ON 11 APRIL 2002, TEN STATES DEPOSITED THEIR INSTRUMENTS OF ratification of the International Criminal Court (ICC) at the United Nations (UN), taking the number of ratifications to 66 — six more than required. This event triggered the coming into force of the ICC as of 1 July 2002. While it is expected that it will take up to a year for the Court to be fully functional, Kofi Annan, the UN Secretary-General, heralded the Court’s birth by stating that, ‘The long-held dream of the International Criminal Court will now be realized . . . [I]mpunity has been dealt a decisive blow’.¹

The ICC sets out to hold individuals — not states — accountable for gross violations of human rights by establishing ‘a permanent institution (that) shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . and shall be complementary to national criminal jurisdiction’.² The Court has universal jurisdiction to indict, prosecute and punish individuals deemed to have violated, in a serious manner, the human rights of individuals and groups according to an ever growing body of international humanitarian law when the judicial systems of sovereign states have proved incapable or reluctant to do so. As laid out in Article 5 of the Rome Statute, the ICC is granted jurisdiction over four sets of crimes: genocide; crimes against humanity; war crimes, and crimes of aggression (the so-called ‘core-crimes’).

In effect, the ICC is intended to pursue, prosecute and punish those individuals who have ordered, induced, assisted, abetted or committed crimes which are deemed to be of international ‘concern’ in that they violate the rights and conscience, not of nation-states or

² Article 1, Rome Statute of the International Criminal Court. The Rome Statute is the international treaty by which the ICC was created.
the international system, but of particular victims and humanity as a whole. What follows is: an account of the historical background to the ICC; an overview of the Court’s Statute and remit; and a discussion of the Court’s international effects and major contemporary problems that it faces, both in theory and in practice.

THE HISTORICAL BACKGROUND TO THE ICC

‘War criminals have been prosecuted at least since the time of the ancient Greeks, and probably well before that.’ This may come as a startling revelation to those who consider the pursuit of war criminals to be a modern phenomenon, if not one particular to the twentieth century and on. Yet, if one considers human nature, and especially the conduct of humans during times of violent conflict this may not seem so outlandish. The major change, which has occurred in more recent times, has been the attempt to create the conditions for the international prosecution of war criminals, and those who have committed genocide and crimes against humanity.

Nevertheless, this process is a lengthy one, and has important legal and political dimensions which merit brief review in setting the context for the creation of the ICC; it is a process replete with legal codification in various treaties, the setting of precedent, and the political implementation of the prosecution of indicted criminals.

The legal antecedents to the ICC, in terms of treaties and conventions, are extensive but bear repetition. In the first instance, most attempts to codify international law related to the laws of war and conduct in warfare; within this emerged the idea that individuals could and should be held accountable for particular war crimes, a development which had been much constrained by the Westphalian state system based on sovereign rights. Individual criminal liability would remain at the fringes of most treaties and conventions until well into the twentieth century. Nonetheless a major step was taken in the codification of the laws of war with the Hague Conventions of 1899 and 1907, which included limited provisions relating to the


rights not only of civilian populations and their property, but also

cultural and religious conventions and artifacts. This was very much

the codification, and putting into treaty form, of the principles and

practices espoused many centuries earlier by Hugo Grotius.

This process of codification, and the signing of international
treaties and conventions relating to war crimes and crimes against
humanity, genocide and more latterly torture was accelerated in the
first half of the twentieth century primarily because of the two World
Wars. The Kellogg–Briand Pact of 1928 renounced the use of force
as a legitimate means of resolving international disputes and could
in some ways be seen as a distant, but logical, precursor to the incul-
sion of the crime of ‘aggression’ in the ICC’s Statute. The Pact was
in part motivated by the memories of the First World War and mainly
by a desire to avert a similar confrontation in the future in an uncer-
tain international environment.

Similarly, the end of the Second World War resulted in a spate of
treaties and conventions dealing with the control of war in general,
and more specifically with the protection of individual rights in
warfare and beyond. One must not exclude the Charter of the UN
from this list, especially with regard to its provisions on international
peace and security. But, of more direct relevance are the 1948
Convention on the Prevention and Punishment of the Crime of
Genocide, the 1948 Universal Declaration of Human Rights, and
the 1949 Geneva Conventions on the protection of those affected by
armed conflict. These were followed up in 1977 with two sup-
plementary Protocols to the 1949 Geneva Convention and in 1984
with the Convention against Torture and other Cruel, Inhuman or
Degrading Treatment or Punishment.

The two World Wars also set precedents as, in their aftermath,
the respective victorious powers attempted, in each case in their

See Adam Roberts and Richard Guelff (eds), Documents on the Laws of War,
Oxford, Oxford University Press, 2000, especially ch. 5.

See generally Steven R. Ratner and Jason. S. Abrams, Accountability for Human
Rights Atrocities in International Law: Beyond the Nuremberg Legacy, Oxford, Oxford

The 1929 Geneva Convention on the Wounded and Sick in Armies and a similar
Geneva Convention on Prisoners of War added relatively little to the existing body of
law yet must not be ignored. Ibid., p. 5.

For a key work regarding the development of the law of war since 1945 see,

© Government and Opposition Ltd 2003
respective manner and with varying success, to prosecute those individuals from the vanquished power deemed to have committed aggression, war crimes and/or crimes against humanity. The Versailles Treaty included minor provisions for the prosecution of war criminals, including Kaiser Wilhelm II, which in the end amounted to nothing. While, as is well known and will be discussed below, in the aftermath to the Second World War the victorious powers actively pursued, prosecuted and punished German and Japanese individuals responsible for the war and the atrocities committed in its duration. As the importance of the inclination to prosecute after the First World War and the actual prosecution of individuals after the Second World War through the War Crimes Tribunals in Nuremberg and Tokyo are sketched out below, here reference to them serves a different purpose. In both instances, and especially in 1945, existing law was both put into practice and developed. In turn this meant that theory was given substance through application, and the legacy of the Tribunals was not only to set precedent but also to add to the codification process: individuals were now the subjects of customary public international law and could be prosecuted both for crimes against the laws of war and crimes committed against peace and humanity.9

The International Military Tribunals both had governing charters, which inevitably became an important foundation for the future codification and development of the law with respect to the so-called ‘core-crimes’.10 The main responsibility for this fell to the International Law Commission (ILC), ‘a body of experts named by the United Nations General Assembly and charged with the codification and progressive development of international law’, which in the late-1940s was tasked with drafting a code of the principles arising from the Nuremberg tribunal and the ‘Code of Crimes against the Peace and Security of Mankind’.11 The first task proved much easier and


was completed by 1950. A most remarkable development in the wake of the Second World War — and of great relevance to this discussion — was that in 1951 the ILC was delegated to draft a statute for a ‘Criminal Chamber of the International Court of Justice’. This was in effect the ICC all but in name and the ILC returned various draft statutes all rejected by the General Assembly. By 1957 the process was overtaken by the broader geopolitical tensions and concerns of the superpowers in the cold war context, which affected every single aspect of the workings of the UN until after 1989.\(^\text{12}\)

Some efforts were made to pursue the drafting of a code for a future ICC during the cold war years, especially in 1974 and annually from 1981 onwards. These were primarily concerned with organizational and procedural matters and did not touch on the delicate issues of the potential Court’s jurisdiction or the definition of the crimes it would cover. And yet, while some progress was made in this period, the East–West confrontation rendered it politically — if not legally — marginal, and it was not until 1991 that the process reconvened in a substantive fashion. By 1994 the ILC was able to produce a draft statute for the ICC, which was then passed on to the General Assembly for consideration.\(^\text{13}\) The work of the ILC was continued throughout the mid-1990s, initially by an ad hoc committee set up the UN and subsequently by a Preparatory Commission — commonly referred to as PrepCom — which used the ICL’s 1994 draft as its working document for negotiation. This process culminated in the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which met in Rome in June 1998 and produced the final draft of the Statute resulting in the ICC.

The brief historical outline above concentrates on the course of the codification of legal principle through its various stages, especially in the twentieth century. But one must not neglect the impact of law in action to the process of the creation of the ICC: the impact of actual war crimes tribunals, in which individuals are prosecuted and punished for humanitarian crimes, have been phenomenally influential both in the codification of custom into law but also in the political sense by adding impetus to the creation of a permanent institution.


\(^\text{13}\) This sequence is most lucidly set out in William A. Schabas, An Introduction to the International Criminal Court, op. cit., pp. 8–10.
For some time, I shared the common misconception that the Nuremberg and Tokyo Tribunals were unique examples of attempts, successful or not, at prosecuting individuals considered responsible for a range of proscribed humanitarian crimes and crimes of aggression. But as I looked beyond these two instances of international justice in action I discovered that there was a longer history of attempted war crimes tribunals which were also highly politicized. There is an authoritative account of these efforts that states this clearly: ‘war crimes trials are a fairly regular part of international politics, with Nuremberg as only the most successful example. International war crimes tribunals are a recurring modern phenomenon, with discernible patterns. Today’s debates about war criminals in Rwanda, Bosnia and Kosovo are partial echoes of political disputes from 1815, 1918, and 1944’.14 The author concentrates on seven instances when the international system debated, and at times put in train, the prosecution and punishment of individuals. Apart from the obvious cases of Nuremberg and Tokyo, and more recently the Hague and Arusha,15 this book covers: the ‘abortive treason trials of Bonapartists in 1815 after the Hundred Days; botched trials of German war criminals after World War I; (and) an abortive prosecution of some Young Turk perpetrators of the Armenian genocide.’16

Understandably, the International Military Tribunals in Nuremberg and Tokyo have played the biggest historical role in setting both a legal and political precedent. The Nuremberg Tribunal was highly politicized and often accused of being the manifestation of vengeance or ‘victor’s justice’. In terms of legal precedent, as mentioned previously, the victorious powers did draw up a charter setting up the Tribunal and governing its rules and procedure; but there was no international treaty setting up the Tribunal, hence the later codification of the Tribunal’s principles and procedures. The Tokyo process was similar in many respects.

The main impact of these Tribunals was in the realm of international politics. Despite the legal advances made, and precedents set, it was the political willingness of the victorious powers to follow the

15 The seats of the Tribunals on former Yugoslavia and Rwanda respectively.
judicial path in prosecuting individual suspects of humanitarian crimes and crimes against peace which had a lasting effect. This was not the meting out of summary justice. Nor were previously aired options of summary executions of Nazi and Japanese leaders — or the bizarre proposal to castrate them — ever deliberated upon at length. While elements of a show trial did occasionally emerge, justice was pursued through the courtroom and was seen to be done. This was a political decision and a political process which was carried out through legal means, and could only realistically be accomplished as result of the total military defeat of Germany and the collapse of the Nazi regime (and the collapse of the military regime in Japan including the diplomatic subtleties needed to deal with the sensitive position of Emperor Hirohito). The Tribunals were made possible not through the exigencies of international law, but rather through the willingness — if not political necessity — and ability of the victorious powers, especially the US and the USSR, to impose their policies on their allies and the international system and meet popular domestic calls for retribution. Existing international law did cover some of the issues addressed in these Tribunals. But the international political realities of the time led to the promulgation of values, and law, which have had a decisive impact in the drive towards the criminalization of individual responsibility for the violation of certain universal human rights.

Nuremberg and Tokyo also set the precedent for the current International Tribunals on Yugoslavia and Rwanda. In turn these two ad hoc Tribunals, set up under the aegis of the UN, have played a major role in smoothing the path towards the creation of the ICC. In May 1993 and November 1994 respectively, Security Council Resolutions 827 and 955 established the International Criminal Tribunal for Former Yugoslavia (ICTY) and Rwanda (ICTR). They were established under Chapter Seven of the UN Charter and were tasked with the prosecutions of ‘persons involved in the serious violation of international humanitarian law’.¹⁷

The case of the ICTY is peculiar; war was still waging in Bosnia–Herzegovina when it was established, and some may argue that it was viewed at the time as a weak alternative to effective international intervention to terminate the gross violation of

¹⁷ William A. Schabas, An Introduction to the International Criminal Court, op. cit, p. 11.
international humanitarian law. But it indicated a novel departure for the UN, which for the first time in its history utilized a judicial body to pursue its Charter responsibilities for the maintenance of international peace and security.\textsuperscript{18} It was an ad hoc tribunal in that it was specifically established to have jurisdiction over certain crimes committed within the confines of the territory of former Yugoslavia within a defined time-span (initially from 1991 until the UN Security Council decided a termination date). While its mandate included genocide, war crimes and crimes against humanity, it excluded crimes against peace and allowed only for the prosecution of individuals and not organizations. To ensure that the accusation of victor’s justice was not made of the ICTY, the Tribunal’s Statute makes clear that no two judges of the sixteen appointed to the Tribunal may be of the same nationality; a truly international panel.

The ICTR was also of limited jurisdiction and hence ad hoc. It was created to deal with acts of genocide and crimes against humanity committed by individuals on Rwandan territory and by Rwandan citizens on the territory of neighbouring states, in 1994. War crimes are not part of the ICTR’s mandate as the conflict in Rwanda was classified as an internal, domestic conflict falling outside the domain of long-standing laws of war which are specifically international. This in itself was an innovation in that an international, UN-sponsored, judicial organ was granted rights of prosecution within the specific domestic jurisdiction of a sovereign state. Genocide and crimes against humanity, within the context of an internal conflict, are judged to be international by nature, crimes against the values and laws of mankind as a whole.

The ad hoc Tribunals share many similarities in structure, organization, procedure and jurisdictions. The chief Prosecutor is the same for both tribunals, which also share the same appeals chamber. They are restricted by ‘\textit{ratione loci}, ‘\textit{ratione temporis}’ and ‘\textit{ratione personae}’; the legal terms for the definition of specific territory, time and individuals over which they have jurisdiction. Thus these Tribunals can only prosecute individuals who are alleged to have committed specified crimes within narrow territorial limits over a particular

time-period. Perhaps the most important features shared by the two ad hoc tribunals are their point of origin and the nature of their powers of enforcement, especially in the execution of warrants and the delivery into custody of those individuals indicted. Both the ICTY and the ICTR were the products of UN Security Council Resolutions. They derive their legitimacy and authority from the authority of the UN as the representative of international concerns, if not a rudimentary form of the ‘international will’. Even so, their establishment was contingent on the politics of the Security Council itself and the ability to forge and maintain some sort of consensus which would allow the Tribunals not only to be set up but also to operate effectively. This last point is mightily important if considered in relation to the fact that the Tribunals are heavily reliant on the good will and desire of states to voluntarily assist in the process of prosecution and punishment of individuals indicted of international humanitarian crimes. Despite all these restrictions and caveats, the creation and workings of the ICTY and the ICTR provided, in large measure, the final, real, practical incentive to the ‘international community’ to step up its efforts to finalize and codify the legal elements and procedural provisions of a permanent international criminal court. In more anecdotal fashion, and post-dating the finalization of the Rome Statute establishing the ICC, the high-profile trial of Slobodan Milosevic at the ICTY has given a massive psychological boost to the process of criminalizing individual violations of international humanitarian law.

THE ROME STATUTE AND ITS NEGOTIATION

The Rome negotiations were the final stage in the process of drafting and agreeing a Statute for the ICC. The negotiations were based on the draft Statute produced by the ILC in 1994, which had been revised and tweaked by the PrepCom which met periodically in 1995, 1996 and 1997.19 This did not mean that by 15 June 1998, when the Rome talks commenced, all outstanding issues, controversies, differences and details had been settled. The Rome Conference lasted almost five weeks, until 17 July 1998, and was laced both with legal

19 See above, p. 33.
and political disputes emanating from a wide variety of sources. In an interesting departure from many previous international conferences of this sort, it must be pointed out that also participating alongside the states represented in Rome were a host of Non-Governmental Organizations (NGOs) and activist/pressure groups which played an important role in the outcome of the talks.

The Rome Statute of the ICC comprises 128 articles divided into 13 parts and was authentically reproduced in six languages. There are also two lengthy annexes with the ‘Elements of Crimes’ as defined in the Statute and ‘Rules of Procedure and Evidence’ of the Court.

The most important constituents of the Statute deal with the jurisdiction of the ICC both in relation to the ‘core-crimes’ and to the time, territory and subjects over which the Court will have legal power. There are also important elements dealing with, among others, the relationship with the Security Council of the UN, the role and powers of the Prosecutor, and all the issues relating to conviction, sentencing, appeal, enforcement, structure, resources and procedure which had to be defined.

As set out in Article 5 of the Statute, the Court has jurisdiction over four categories of crime: genocide, crimes against humanity, war crimes and crimes of aggression. Articles 6, 7 and 8 of the Statute provide detailed definitions of the first three of these crimes, while the crime of aggression is left for future negotiation within the context of the PrepCom, which would subsequently go on meeting beyond Rome to sort out outstanding issues of difference and definition. Even though, as has been outlined above, there is a long historical sequence in the evolution of the definitions — and codification — of these crimes, the Rome conference dwelt on them extensively. In the case of the crime of aggression, no agreement could be reached other than that the crime should fall within the Court’s remit. Many states and NGOs wished to see this crime included in the statute. A variant of this crime, the crime against peace, had long formed part of international humanitarian law and was indeed a basis for the Nuremberg and Tokyo Tribunals. Indeed,

While the legal aspects of the Rome Statute and its negotiation are well documented and discussed, the political dimension of what actually happened in Rome is less well covered. See, for example, Spyros Economides, ‘The International Criminal Court’, op. cit., pp. 117–26.
both Germany and Japan pushed hard, in Rome, for the inclusion of the crime of aggression as a ‘core-crime’.21

Discussions over the crime of aggression were further complicated by the identification of a potential clash between the jurisdiction of the ICC and the UN Security Council in determining what constituted aggression. The UN Charter, under Chapter 7, stipulates that the Security Council has predominant rights in determining what constitutes an act of aggression, which is considered an act of state (and not of an individual) by UN General Assembly Resolution 3314. If the right of determining aggression were left solely in the hands of the Security Council it would severely limit the ambit of the ICC and certainly be problematic in the prosecution of individuals who did not explicitly fall under the UN’s definition of aggression.22 If the ICC were granted too strong a mandate with respect to delimiting what constitutes aggression then the Security Council’s — and hence the UN’s — authority as the premier international organization would be severely challenged if not diminished. In turn, this would inevitably also affect the status and power of the five permanent members of the Security Council who would see their influence reduced.

The definition of genocide and war crimes, under Articles 6 and 8 of the Statute did require some negotiation, which was nevertheless uncontroversial. In the case of genocide, ‘acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’, would fall within the Court’s jurisdiction. In an interesting development of this aspect of humanitarian law, provisions were included in Article 6 which went beyond only killing to include injury to body and mind, forced prevention of birth and transfer of children, based on the groups mentioned above. In the case of war crimes, the wars of law have for the most part been drawn up and agreed over a long period of time. As such, the Statute, under Article 8, makes specific reference to the Geneva Conventions of 1949, and lists the commonly agreed provisions relating to a wide range of proscribed acts in warfare.

Crimes against humanity proved to be much more controversial. Article 7 of the Statute defines crimes against humanity as ‘acts

---


committed as part of a widespread or systematic attack directed at any civilian population, with knowledge of the attack’. To limit the possibility of extensive overlap with the definition of the crime of genocide, Article 7 goes on to break down the ‘headline’ crime into a lengthy and specific list of violations. Among this list were included what could be seen as more contemporary crimes such as ethnic cleansing, apartheid, rape and forced pregnancy, ‘enforced disappearance of persons’, as well as enslavement, torture, extermination, murder, and persecution of political, racial, cultural, national, ethnic and religious groups. In true legal and diplomatic fashion the wording of the definition of this ‘core-crime’ proved to be rather troublesome on a number of fronts. Significantly there was lengthy debate on whether the definition should relate to a ‘widespread and systematic’ attack. Ultimately, the latter was used. But it is an indication of the detailed — if not pernickety — level of negotiation encountered in Rome over the most fundamental elements of this Statute which had been repeatedly discussed prior to this conference and yet still needed amendment.

Having defined and set out the crimes over which the Court would have jurisdiction, the Statute also had to clarify over what territory, time and people it would have legal competence (the *ratione loci*, *temporis* and *personae* mentioned earlier). Crimes committed on the territory of the signatories to the Statute, of states that have afforded the ICC ad hoc recognition, or of state territories pointed out by the UN Security Council fall under the Court’s jurisdiction. The Court’s competence is not retroactive. No case will be admissible in Court for crimes predating the establishment of the Court, nor will cases be transferable from the existing ad hoc tribunals with respect to former Yugoslavia and Rwanda. Much like *ratione loci*, the Court’s

23 In this case the jurisdiction of the ICC is not restricted to nationals of states party to the Statute. Indeed, the Court has jurisdiction over nationals of states not party to the Statute who have allegedly committed crimes on the territory of a signatory. This is a key issue in the US objection to the Court; US nationals could be indicted and prosecuted despite the American refusal to participate in the ICC.

24 There is, nonetheless, an extensive legal debate relating to time restrictions which is slightly more complicated than this and which separates the rights and duties of states to proceed with retroactive prosecutions if the crimes were acknowledged when committed. They could also possibly be referred to universal jurisdiction. See Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law*, op. cit., pp. 21–4.
jurisdiction extends to individuals who are citizens of signatory states, of non-signatories who accept the ICC’s jurisdiction on an ad hoc basis or by ruling of the UN Security Council.

A more controversial aspect of the Statute, and the Rome negotiations, involves the so-called ‘trigger-mechanism’; that is, which body has the right to instigate the criminal procedure against those suspected of crimes against the elements of international humanitarian law covered by the Statute. Here the Statute makes it clear that the right of initiation lies within the remit of the state parties to the Statute, the Prosecutor or the Security Council. Non-state actors, ranging from individuals to NGOs, non-signatory states and international organizations — other than the UN through the Security Council — have no power to instigate proceedings unless they approach one of the other actors entitled to ‘trigger the mechanism’. For example, a pressure group or human rights organization could quite legitimately approach the office of the Prosecutor and present a case for the indictment and prosecution of a suspected criminal. The Prosecutor, if convinced, could then act to trigger an investigation and hypothetically a prosecution.

This seems rather straightforward but in fact forms part of the most controversial element in the Rome Statute, commonly referred to as ‘complementarity’. In essence, complementarity refers to the relationship between the jurisdiction of the Court and the sovereign rights of states. For the purposes of the Rome Statute, complementarity deals with this relationship strictly in legal terms. Both the Preamble and Article 1 state that the Statute ‘shall be complementary to national criminal jurisdiction’. Further on in the Statute, under the articles dealing with ‘Admissibility’, it is plainly written that while a signatory state is conducting an investigation, is prosecuting or has declined to prosecute after investigation, the ICC has no right of interference or jurisdiction. In this instance the Court can only claim jurisdiction when there is ‘unwillingness or inability of the State genuinely to prosecute’.

On this evidence, domestic jurisdiction takes clear precedence over universal jurisdiction and international law, and the competence of the ICC in general. The domestic courts of a signatory state would have primacy over the international body to pursue an investigation — and if desired a prosecution — granting its judicial

25 All form part of Article 17 of the Rome Statute.

© Government and Opposition Ltd 2003
system first responsibility against suspected violators of international humanitarian law. Many potential, and now actual signatory states, were strongly in favour of this balance, arguing vociferously that it would be unrealistic to expect states to cede so much of their sovereign right to the ICC by signing up.

This very tension between the sovereign rights of states and the powers of the Court was equally reflected in the long-drawn-out negotiations regarding the relationship between the ICC and the Security Council of the UN. The ICC is not established as a branch or agency of the UN. Yet it has an almost symbiotic relationship with the Security Council by dint of the problem surrounding who decides what constitutes aggression (see above), the right of the Security Council to determine territorial and personal jurisdiction, as well as to initiate an investigation and prosecution, and also the right to suspend — and by extension terminate — a prosecution by passing a resolution to do so. Much of this is remarkably similar to the complementary relationship between the ICC and signatory states that share many of these rights. But the point of major significance here is that the UN, and its chief organ the Security Council, is an organization comprising members which are sovereign nation-states. Thus, as I have argued elsewhere, there is more than one level of complementarity. There is that between the ICC and states concerning the relationship between domestic and international or universal jurisdiction. There is also that between the ICC and the UN — and especially the Security Council — concerning jurisdiction over definitions of aggression, the maintenance of international peace and security and the initiation and suspension, if not termination, of prosecutions. The principles, provisions and mechanisms are quite heavily loaded against the Court, in what has been called complementarity ‘in a triangulated fashion’. Not only does the ICC have to take into account, and defer, to two other actors or sets of actors with complementary rights. It is dealing with actors which represent the interests of the same entities, sovereign nation-states: ‘[I]n name, the ICC is to have jurisdiction over a whole raft of defined crimes, “when either the State in whose territory the crime was committed, or the State of the nationality of the accused is party

27 Ibid., p. 123.
to the Statute”. In practice, however . . . the inclusion of provisions which asserted the sovereign rights of states and the preeminent authority of the UN Security Council severely undermined the powers of the ICC.28

THE ICC AND INTERNATIONAL POLITICS

There are three sets of issues to consider in any discussion on the relationship between the ICC and international politics. First is an assessment of what the Court is setting out to do and what effects it will have. Second, are the attitudes of particular states to the establishment of the Court and how it may affect their domestic and foreign policies. The concluding, and most important set of issues, is the more abstract relationship between law/justice and politics/power in the international domain.

The primary function of the ICC will be to investigate, prosecute and punish those individuals suspected of having violated international humanitarian law as laid out in the Rome Statute. To this extent the primary function of the Court is said to be remedial: to provide legal solutions to proscribed, criminal activities according to a particular body of law. Consequently, the more cases that are successfully prosecuted and the more suspected criminals that are actually punished should also result in the creation of some sort of deterrent effect. Therefore the provisions of the Statute, the power of the Court and the cooperation of the signatory states could result in the formation of a fear of the court and a deterrent against the violations of its legal ambit.

As with other legal institutions and processes, the findings and decisions of the Court will also inevitably set legal precedent. This may be a secondary function of the Court. But more importantly the decisions of the Court — especially successful prosecutions of suspected criminals — will go beyond setting legal precedent and enter into the realm of setting norms and standards of behaviour. Within the framework of a permanent ICC, successful prosecutions will be considered more than victor’s justice, revenge or simply purges of undesirable individuals and leaders: they will be ‘enhancing an

28 Ibid.
international normative framework’ as well as carrying out the law.\textsuperscript{29} In a similar fashion, it has been argued that the Court will play the role of the ‘watchdog’.\textsuperscript{30} It will not only be meting out justice and setting precedents and standards, but will also act as a focal point for public interest and attention with respect to international humanitarian concerns. A more activist development of this sees the ICC actually taking on the attributes of a pressure group or lobby, ‘to mobilize and inform public opinion’.\textsuperscript{31}

Lessons learnt from the previous and existing ad hoc International Criminal/War Crimes tribunals have shown that these bodies, in their workings, assemble in short order a huge store of information and documentation which amounts to an immediate and highly valuable historical archive of a particular conflict or era.\textsuperscript{32} As Goldstone and Bass argue, what is significant about these archives is not only their documentary and historical value, but that they serve a psychological and political purpose of ‘fighting forgetting’.\textsuperscript{33} One could also argue that a side effect of the prosecution of suspected violators of international humanitarian law is to promote transparency and reconciliation in the states where the atrocities were committed: that is trials at the ICC would provide legal remedy and also have societal effects way beyond the law in a similar fashion to ‘Truth and Reconciliation Commissions’ elsewhere. An extension of this argument is to suggest that a successful ICC would promote the cause of peace through justice rather than simply be a judicial adjunct to a peace which was arrived at through more traditional — and perhaps military — forms of enforcement.


\textsuperscript{31} Ibid.


\textsuperscript{33} Ibid.
Ultimately, the main effect of a successful Court will be to provide a further bulwark against violation of human rights. The protection of the rights of individuals internationally has become increasingly important throughout the twentieth century. It is hoped by many that the establishment of a process which individualizes criminal activity in the domain of international law cannot be anything other than a strong, positive development in the protection of international human rights.

The ICC will not just have general legal and political, and indeed even psychological, effects. It brings with it a whole set of concerns for states, signatories and non-signatories, both in their domestic affairs and in their foreign policy. Domestically, states party to the Rome Statute are bound to incorporate the provisions of the Statute into domestic law. In part this explains the long delay between the signing of the Statute and its coming into force four years later. In ratifying the Statute, signatory states have to make the necessary alterations and amendments to domestic legislation and constitutions which inevitably lead to extensive debate and are time-consuming. Certain parts of the Statute, and some of its provisions, gave rise to serious problems for states which were keen to sign up but objected to one or other item.

There are many examples of these types of problems which have been covered in some depth elsewhere. These were by and large reflected in the politics of negotiation in Rome and the formation of expedient groups of states, referred to as ‘caucuses’, which shared interests and concerns and fought to protect their interests in the working groups which made up the negotiations. One of the prime movers for much of the Statute, and a strong supporter of universal jurisdiction for the Court and increased powers for the Prosecutor, was the ‘caucus’ of ‘like-minded states’. This grouping, numbering over 60, in which Canada and Germany along with many other Western liberal states played a leading role, campaigned strongly for a very powerful ICC with primacy over state interests. This was a reflection, if not a spill-over, of the liberal values and institutions prevalent in their own domestic system, the benefits of which they wished to see extended universally. By promoting the primacy of the ICC and its Prosecutor, the ‘like-minded’ states came into conflict with, for example, the permanent members of the UN Security

Council who could see their influence on international affairs through their permanent seat on the Council — and their veto powers — being eroded. While France, Great Britain and the US shared the principles and aspirations of the like-minded states, many of which were allies and fellow member states of the EU respectively, they saw the ambitions of this caucus as a challenge to their international authority and status.  

Other caucuses were either regionally based and/or had a particular point that they wished to push. For example, many Middle Eastern and Islamic countries had a specific concern with the maintenance of the death penalty as an acceptable punishment within the domestic judicial system. The Rome Statute does not allow for the death penalty as a sentence, and there was a fear in the countries who wished to maintain it that by ratifying the Statute and incorporating its legal provisions into domestic law they would have to abolish the death penalty. This would cause immense legal, political and religious problems for many Middle Eastern and Islamic states — let alone for the US. Similarly, the non-aligned states argued strongly for the inclusion of the crime of aggression on the list of ‘core-crimes’.

In terms of foreign policy, much time was spent discussing the role of nuclear weapons within the scheme of the ‘core-crimes’ and the provisions of the Statute. A variety of states ranging from the Arab states, India, to Great Britain and France had serious differences over whether to include the proposal categorizing the use of nuclear weapons as a war crime. To the Arab states — and India — branding the use of nuclear weapons as a war crime would create an added deterrent against the use of these weapons by their perceived rivals if not enemies, Israel and Pakistan respectively. The British and French positions were somewhat more complicated. As advocates of a strong ICC they were pushed to support this provision. As nuclear powers — and members of NATO — they were keen to conserve their own status in the international military hierarchy and the Western alliance, and preserve their relationship with the US. Ultimately, a compromise was negotiated which promised to include the

35 Of the ‘Western’ Permanent Security Council members, Great Britain swiftly moved closer to the like-minded caucus as the new Labour government, elected in 1997, adopted an ethical dimension to its foreign policy and became a strong supporter of a strong ICC.

© Government and Opposition Ltd 2003
use of nuclear weapons — among other weapons of mass destruction — as a war crime only when an international treaty comprehensively banning their use was signed in the future.

Of course, at the forefront of the campaign to strike out this provision on the use of nuclear weapons was the US. The US had vast difficulties accepting many of the Statute’s provisions on matters impinging on foreign and defence policy — let alone the whole question of infringement of sovereign rights. For example, one of the major sticking points for the US was with the Court’s jurisdiction over territory in which atrocities were said to be committed. The US argued that as a major provider of troops for peacekeeping and peace enforcement operations around the world, its personnel would be vulnerable and become the target of politically motivated accusations, investigations and perhaps prosecutions over which the US would have no control. This is a simplified and solitary example of the immense difficulty which the US had with the Rome Statute which ultimately led to the US into being the most obvious and powerful opponent of the Court.36

The US’s opposition to the Court is not simply driven by the Pentagon in an attempt to defend US troops from prosecution. It is part and parcel of a new form of US exceptionalism driven by its concerns over sovereign rights, its ambivalent attitude towards committing to internationalist, if not universalist, principles which are out of its control, and its unique position as the sole remaining superpower in the post-cold war world. This was perhaps most starkly illustrated by an off-the-record statement made by the US’s chief negotiator in Rome, and Ambassador at large for war crimes issues, which has recently been published. It is a slightly long extract but one which encapsulates the US position:

There have been times, there will come others, when the US as the sole remaining superpower, the indispensable power, has been and will be in a position, to confront butchery head-on, or anyway to anchor a multilateral intervention along those lines. But in order for that to be able to happen, American interests are going to have to be protected and American soldiers shielded. Otherwise it’s going to get that much more difficult, if not

36 The US did not sign the Statute at the Rome Conference. President Clinton did finally sign the Statute in the last days of his presidency, while also making clear that he would not promote its actual ratification. Not only was the Statute never ratified but in a move which caused some legal consternation, Clinton’s successor, George Bush, has ‘unsigned’ the Statute.

© Government and Opposition Ltd 2003
impossible, to argue for such humanitarian deployments in the future. Is that what people (here) want?’.37

At heart what the US objected to in Rome, and still objects to today, is that it will not have the right to approve any investigation by the ICC Prosecutor. Despite the provisions allowing the Security Council to suspend an investigation, this has to be done by resolution and not negatively through the casting of a sole vote, or in the case of the US the use of its veto powers. The US wants to maintain its independent sovereign rights, or those it has through the UN Security Council, and to be able to have a controlling influence over the jurisdiction of the Prosecutor and the Court itself. While in principle in favour of the ICC and all that it represents, the US refuses to accept the ceding of sovereign rights to an external body. The US position is a microcosm of the general tension which exists, in international affairs, between justice and politics.

The relationship between law and politics, or otherwise justice and power, in international relations is at the core of the establishment and workings of the ICC. One avowedly idealistic position, highly supportive of the process leading to the creation of the ICC, has suggested that this process is one of ‘legalism’, springing from the belief ‘that it is right for war criminals to be put on trial’.38 This position asserts that the pursuit of international justice is a direct spillover from the domestic law of liberally minded states. A variant of this position holds that with the creation of the ICC, and the general focus on issues of international human rights, ‘[T]he response to (their) violation, as in the domestic field, should improve the legal system rather than (allow) resort to vigilantism and self-help’.39 The Court is concerned with individual rights, not the rights of sovereign states. It is based on principle and not the exigencies of power. It purports to be born from the kernel of the idea that international justice should be dispensed universally and is not the sole prerogative of the international state system. The subject of this Court is not

37 Lawrence Weschler, ‘Exceptional Cases in Rome: The United States and the Struggle for a ICC’ in Sarah B. Sewall and Carl Kaysen (eds), The United States and the International Criminal Court op. cit., pp. 102–3.
the sovereign nation-state but rather the individual human being whose rights are not always adequately protected in the history of international relations.

It suggests that in the post-cold war era, Western — if not broader — concerns with ethical standards, and foreign policy imbued with a degree of morality, are bearing fruit. The successes of the ICTY and ICTR, in conjunction with the coming into force of the ICC are, to some, an indication that the role of international justice is moving into a new dimension which has immense implications for the power and authority of the sovereign state and its pre-eminence in international affairs. State-centrism is gradually being edged away from centre stage by a form of internationalism if not universalism, which arguably is leading to the erosion of sovereignty.

But the relationship between international law and politics, principle and power is slightly more complex than that. States, of whatever ideological disposition, are loath to relinquish the power conferred by state sovereignty. Those who argue that the rule of law will gradually replace the rule of force in international affairs have to confront the reality of an anarchic international political system, which is still the font of any cooperative, internationalist, or universal projects. As Robert Tucker has argued, ‘Advocates of the court err in confusing law with politics and in expecting from a court results, whether remedial or deterrent, that at best can only be the consequences of a functioning political order’.40 The Court is a legal institution but a highly politicized one which will only be viable, and successful, through cooperation by states and consensus politics.

Atrocities and gross violations of international humanitarian law can no longer simply be shielded by the hand of state sovereignty. Yet both in theoretical and practical terms we are still a long way from a new global order predicated on the pursuit of international justice. The current international order accommodates the establishment of institutions such as the ICC as an indication of a general and gradual shift away from power politics. But the Court will only be successful if individual states give their consent in principle and assist the Court with resources in practice. The US remains the Court’s strongest opponent and its most formidable. Yet the biggest obstacle to the ICC is provided by US opposition when viewed in tandem with other

states which have either not signed or not ratified the Statute. The list includes China, Russia, Israel, Iran, Iraq, Syria, Turkey, India and Pakistan. This grouping makes clear the enormity of the problem confronting the ICC, and its supporters, in gaining acceptance, legitimacy and the means with which to act successfully. It is a problem confronting not only individual states or groups of ‘like-minded states’, but of international society as a whole.

Prudence suggests that the work of the ICC should be seen as the beginning of a long cumulative process of reforming the politics of international justice rather than the end of a process of international transformation. The ICC will face enormous practical problems, and encounter deep scepticism and opposition. It can only succeed if the law is viewed in tandem with politics and statecraft, and principle wielded alongside power in the international sphere.

CONCLUSION

To the lawyer, the ICC represents the culmination of a long and complex history of conventions, treaties, precedent and practice — such as the Nuremberg and Hague/Yugoslavia tribunals — which has as its foundation the moral and legal concern of defining and protecting certain rights of man which were increasingly considered universal. The heightened concern over the protection of human rights in the twentieth century, and especially since 1945, has added weight to demands for the codification and universalization of individual rights which were previously either attended to in an ad hoc fashion and/or fell foul of public international law and its inherent dichotomy between international justice and the sanctity of state sovereignty. Indeed, in contemporary terms, a pre-eminent jurist, Richard Goldstone, has insinuated, that ‘in a globalized village of a world’, there is a need for some sort of institutionalized, globalized justice.41

The student of politics and international relations will share many of these concerns and perhaps some of the aspirations of the ICC. What the creation of the court will certainly indicate to that student is the enduring tension, in theory and practice, between international politics and international justice; to put it more crudely, this

41 The Observer, 4 November 2001.
tension is not simply one only between law and politics but between principle and power. Some political scientists share the concerns of the lawyer with respect to the rights of individuals in the international context or with the legitimacy of the use of force in international affairs. Others may argue that, post-1945, we have seen massive growth in international cooperation and multilateralism, and the creation of international institutions and organizations, which can but assist in the engendering of more peaceful relations between men. But underlying all of this, in the context of the ICC, is the knowledge and awareness that there is a gulf between the aspirations of codified international criminal justice and the reality of an international system still based on the premises of state-sovereignty and self-help, in which power rather than principle is often the deciding factor.

It may also be the case that in many instances it will not be practical to fulfil the conditions laid down in the Court’s Statute, or indeed the resources and expertise may not exist to do so. This may frustrate the jurist in his practical concerns and entertain the academic in his ivory tower; it will definitely be the statesman or practitioner of foreign affairs who will be most troubled. Governments and diplomats will look closely at the relationship between expectations and capabilities in the context of the ICC, and carefully assess whether and where the expectations — in the short term — have to be reined in, and how and where more resources have to be devoted to extend its capabilities.