formulation of international law, Grotius was already focusing on the need for justice to accompany the ending of war:[2]

> Furthermore, according to the principles which in general terms we have elsewhere set forth, those persons are bound to make restitution who have brought about the war, either by the exercise of their power, or through their advice. Their accountability concerns all those things, of course, which ordinarily follow in the train of war; and even unusual things, if they have ordered or advised any such thing, or have failed to prevent it when they might have done so.
>
> Thus also generals are responsible for the things which have been done while they were in command; and all the soldiers that have participated in some common act, as the burning of a city, are responsible for the total damage. In the case of separate acts each is responsible for the loss of which he was the sole cause, or at any rate, was one of the causes. . .

The driving force of a major part of international law right up to the early part of the 20th Century was to develop processes such as bilateral and multilateral treaty negotiations and organizations to limit the illegal use of force by states and ensure that judicial mechanisms could settle disputes that could trigger wars and other violent conflicts. It is not an accident of history that the scene of much of these developments seems to end up at the European countries of the Netherlands and Switzerland, and in particular the cities of The Hague, the present site of the International Criminal Court, and Geneva, the city that gives its name to the laws of war.

The Swiss architects of the modern laws on war crimes and crimes against humanity, Gustave Moynier and Henri Dunant, saw the horrifying impact of battles on the dying and the wounded during the Napoleonic wars, especially at the battle of Solferino. They pressed for rules to limit the

brutality of the battlefield and for basic rules of humanity for the wounded and the non-combatants. After founding what eventually became the International Committee of the Red Cross, the two Swiss humanitarians were successful in getting the Swiss government to convene negotiations on the laws of war that would eventually become the Geneva Conventions of 1864. The purposes of these earliest international rules that put limits on what was permissible in situations of war included the humane treatment of sick, wounded or out-of-combat soldiers and allowing unimpeded access to medical aid provided by neutral organizations such as the Red Cross. Moynier sought to have a convention drafted for an international criminal court to prosecute breaches of the Geneva Conventions, but was not successful. That would have to wait for another century and more events to happen to trigger the establishment of a permanent court.[3]

In the 19th Century, President Abraham Lincoln commissioned international law jurist Francis Lieber to draft the military code for the Union Army regarding rules of war concerning prisoners of war, the wounded and civilians under occupation.[4] If ever there was a leader who realized that justice both *ad bello* and *in bello* was required to promote a sustainable peace after the conflict 'with malice to none and charity for all' it was President Lincoln.

The Hague Conventions of 1899 and 1907 were a turning point in the move to the establishment of the positive laws of armed conflict in the form of an international treaty. The Conventions drew and expanded on the earlier Geneva Conventions and the Lieber Code to create the first substantial body of the laws of war and armed conflict. Acknowledging the growing plight of civilians in such conflicts, the Hague Conventions established some of the first major provisions dealing with the protection of civilians in regulations annexed to the Conventions, while stating in the preamble 'the inhabitants and the belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'. This famous statement in the preamble to the Hague Conventions, known as the Martens Clause, recognizes the possibility of a common human understanding of what is required by the public conscience of nations during armed conflicts,[5] the satisfaction of which is a *sine qua non* of any notion of sustainable peace in the aftermath of war.

The major weakness of the Hague Conventions, however, was that they imposed obligations only on states and did not pretend to extend to imposing criminal accountabilities on individual transgressors of the provisions of the Conventions. However, the Hague Conventions did establish in the modern era that a body of international law called humanitarian

adopted on August 8, 1945. The Agreement and Charter for the Tribunal established the criminal liability of those charged before the Nuremberg Trials. The details of such criminal liability would foreshadow the definition of serious international crimes that would be listed as being within the jurisdiction of the future ICC: conspiracy to commit crimes against peace; planning, initiating and waging wars of aggression; war crimes and crimes against humanity. Again, foreshadowing the *modus operandi* of the ICC, the focus of the indictments was not aimed at lower level German military personnel, but at twenty-four individuals who gave birth to the title of their trial, namely the Trial of the Major War Criminals. After a long and historic hearing that lasted almost a year, the Tribunal handed down twelve death sentences and convicted nineteen other major Nazi leaders. The trials of thousands of Nazi officials of lesser rank continued in Germany and elsewhere, reaching their zenith in the abduction, trial and conviction of Adolf Eichmann in Israel on December 11, 1961.

While the Nuremberg trials were criticized for being a form of victor's retribution or vengeance, the demands and foundations of justice recognized by human civilization over the centuries required that there be an accounting for the atrocities committed by the major Nazi leaders. Indeed, the particular criminal liability of crimes against humanity was a recognition that past criminal atrocities, such as the Armenian genocide, could not go unpunished if future similar actions were to be deterred. The fact that the impunity of those who had orchestrated the Armenian genocide was used by Adolf Hitler to justify the Holocaust is conclusive proof of this requirement for an accounting for crimes against humanity.

The Nuremberg Trials were followed widely in Germany and throughout the world. While Germans might have been more comfortable with a German court trying the top leadership of the National Socialist regime, the imperatives of a sustainable peace in Europe required that the population face the horror that was committed in their name and for them to willingly cooperate in the post-war effort to purge the country of the Nazi philosophy that had led to the most gruesome atrocities that humanity had ever experienced.

One basis of criminal liability was still waiting to be established, namely the crime of genocide. Although the Nuremberg prosecutor used the term 'genocide' to charge the major Nazi war criminals, this ground of criminal liability was yet to be established. The origins of that criminal liability had been proposed since the 1930s with the tireless work of Polish lawyer Rafael Lemkin. He was so appalled by the horror of the Armenian genocide, the Iraq Arameans in the 1930s and finally the Second World War Holocaust, that he began a life's work to establish the crime of attempts to wipe out in whole or in part an entire group of people, which he termed

genocide. His campaign was finally successful when, on December 9, 1948, the U.N. General Assembly passed the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention entered into force on January 12, 1951. The historic definition of genocide in Article II of the Genocide Convention would reverberate down the years and we find the same definition substantially unchanged in Article 6 of the Rome Statute of the ICC.

While the Genocide Convention called for the establishment of a permanent international crime of genocide, it lacked the essential feature of enforcement through an independent tribunal which could attach criminal liability on individuals in the manner that future ad hoc international criminal tribunals and the ICC could accomplish. Instead the Genocide Convention provided only that prosecution of this most serious of international crimes would proceed either at the national or the international level before a penal tribunal the jurisdiction of which Contracting Parties had agreed to. There had been a proposal to establish a Court to hear allegations of genocide in earlier drafts of the Genocide Convention but, as with those who opposed the creation of the ICC, some of the members of the international community argued that the time was not ripe for such an institution.

2. THE CAMPAIGN FOR JUSTICE, BEFORE AND AFTER THE COLD WAR

The fleshing out of the details of any such future tribunal would be left to the International Law Commission which had also just been established. In the 1950s both the International Law Commission and the U.N. General Assembly were the prime movers on the establishment of draft codes of international crimes and started work on the drafting of the statute of an international criminal court. However, the Cold War placed severe ideological barriers to progress on both fronts and the impacts of the condoning of such international crimes were felt by the peoples of East Timor and many other fronts where the Cold War raged.

The history of the Cold War is replete with the evidence that justice is not a dispensable option to a sustainable peace either in a country, a region or indeed for the entire international community.

From the genocides in Cambodia and East Timor to the slaughter of civilians in Indonesia, South and Central America and in the Soviet Union, the prevalence of impunity for serious international crimes extended around the world and to both sides of the Cold War. The failure of the U.N. Security Council and its permanent members to either prevent

or stop an unfolding of genocides and mass slaughter, such as the one that killed up to a third of the population in East Timor, would register in the minds of many of the drafters and supporters of the ICC Statute in Rome in 1999.

One casualty of the Cold War was the efforts by the ILC to draft and establish a permanent international criminal court. The ILC had submitted drafts of the statute of such a court along with a draft code of offenses. However, the U.N. and its member states had moved the international justice agenda to the side in the face of opposing ideological camps.[12]

With the end of the Cold War, it is an irony of international justice history that it was the fear of the exploding global narcotics trafficking, rather than exploding impunity, that triggered the move by the international community and the international human rights movement to establish the ICC. In 1989, the two Caribbean states of Trinidad and Tobago were successful in getting the U.N. General Assembly to pass a resolution requesting that the ILC take up again the task of considering the establishment of an international criminal court that could deal with drug trafficking along with its ongoing work on a draft code of international crimes.

By 1994 the ILC had completed the task of developing the main procedural and organizational structure of the court, but would not complete the task of drafting the 'Code of Crimes Against Peace and Security of Mankind' until 1996. These documents would become the foundations of both the ad hoc Tribunals for Yugoslavia and Rwanda and later for the ICC.

The history and legacy of the ad hoc Tribunals for Yugoslavia are in many respects the emergence of both a local and a global thirst for justice in the aftermath of the demise of the Cold War and the guilt arising out of the failure of the United Nations and the major powers in the Security Council to live up to the promise of 'never again'.

Yugoslavia, a country of historically warring ethnic groups, was one of the first casualties of the failure of the U.S. and other major powers to establish a new global order of peace and security with the fall of the Soviet Union. With the death of Marshal Tito, aspiring Serbian leaders would ignore the basic standards of humanity and use the disintegration of the multiethnic state to gain territorial and political power at any cost.

In the immediate aftermath of the declaration of independence by Bosnia in March of 1992, President Slobodan Milošević of the Federal Republic of Yugoslavia (FRY) and his army together with the Bosnian Serbs, led by the soon to be indicted war criminals Radovan Karadžić and General Ratko Mladić, initiated a savagery unmatched since World War II. The atrocities reached their zenith in the siege of Sarajevo and the massacre at Srbrenica that shocked the conscience of the world. but saw little

action from the U.N. Security Council or the assembled economic and military might of Europe.

The United Nations Commission of Experts' report on the war crimes in Bosnia revealed the horrific details of what would soon be judged in individual cases to be war crimes, crimes against humanity and, as regards Milošević, the ultimate crime of genocide. He would die before judgment was passed on his crimes.[13] Over 200,000 people would perish before the Dayton Peace Accord ended the war.

The U.N. Commission of Experts on Bosnia warned that preventing such crimes is as much a moral cause as a military cause which demands that the international community ensure such horrors do not reoccur and strongly proposed the establishment of an international tribunal to hold the main perpetrators of these crimes accountable:[14]

> The United Nations experience in Bosnia was one of the most difficult and painful in our history. It is with the deepest regret and remorse that we have reviewed our own actions and the decisions in the face of the assault on Srebrenica. Through error, misjudgment and an inability to recognize the scope of evil confronting us, we failed to do our part to help save the people of Srebrenica from the Serb campaign of mass murder. . .. Srebrenica crystallized a truth understood only too late by the United Nations and the world at large: that Bosnia was as much a moral cause as a military conflict. The tragedy of Srebrenica will haunt our history forever.
>
> In the end the only meaningful and lasting amends we can make to the citizens of Bosnia and Herzegovina who put their faith in the international community is to do our utmost not to allow such horrors to recur. When the international community makes a solemn promise to safeguard and protect innocent civilians from massacre, then it must be willing to back its promise with the necessary means.

The U.N. Secretary General, Kofi Annan, agreed with the Commission Report, and in November of 1999 apologized for the U.N.'s failing in Bosnia. The Security Council decided on February 22, 1993, to agree with the recommendations of the Commission and called for the establishment of a criminal tribunal to prosecute 'persons responsible for the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'.[15]

In a subsequent Security Council Resolution, the Statute of the International Tribunal for the Former Yugoslavia (ICTY) was adopted on May 8, 1993.[16] The Statute of the ICTY was to apply the customary international law rules of humanitarian law and its territorial jurisdiction would be limited to the former Yugoslavia. The Court could prosecute for international crimes that started in 1991. There was an unspoken

consensus in the Security Council and the international community that without the main organizers and perpetrators of the conflict in the disintegrating Yugoslavia being held to account, the prospect for an enduring stability in the Balkans would be greatly diminished.

Sadly the consensus to hold to account those responsible for the gravest of international crimes only after the international community had so abjectly failed to stop it in the first place would be repeated in Rwanda. The report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda produced similar views stating categorically that 'The United Nations failed the people of Rwanda during the genocide in 1994'.[17]

The report urged far more effective genocide prevention strategies, which included the obligation under the Genocide Convention to 'prevent and punish' genocide. Given these two independent reports, it is hard to fathom those who argue that in the interests of peace, whether temporary or not, those who perpetrate the worst crimes known to humanity should not be held accountable.

Rwanda itself requested the Security Council to establish the second ad hoc international criminal tribunal for the genocide by the previous Hutu government and its militias. In November of 1994, the Security Council acceded to the request and created the Rwanda Tribunal for the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and neighboring countries in 1994.[18]

The legacy of both Tribunals, but more substantially the ICTY, is of very progressive approaches to the interpretation of international humanitarian law and human rights law that have transcended the principles from the Nuremberg Trials. The most important of the progressive interpretations of the law by the ICTY on the gravest of international crimes by both Tribunals is that crimes against humanity can be committed outside international conflicts, that war crimes can be committed during internal conflicts and that those who have organized, perpetrated and aided and abetted these crimes can and will be held accountable. While some have argued that the tribunals appeared to be motivated by the guilt of the international community for failing to stop the mass slaughter in the Balkans and Rwanda, both were regarded as essential to the restoration of peace and security.

The U.N. Security Council in setting up the ICTY stated that, even with the ongoing crimes constituting a threat to international peace and security, the Tribunal would assist in putting an end to such criminality and 'contribute to the restoration and maintenance of peace and security'.[19]

The ICTY itself made the link between peace and justice in the following manner:[20]

> The key objective of the ICTY is to try those individuals most responsible for appalling acts such as murder, torture, rape, enslavement, destruction of property and other crimes listed in the Tribunal's Statute. By bringing perpetrators to trial, the ICTY aims to deter future crimes and render justice to thousands of victims and their families, thus contributing to a lasting peace in the former Yugoslavia.

Likewise, the Security Council in establishing the Rwanda Tribunal asserted that prosecuting those responsible for serious violations of international humanitarian law would 'contribute to the process of national reconciliation'.[21] The official site of the Rwanda Tribunal also claimed that the Tribunal would 'contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region'.[22]

The Security Council linkage of the violation of humanitarian law norms with a threat to the peace to establish the Tribunals under its powerful Chapter VII powers was also laying the ground for further global initiatives to establish more effective international responses to such violations.[23] That more effective global response would come in the determination by a majority of the world's states to establish a permanent international criminal court in the summer of 1998.

However, it was clear that the two Tribunals were designed only for designated territories and specific allegations of gross impunity, and could not be a substitute for a permanent criminal court given ongoing allegations of gross impunity around the world. Some of the experts who have studied the establishment and legacy of the ICTY and ICTR are convinced that the ICC would not have been created without the two previous ad hoc Tribunals. In particular there is a claim that an extraordinary transformation in world opinion occurred largely as a result of the ICTY's operations.[24] There is also a claim that the ICC has learned from both the successes and the failures of the ad hoc Tribunals in terms of both procedure and substantive legal issues, including the definition of the crimes codified in the Rome Statute of the ICC.[25]

The legacy of the ICTY and ICTR ad hoc Tribunals also provides a history lesson. Prosecutions of those most responsible for serious crimes can lead to their marginalization, which itself could be a critical factor in peace negotiations and ultimate stability in the situation of conflict. Human Rights Watch has given a compelling account of how the indictment of Radovan Karadžić by the ICTY in the context of the Bosnian conflict led to his marginalization and prevented him from being a participant (and perhaps a spoiler) in the Dayton peace talks that ended the Bosnian conflict.[26]

Likewise, the arrest warrant for Charles Taylor, the sitting Liberian President, at the start of the peace talks was also viewed as being conducive

to the negotiations to end the conflict by 'delegitimizing' Taylor domestically and internationally. This may well have led to forcing him to leave office and the country a few months later.[27]

Perhaps the lasting legacy of the ICTY and the ICTR, like the Nuremberg trials, is the creation of a detailed historical record through the evidence presented at fair and neutral trials. As in the case of the Nuremberg trials, the evidence of the atrocities committed in the former Yugoslavia and Rwanda can act as a bulwark against revisionism used by future unscrupulous leaders who deny past serious crimes and assert imagined humiliations to revive inter-communal conflict and human rights abuses.[28]

The success, partial or otherwise, of the ICTY and the ICTR have spawned other non-permanent hybrid international tribunals that seek justice with the peace that was established, sometimes long after the conflict has ended.

The Special Court for Sierra Leone was a hybrid tribunal set up jointly by the Government of the country and the U.N. under Security Council Resolution 1315. It was given a mandate to prosecute those with the greatest responsibility for serious violations, not only of international humanitarian law, but also of the law of Sierra Leone committed by various rebels and the army in the territory of the country since November 30, 1996.

As with other conflict situations in Africa, the civilian population of Sierra Leone suffered some of the most savage atrocities that humanity has witnessed during the eleven-year civil war that started in 1991, much of it driven by the push to control the highly profitable trade in what has come to be known as 'blood diamonds'. Thousands of civilians were abducted and used as slave labour in the mining of diamonds, with accompanying widespread mutilation of limbs as an instrument of terror. Thousands more were killed in militia attacks, some burned alive in their homes after extensive looting of civilian property. There was also widespread enslavement of children under 15 as child soldiers and approximately 275,000 women and girls were victims of mass and systemic sexual violence and forced to become 'bush wives' of the militia members.

The Trial and Appeals Chamber judges of the Sierra Leone Special Court are jointly appointed by the government of Sierra Leone and the U.N., with the international judges forming the majority in both chambers. While this hybrid tribunal has attempted to integrate the country's judiciary into the work of the tribunal, it is still regarded in international law as an international court independent from the domestic legal system of Sierra Leone. This tribunal has moved with relative speed and managed to prosecute two cases successfully before it completed its mandate. One case, completed on June 20, 2007, resulted in three accused from the Armed Forces Revolutionary Council receiving forty-five to fifty year

sentences. The other case, completed on August 2, 2007, involved two accused individuals from the Civil Defense Forces receiving sentences of fifteen and twenty years. The Court also had to deal with the Charles Taylor prosecution, the first former African Head of State to be indicted for serious violations of the relevant laws described above. For security reasons, his prosecution was moved to The Hague although still under the jurisdiction of the Special Court for Sierra Leone. Although the hearing of evidence started late on January 7, 2008, the case for the prosecution has ended already after hearing the evidence of ninety-one witnesses. The remaining prosecution case concerns a fugitive, Johnny Paul Koroma, but the Special Court has not closed the possibility of pursuing other individuals connected with the commercial links to the blood diamonds that was the catalyst for the atrocities committed in the country.

The other ad hoc hybrid tribunals set up by the Government of Cambodia and the U.N. and the East Timor mixed panels have so far proved much less effective. As regards the Cambodia tribunal, the refusal of the Cambodian government and especially its authoritarian Prime Minister, Hun Sen, with his own checkered past, to accept a truly independent international tribunal has led to a weak hybrid tribunal composed of a tribunal under Cambodian law controlled to a large extent by Cambodian judges and prosecutors, with international judges and prosecutors attempting to ensure international credibility. The Cambodian tribunal is part of special chambers of the Cambodian court system called the Extraordinary Chambers in the Courts of Cambodia. The Cambodian National Assembly approved the law establishing the Extraordinary Chambers on January 2, 2001. The subject matter jurisdiction covers genocide, crimes against humanity, grave breaches of the Geneva Conventions and various violations of the 1954 Hague Convention and the 1961 Vienna Convention on Diplomatic Relations. However homicide, torture and religious persecution are to be prosecuted under Cambodian law. The prosecutions are limited to the most senior leaders of the Democratic Kampuchea who are most responsible for the genocide and atrocities committed during the 1975–79 period.[29] After thirty years, no one has been convicted of some of the worst atrocities since the Holocaust in World War II because of the decades of attempts to block accountability for the crimes committed by both China and the United States.

The Tribunal began on February 17, 2009, its first trial being that of Kaing Gech Eav (Duch) one of the Khmer Rouge leaders most responsible for the deaths of up to two million people. Duch, the commander of the infamous torture and execution Centre S21 in Phnom Penh, is one of five former Khmer Rouge leaders currently facing prosecution before the Extraordinary Chambers. However, serious allegations of political

interference, low professional standards and corruption have dogged the Court since its establishment in 2001.[30] The case for a permanent international tribunal free of political interference, such as the ICC, is best made by the challenges facing the Cambodian hybrid tribunal.

The East Timor situation is just as troubling as that of Cambodia. After the killing and destruction by Indonesian-led forces and militias that followed the U.N. sponsored referendum in 1999, the U.N. Transitional Administration of East Timor (UNTAET) established in 2000 special mixed international/East Timorese judicial panels within the Dili District Court to prosecute those who allegedly committed serious criminal offenses that constituted also violations of international humanitarian law. There is great concern about the viability and effectiveness of these panels, even though approximately twenty-one individuals have been convicted with sentences ranging from four to thirty-four years' imprisonment. The criticism includes the postponement of scheduled hearings due to the unavailability of the judges and some appeals not being heard because the judges have not been appointed. Given the failings of this particular experiment in hybrid tribunals, many civil society groups are calling for a U.N. sponsored independent criminal tribunal.[31]

The demands of justice require not only true independence of any international or hybrid criminal tribunal to prosecute the most serious of international crimes, but also the external guarantees that ensure the tribunal can meet its mandate of ensuring that such crimes do not go unpunished and to act as a catalyst for peace in the future.

All these ad hoc international criminal tribunals will end. The ICTY and the ICTR are scheduled to wind up all of their judicial activities by 2010, although circumstances may allow some trials to continue until 2011. None of the others are permanent. When they all end there will be a vacuum which could only be filled by a permanent international criminal tribunal like the ICC or a new mandate from the regional human rights courts that would focus primarily on the most serious international crimes listed in the Rome Statute. If the ICC did not exist it would have to be invented as it will likely be the 'only game in town'.

3. THE BIRTH OF THE INTERNATIONAL CRIMINAL COURT

While the ad hoc Tribunals were being established and started operations, the U.N. General Assembly renewed its work to establish a permanent criminal tribunal that would not be limited to a defined territory. An Ad Hoc Committee of the Assembly would start with the draft statute of such

a permanent court produced by the International Law Commission (ILC). However, the political nature of the Ad Hoc Committee soon manifested itself and some members even questioned the viability of such a permanent court. As the work went on, it became clear that the ILC's desire to have a permanent court that would have primacy over national courts in the case of grave international crimes would give way to the Ad Hoc Committee's desire to give primacy to national courts to prosecute such crimes, and that a permanent court would only have 'complementarity' jurisdiction if the national courts were unable or unwilling to genuinely prosecute such crimes.[32] This would become a crucial provision of the ICC that should be a major counter argument to those who would suggest that the ICC promotes a western and colonial approach to international humanitarian law and human rights.

In a similar fashion, and with a similar lasting legacy, the Ad Hoc Committee insisted that the permanent court's jurisdiction would be limited by a detailed statute that would define the crimes that would be the subject of prosecution by the ICC. In addition the Committee insisted on a listing of general principles of law and other substantive and procedural parameters that the ICC would have to operate within. The fear and uncertainty about too much judicial discretion was a motivating force for this U.N. Committee.

In contrast to the much less defined parameters of the ad hoc Tribunals for the FRY and Rwanda, these detailed provisions, insisted on by the Ad Hoc Committee and later agreed upon at the Rome Conference that established the ICC, would have, in the view of this author, the effect of 'constitutionalizing' the law relating to the most grave of international crimes together with the applicable general principles of law, including human rights norms. Following the bureaucratic nature of the U.N., the General Assembly decided in 1996 to submit the work of the Ad Hoc Committee to lengthy sessions of a 'Preparatory Committee' that involved member states, NGOs and International Organizations in multi-week sessions that ultimately produced a final draft called the 'Zutphen draft' to the Rome Diplomatic Conference in 1998.[33]

What took place at the Diplomatic Conference in Rome that started on June 15, 1998, is a testament to the success of the global human rights and humanitarian movements linking up with a progressive group of nations called the 'like-minded caucus' to produce a milestone in human progress, namely the establishment of the ICC. However, among the 160 state delegations and the hundreds of NGOs at the Rome Conference, an historic battle was shaping up between those states that wanted state sovereignty to trump the imperatives of fighting impunity, and those that wanted the world to see a new stage in the development of the rule of law in global affairs.

The former group, led by the United States with strong support by China, India and Israel, wanted the permanent court to be subject to a Security Council veto on prosecutions. In addition these countries wanted the elimination of the power of an independent prosecutor of the new court being able to start an investigation on his own initiative called the '*proprio motu*' jurisdiction. The like-minded caucus of states led by Canada, backed by an army of civil society groups and NGOs, refused to concede on these issues. Special mention must be made of the very powerful and effective lobbying strategies of the Coalition for the International Criminal Court (CICC) which is led and convened by Executive Director William Pace. Presently comprising approximately 2,500 organizations around the world, including the leading human rights organizations such as Amnesty International and Human Rights Watch, the CICC since 1955 has been the main force of global civil society in lobbying for the establishment of the Court. With the establishment of the Rome Statute, the CICC has worked tirelessly to strengthen international cooperation with the Court and ensure its effectiveness and independence, while promoting stronger national laws that advance the complementarity nature of the Rome Statute. The CICC has been involved in every stage of the development of the Court from working in the preparatory Committee leading to the Rome Statute to active participation in the annual Assembly of States Parties meetings.

The like-minded group of states led by Canada together with their civil society partners won the day, in no small measure due to the great diplomatic skill of Canadian diplomat Phillipe Kirsch who was elected president of the Rome Conference's Committee of the Whole. His Committee had the daunting task of dealing with and brokering solutions regarding the most contentious issues. On July 17, 1998, the Statute of the International Criminal Court was adopted at the Rome Conference with 120 states voting in favour, twenty-one abstentions and without a formal roll call; only the United States, China and Israel declared that they were opposed to the adoption of the ICC Statute. The Rome Conference also called upon the U.N. General Assembly to initiate another Preparatory Commission to draft the Elements of Crime and the Rules of Procedure and Evidence which would give further definitions to the crimes listed in the ICC Statute.

Negotiations at the Rome Conference had tried hard to get the U.S. on side. Before the Rome Conference, the Clinton Administration supported a permanent international criminal court if the right protections for its military personnel were built into the Statute of the court. Indeed the U.S. had been the catalyst for the establishment of the ad hoc Tribunals for the FRY and Rwanda. Some of the leading U.S. experts had convincingly

argued that the lessons learned from these Tribunals, despite their lack of resources, had shown how crucial criminal indictments and arrest warrants could combat impunity by isolating individuals responsible for these crimes and strengthening the hands of domestic rivals and trigger international political will to take aggressive action to bring about the end of the conflict.[34] Such views had been confirmed by the removal of President Slobodan Milošević, the leader of the FRY, who had triggered the mass slaughter in the Balkans on June 28, 2001, to stand trial for genocide, crimes against humanity and war crimes to the ICTY in The Hague. This was an historic first time that a former Head of State had been brought before an international criminal tribunal.

There is irony in the fact that the U.S. had pressured strongly for an ICC that would be controlled by the U.N. Security Council including eliminating the power of an independent prosecutor to start an investigation *proprio motu*. The U.N. Security Council was the same body that the U.S. ignored in the decision to take military action in Kosovo to end the slaughter there. To dispel criticisms of its contrary positions, the U.S. justified its position at the Rome Conference by asserting that, as the lone superpower, it would have the greatest burden of intervening in humanitarian crises and this would potentially open its military personnel to investigation by an independent prosecutor of the ICC and the jurisdiction of the Court.[35] The like-minded caucus of states and the NGOs that led the opposition to this U.S. position has suggested that the U.S. position was dictated more by the U.S. Pentagon rather than the State Department and arose from the mistrust of the U.S. military of the decision of the International Court of Justice (ICJ) in *Nicaragua v. United States*[36] which resulted in the withdrawal of compulsory jurisdiction of the ICJ.

When the actual provisions of the ICC Statute are examined, it is clear that the U.S. had little to be concerned about. Some would argue that most of the Pentagon's concerns had been addressed in the detailed provisions of the Statute. This included the fundamental principle of complementarity which required the primacy of national courts' jurisdiction over the crimes listed in the Statute. Only if the U.S. courts were unable or unwilling to prosecute any alleged offenses listed in the ICC Statute would the jurisdiction of the Court be triggered. Likewise, the Rome Conference had decided to curtail the ability of the Chief Prosecutor to overreach his *proprio motu* powers of investigation by imposing the supervision of the Trial Chamber of the Court over these independent powers of the Chief Prosecutor. The omission of the U.S. from the majority of states supporting the introduction of a global order against impunity was a sad historic event. This was the same superpower which had shown the greatest leadership in the Nuremberg and Tokyo War Crimes Tribunals, the Universal

Declaration of Human Rights and the establishment of the two ad hoc Tribunals for the FRY and Rwanda. But the challenge for the ICC was just beginning with the election of George W. Bush and his Administration who would be a ferocious opponent of the newly established ICC.[37]

The Statute came into force on July 1, 2002 when it received its sixtieth ratification. The pace of ratifications was substantially faster than had been expected. This result was even more significant than at first may be apparent. While even states, including the U.S. and Israel, that had opposed the Statute signed on just before the deadline of December 31, 2000, those wishing to ratify after signing had to take very significant legislative and administrative steps in their own jurisdictions to comply with the obligations of being parties to the ICC Statute.

In a relatively very short space of time, many of these states passed legislation to ensure their own criminal laws were compatible with the ICC Statute, especially as regards the crimes of genocide, crimes against humanity and war crimes, and to allow their courts the ability to exercise universal jurisdiction over these crimes. Likewise, the ratifying states also had to provide for the necessary legislative and administrative mechanisms for cooperation with the ICC over the investigation, arrest and transfer of alleged criminals targeted by the Chief Prosecutor of the ICC. As of June 1, 2008, 108 states, a majority of states in the world, had signed and ratified the Rome Statute of the ICC.

These rapid legislative and administrative changes in many of the 110 states that have presently ratified the Statute could by themselves foster sustainable peace in their respective territories without the Court ever having started an investigation in any of these countries. However, there is great concern that of the present 110 States Parties, only thirty-nine have implemented the legislation necessary to implement the Rome Statute.

Greater numbers of States Parties implementing the Rome Statute will be needed to cement the argument that the ICC is an institution that promotes peace with justice as opposed to justice against peace. As of March 1, 2010, 110 states, a majority of the world had signed and ratified the Rome Statue of the ICC.

The Assembly of States Parties is therefore a type of both legislative and oversight body of the ICC. Made up of all the ratifying states, the Assembly sessions are also open to NGOs and observer states. In addition to electing the above key positions in the Court and approving the budget of the ICC, the Assembly also provides oversight and guidance to the administration of the Court. A growing controversial role for the Assembly is also to consider referrals from the Court regarding non-cooperation by states. This role may well become the greatest challenge for the Assembly as the Court begins to urge States Parties to do more in ensuring that the arrest

warrants issued by the Court are executed, especially as regards the arrest warrant issued against the President of Sudan, Omar al-Bashir.

In the same period in which the States Parties were building the Court's basic rules and infrastructure, the U.S. Bush Administration was focused on undermining the Court. The Bush Administration first indicated on May 6, 2002 that it would not become a party to the Rome Statute, thereby 'unsigning' from the majority recognition of the need for a global rule of law against gross impunity for genocide, crimes against humanity and war crimes. This unprecedented unsigning of its international legal obligations was followed by the Bush Administration pressuring states receiving military and financial aid to sign bilateral agreements that would make US military officials and civilians immune from being subject to the jurisdiction of the ICC. The Bush Administration officials were proceeding under the view that Article 98(2) of the Rome Statute permitted states to impede surrender of an accused if it would require a violation of their legal obligations to another State.

Just over 100 states succumbed to such geopolitical blackmail by the Bush Administration by 2006, while fifty-four countries stood on their principles in the same period and refused to bend to the ideological campaign against the ICC by the Bush Administration. Some of the poorest countries in Africa, including Benin, Mali, Tanzania and Losotho, lost critically needed foreign aid funds for refusing to go along with the demand for Article 98(2) agreements.

Only a handful of the ratifying states succumbed to this pressure, with key U.S. allies such as Canada, Mexico and most Western European states leading the opposition to this attack on the ICC. The petulant attempts by the Bush Administration continued with threats to veto U.N. Security Council resolutions on peacekeeping if the jurisdiction of the ICC over such operations was not ousted. The attempts to undermine the ICC reached absurd heights when former President Bush on August 2, 2002 signed the American Service Members' Protection Act which was nicknamed the 'Hague Invasion Act'. This astonishing work of former Bush officials led by the senior State Department official and later U.S. Ambassador to the U.N., John Bolton, prohibited U.S. government agencies from cooperating with the ICC and included the authorization of the use of force to free any American national who was detained or imprisoned by the ICC.[38]

The fact that large numbers of the world's states were able to resist the attempts by the former Bush Administration to undermine the newly born ICC is a testament to the will of humanity not to retreat in the evolution of a global rule of law against gross impunity. Leading experts have asserted that the establishment of the Court is one of the most important developments in international law. It could contribute not only to the restoration

of peace and reconciliation in specific situations but, in the words of Professor William Schabas, contributes to the evolution of a more peaceful global society:[39]

> The Influence of the Rome Statute will extend deep into domestic criminal law, enriching the jurisprudence of national courts and challenging prosecutors and judges to display greater zeal in the repression of serious violations of human rights. National courts have shown, in recent years, a growing enthusiasm for the use of international law materials in the application of their own laws. A phenomenon of judicial globalization is afoot. The Statute itself, and eventually the case law of the International Criminal Court, will no doubt contribute in this area.

4. THE STATUTE OF THE COURT; BALANCING NATIONAL SOVEREIGNTY, PEACE AND JUSTICE

The desire to balance national sovereignty with justice led the drafters of the ICC Statute at Rome to impose a much more detailed set of provisions on the crimes within the jurisdiction of the court and the rules of evidence and procedure in comparison to the ad hoc Tribunals for Yugoslavia and Rwanda. This was partly a reaction to criticism that the ad hoc Tribunals had too much liberty to interpret and even modify the provisions relating to jurisdiction, procedure and evidence under which they operated. The imposition of such detailed rules upon the ICC was the subject of much heated discussion at the Rome Diplomatic Conference.[40]

The provision in the ICC Statute that allows states almost complete leeway to pursue national reconciliation and peace through their own investigative, judicial and other similar institutions is the principle of complementarity.

The very definition of this concept can be found in the preamble to the Rome Statute. That preamble states that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. This concept that the ICC does NOT take supremacy to national courts is repeated in the very first Article of the Rome Statute. So while the preamble to the Rome Statute speaks with such eloquence about the common desire of humankind not to let the most serious of crimes go unpunished and that such crimes threaten the peace, security and wellbeing of the world, it also accepts that territorial integrity or political independence is a fundamental part of the purposes and principles of the United Nations. These principles must be balanced against the fight against impunity for the most serious crimes that in the 20th Century

have shocked the conscience of humanity. What the preamble is stating in a circuitous fashion is that without a permanent institution dedicated to justice against impunity the chances of a sustainable peace without mass atrocities as witnessed in the last century is greatly diminished.

Despite this primacy of national sovereignty and courts over the jurisdiction of the ICC, the U.S. negotiators at the Rome Conference were not convinced that their military personnel could still avoid being hauled before the ICC. Such a fear would almost be a fantastical admission that the much lauded American justice system is not to be regarded as legitimate. This is because the ICC statute balances national sovereignty and justice carefully by stating in Article 17 that the Court can still have jurisdiction where the state is unwilling or unable genuinely to carry out its own investigation or prosecution. This safeguard for justice ensures that impunity cannot hide behind illusory or non-existent national judicial institutions.

National sovereignty and the ability to conduct genuine domestic investigative and judicial proceedings in civil conflicts are further reinforced by the detailed provisions on the ICC's jurisdiction over subject matter, territory and persons, the parameters around the independence of the Chief Prosecutor, the oversight of the Pre-Trial Chamber and the role of the U.N. Security Council.

Turning to the jurisdiction of the Court over subject matter, the ICC Statute in Article 5 also balances national sovereignty over justice by limiting the Court's jurisdiction to only the most serious crimes of concern to the international community as a whole. These are of such grave character that in many cases peace efforts have either failed or never been undertaken because the perpetrators have initiated the crimes as a sustained strategy to obtain or keep power. The crimes listed in Article 5 are (a) The crime of genocide, (b) Crimes against humanity, (c) War Crimes; and (d) the as yet undefined crime of aggression. The first three crimes are defined further in great detail in Articles 6 to 8 of the Statute and further elaborated in the Elements of Crime as drafted by the Assembly of States Parties. The Rome Conference resolved the contentious issue of the crime of aggression, demanded by the nations which had been colonized in the past, by leaving it to the Assembly of States Parties to define it, starting within seven years of the establishment of the Court.

What we see in the provisions of the ICC Statute is the constitutionalization of the whole body of international criminal law that by itself also incorporates the body of customary and treaty based humanitarian law and international human rights law. While the ad hoc Tribunals had also prosecuted and interpreted customary international law on crimes against humanity, the ICC Statute consolidated over a century's worth