THE INTERNATIONAL CRIMINAL COURT: CHALLENGES AND PROSPECTS, ANNUAL LECTURE ON HUMAN RIGHTS AND GLOBAL JUSTICE, CENTER FOR INTERNATIONAL LAW AND JUSTICE (CILJ)

by
Judge Akua Kuenyehia
Appeals Division, International Criminal Court
March 21, 2011

I. INTRODUCTION

This past century has seen some of the worst atrocities in the history of humanity. These atrocities, often involving serious violations of international humanitarian and human rights law, have often been committed on such a scale and in a context that national courts have not always been able to deal with such crimes effectively. In all too many cases, these crimes have been committed with impunity, which has only encouraged others to violate international humanitarian and human rights law. International tribunals set up to address some of these issues have been established on an "ad hoc" basis with limited temporal and subject matter jurisdictions. It is against this backdrop that the International Criminal Court (ICC) assumes its significance as the most ambitious development in the struggle against impunity.

As noted above, the prosecution of war crimes internationally is not new. It dates back to the period after World War II when Allied Forces established the Nuremberg and Tokyo Tribunals to try the perpetrators of the heinous crimes committed in Europe and Asia. Regrettably, after these historic trials, the move towards creating international criminal tribunals stalled; the realities of Cold War paralysis quickly set in. Thus, although the International Law Commission (ILC) said in a 1950 report that a permanent international criminal court would be "possible and useful," it took another 50 years to make it a reality.

The desire for an international criminal court was rekindled in the wake of the atrocities that occurred in the former Yugoslavia and Rwanda in the 1990s. It may be recalled that following the atrocities
committed in the Former Yugoslavia and Rwanda, and the huge international outcry against the international community for its slow response to the carnage that ensued, the United Nation (UN) set up the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY/R) in 1993 and 1995, respectively. These tribunals gave more impetus to the attempts to establish a permanent international criminal court capable of intervening in an on-going conflict or immediately after a conflict rather than an ad hoc tribunal with limited jurisdiction established long after a conflict. Such an approach to international justice was obviously not considered satisfactory not only because of the costs and effort involved in establishing these courts but also because of the difficulty in collecting evidence long after a conflict had ended. The ICC therefore owes a great debt to previous international tribunals, on a political, jurisprudential and symbolic level. At the same time, the ICC is unique. It has many characteristics that set it apart from any previous international criminal law institutions.

II. THE ICC: AN OVERVIEW

The ICC is a treaty based institution. The Rome Statute, which establishes the ICC, came into force on July 1, 2002 following its ratification by 60 countries. The negotiation of the Statute had taken place in Rome at a meeting that was open to all member States of the UN. The Statute was adopted on the July 17, 1998 and came into effect on the 60th ratification. There are currently 114 States Parties to the Rome Statute. Out of the 114, thirty-one (31), the largest block, are African.

a. Objectives of the ICC

The objective of the ICC is stated in the preamble to the Rome Statute and reiterated in the Strategic Plan of the Court. According to the Preamble, the ICC aims to “put an end to impunity for the perpetrators of [serious crimes of concern to the international community] and thus contribute to the prevention of such crimes.”\(^1\) The ICC also seeks to “guarantee lasting respect for the enforcement of international justice.”\(^2\)

The Strategic Plan of the ICC re-echoes these ideals. It defines the objective of the Court as follows: “to fairly, effectively and impartially


\(^2\) Id.
investigate, prosecute and conduct trials of the most serious crimes; to act transparently and efficiently; and to contribute to long-lasting respect for and the enforcement of international criminal justice, to the prevention of crime and to the fight against impunity.” In short, the ICC seeks to secure international rule of law.

b. Jurisdiction

The jurisdiction of the Court is limited in the following way:

- In terms of the material basis: to genocide, crimes against humanity and war crimes. While the ICC has jurisdiction over the crime of aggression, it was agreed at the time of the adoption of the Rome Statute that it would exercise jurisdiction over the crime of aggression only when the States Parties have adopted provisions defining this crime and sets out the conditions under which the Court shall exercise jurisdiction with respect to the crime. Such a definition and the framework on how the ICC will exercise its jurisdiction over this crime was adopted on June 11, 2010, at the first Review Conference of the Rome Statute held in Kampala, Uganda from May 31 to June 11, 2010. The definition contains a threshold requirement that the act of aggression must constitute a manifest violation of the United Nations Charter. It is important to note that the ICC cannot exercise jurisdiction over the crime until after January 1, 2017 when a decision will be made by States Parties to trigger its jurisdiction.

- In relation to time, with respect to crimes committed after July 1, 2002. For conflicts that started before the Rome Statute, such as the conflict in northern Uganda, the ICC may only exercise its jurisdiction in respect of crimes that were committed after July 1, 2002. In fact, Uganda when ratifying the Rome Statute submitted a declaration accepting the ICC’s jurisdiction as of July 1, 2002.

- In relation to persons, crimes committed either by a national of a State Party to the Rome Statute, or on the territory of a State Party (unless there has been acceptance by a non-State Party or a referral by the Security Council). The jurisdiction of the Court also only applies to persons aged 18 and above at the time of the alleged commission of a crime.

---

• In addition, under Article 27, immunity cannot be asserted on the basis of official capacity. Consequently, heads of states and governments and other high-ranking officials are subject to the jurisdiction of the ICC. Mr. Jean-Pierre Bemba, the former vice president of the Democratic Republic of the Congo, who is currently on trial for crimes committed by troops under his command in the Central African Republic, is so far, the most senior leader to go on trial at the ICC.

• Under Article 28, commanders and superiors can be held liable for criminal offences by their subordinates.

The Prosecutor has, as a matter of strategy, decided to limit his activities to individuals who bear the greatest responsibility for the commission of crimes within the jurisdiction of the ICC.\footnote{See The Office of the Prosecutor, “Prosecutorial Strategy 2009-2012,” International Criminal Court, The Hague, (Feb. 1, 2010).} This is a pragmatic approach since it is obvious that the Court can investigate and prosecute only a handful of those responsible for such serious crimes in any situation.

c. Exercise of jurisdiction

The ICC may exercise jurisdiction through State Party or Security Council referral. The Prosecutor also has the power to initiate his/her own investigation subject to authorization of the Pre-Trial Chamber.\footnote{\textit{Rome Statute}, supra note 1, arts. 13-15.}

As to the conditions for the exercise of jurisdiction, the ICC may exercise jurisdiction over a crime falling within its jurisdiction if the State in which the crime was committed is a State Party to the Rome Statute or the perpetrator is a national of a State Party. The Rome Statute also makes room for non-state parties to voluntarily submit to the jurisdiction of the ICC regarding a particular crime.\footnote{\textit{Rome Statute}, supra note 1, art. 12(3).}

The Security Council is authorised by the Statute to refer a situation in a non-state party to the Court if it considers the situation to be a threat to international peace and security.\footnote{\textit{Rome Statute}, supra note 1, art. 13(b).} This is how the situation in Darfur, Sudan, and Libya, which are not a State Party to the Rome Statute, came before the ICC.
d. Relationship between the ICC and States Parties

The ICC operates on the principle of complementarity, which places the primary responsibility for investigating and prosecuting crimes within the jurisdiction of the Court on States Parties. Accordingly, the Preamble to the Rome Statute requires “every State to exercise its criminal jurisdiction over those responsible for international crimes” and further states, “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”

The ICC is therefore meant to be a court of last resort and will act only when States are unable to do so due to their institutional incapacity or are unwilling to do so. A State is unable to act where, for example, its infrastructure has collapsed as a result of armed conflict. An example of the unwillingness to prosecute is a situation where a State attempts to shield a person from prosecution by conducting proceedings that are not genuine.

A situation must also meet a gravity threshold for the ICC to exercise its jurisdiction. Thus, the Rome Statute requires a case to be of “sufficient gravity to justify further action by the Court.” Whether or not this threshold is met is determined on a case-by-case basis.

III. Unique Features of the ICC

The ICC, unlike the ad hoc tribunals, has some unique features that also present challenges as well as opportunities. I will go through them here.

a. The Assembly of State Parties

It is the legislative body of the Court. It elects the judges and the Prosecutor and sets the budget for the Court. It also considers any questions relating to non-cooperation of states. Each state party has one representative in the Assembly of State Parties. The assembly is also the forum for adoption of amendments to the Statute.

As of January 1, 2011, 114 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 31 are Afri-

---

8. Rome Statute, supra note 1, Preamble.
9. Id.
10. Rome Statute, supra note 1, art. 17(1)(d).
can States, 15 are Asian States, 18 are from Eastern Europe, 25 are from Latin America and the Caribbean, and 25 are from Western Europe and other States. The Assembly has a bureau which consists of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

In view of the role of the ASP, maintaining the confidence of the Assembly of States Parties is a practical necessity for the Court.

b. Rights of victims – Participation and Reparations

International criminal justice is relevant not only for ensuring that perpetrators of the gravest crimes known to the international community are brought to justice, but also for recognizing appropriately the suffering of victims and giving them a direct voice. For the very first time in the history of international criminal law, victims of the most heinous crimes known to humanity have been granted access to an international criminal court to participate directly in the proceedings and to articulate their views and concerns.  

In order to facilitate this participation, victims have the right to legal representation and to assistance from the Victims and Witnesses Unit within the Court’s Registry. Those who suffered most will have the chance to take part in the process of obtaining justice; their voice will never again be ignored.

The Statute also allows the Court to order reparations in appropriate circumstances. For this reason, the Statute in Article 79 provides for a Trust Fund for victims from which reparations will be awarded. The Fund was inaugurated on April 22, 2004.

The independent role of victims in the field of international criminal law is significant. True international criminal justice can only be secured if the international community hears, understands and sees a jurisprudential record created around those who have suffered so terribly.

c. Gender Aspects of the ICC

A final unique aspect of the Court is its attention to gender not only in the inclusion of gender crimes but also in the composition of its bench and in advocating for a gender balance in its workforce.

11. *Rome Statute, supra* note 1, art. 68(3).
i. Codification of Gender Crimes

Previous international humanitarian law treaties failed to properly address sexual and gender violence. Neither the Hague Conventions respecting the Laws and Customs of War nor the Nuremberg Charter contained in the Agreement for the Prosecution and Punishment of Major War Criminals after World War II included any mention of sexual violence. Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes and Crimes against Humanity for Germany included rape as a crime against humanity though not as a war crime.

This was significant because the definition of crimes against humanity requires that the acts in question be either widespread or systematic. Yet, the ways in which sexual violence is committed during war makes it difficult to prove these conditions. Sexual violence crimes form part of the culture of war and are often committed on a sporadic basis. War crimes, in contrast, do not require any proof of systematic planning and therefore have a lower threshold of proof that is more appropriate for sexual assault cases.\textsuperscript{12}

The Rome Statute is the first international treaty to recognise a range of acts of sexual and gender violence as among the most serious crimes under international law thus making the ICC by far the most far-reaching institution of international criminal justice addressing gender and sexual violence. Articles 7 and 8 in defining crimes against humanity and war crimes, respectively, include subparagraphs listing a broad spectrum of gender-specific crimes. The listed crimes are: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence also constituting a grave breach/serious violation of the Geneva Conventions (regarding war crimes) or other forms of sexual violence of comparable gravity (regarding crimes against humanity).

This list of sexual violence crimes is included under the definition of war crimes for both international and non-international armed conflict. In addition to this list, two other gender-specific crimes have been listed under crimes against humanity. The first is the crime of persecution against any identifiable group or collectivity on various grounds, including gender.\textsuperscript{13} Secondly, the crime of “enslavement” is defined as the exercise of any power attaching to the right of ownership over a


\textsuperscript{13} Rome Statute, supra note 1, art. 7(1)(h).
person, including in the course of trafficking in persons, in particular women and children. Thirdly, trafficking of persons, in particular trafficking of women and children is included as a crime against humanity. The provisions on gender crimes under the definitional sections of the Rome Statute are thus a historic development under international law.

Furthermore, the Statute specifies that the application and interpretation of the applicable laws must be without any adverse distinction on the basis of grounds such as gender.

As has already been noted, it will be interesting to observe in the years to come, how the Court will develop its jurisprudence on gender related crimes so as to contribute to a reduction, if not the eradication of the use of some of these crimes as weapons of warfare.

ii. Fair Representation

The ICC Statute does not only address the issue of women as victims of gender violence but also addresses the participation of women in the Court as judges, prosecutors and staff with the necessary expertise. The ICC Statute provides that in the nomination and election of judges, account be taken of a fair representation of female and male judges (Article 36 (8) (a) (iii)). The Statute goes further to emphasize the need to include judges with legal expertise on specific issues such as violence against women (Article 36 (8) (b)). As a result of the need to create gender balance, the ICC, after the most recent swearing in ceremony of new judges, has 11 female judges and 7 male judges.

The inclusion of the above-mentioned specific provisions in the ICC Statute reflects an attempt to mainstream women’s rights into the normative structures of international humanitarian law, a body of law that had previously not taken account of women’s rights.

The challenge for the Court, over the coming years, will be to maintain a good balance between equitable gender representation both on the bench and among the general staff. It will also need to develop the jurisprudence relating to the gender crimes codified in the Statute. In this regard, it is interesting to note that four of the cases before the Court involve charges of rape and or sexual slavery.\(^\text{15}\)

\(^{14}\) Rome Statute, supra note 1, art. 7(1)(c) & 7(2)(c).

\(^{15}\) See Rome Statute, supra note 1, art. 7(1)(g) & 8(2)(b)(xxii) (Mr. Germain Katanga, Mr. Mathieu Ngudjolo Chui, Mr. Bemba and Mr. Callixte Mbarushimana have been
d. The Pre Trial Chamber

The Prosecutor is subject to checks and balances. The Pre-Trial Chamber acts as a check on the Prosecutor. It must authorize investigations begun proprio motu. Its decisions are subject to appeal.

It also has many functions during the investigative and pre-trial phases, including confirming or reviewing certain steps taken by the Prosecution.

IV. The Court today

Today the Court is fully operational with three ongoing trials.

On 7 March 2011, the Pre Trial Chamber I issued its decision confirming charges of war crimes against Mohamed Jerbo Jamus and Abdallah Banda Abubakaer in relation to the attack on AU peacekeepers in Haskanita, Darfur. On March 8, 2011, the Pre-Trial Chamber II issued summons to appear for 6 persons in relation to the post-election violence that occurred in Kenya in 2008. As a result of Security Council resolution 1970 referring the situation in Libya to the ICC, the Prosecutor is also going to start investigations there.

Although, 114 States have ratified the Rome Statute, and despite the fact that the Court is fully engaged in its judicial activities. However, it will not be able to discharge its mandate fully if both States and non-State Parties alike do not support it in diverse ways by way of cooperation.

V. Challenges facing the ICC

a. Unique features

At the outset, it must be pointed out that the unique features of the Court provide opportunities as well as pose challenges for the Court. The Court needs to take advantage of the opportunity offered in relation to gender related crimes, for example, to develop jurisprudence that deal decisively with the many diverse aspects of the issue in a way that is responsive to the needs of victims of these heinous offences. It also has to be mindful of the purpose for which the Pre-Trial Chamber

charged with rape as a crime against humanity and a war crime under articles 7 (1) (g) and 8 (2) (b) (xxii) of the Statute. Mr. Katanga and Mr. Mathieu Ngudjolo Chui have also been charged with sexual slavery under article 7).
was set up by the Statute to ensure that the Prosecutor does not have unfettered power to do as he/she wishes with investigations.

Another challenge that the Court faces in this regard (and please note that this list is by no means exhaustive) is the need for the content and purposes of the Rome Statute to be fully and widely understood by the international community. This is the only way to deal with the many misconceptions that currently prevail about the work of the Court. This job however is not that of the Court alone but all those who are involved in the work of the Court. It must be noted that Non-Governmental Organizations (NGOs) and civil society organizations all over the world have been and continue to be actively engaged in this task.

Lastly, the court operates in war zones, which means that the challenges facing it are markedly different from other tribunals such as the ICTR and the ICTY that were established in the post conflict environment. As such, the court’s functions must be carried out to ensure the safety of all parties including witnesses and victims.  

b. Cooperation

By far, the greatest challenge facing the ICC is the lack of political will on the part of the international community in the enforcement of arrest warrants. This is regardless of the fact that each State Party that ratifies the Rome Statute undertakes to cooperate fully with the ICC in its investigation and prosecution of crimes within its jurisdiction. This is because the ICC, unlike national courts, has no direct powers of enforcement except for a few limited powers of investigation in the event that a state’s justice system has broken down completely. Thus, the ICC has to make requests to a State Party for cooperation. It cannot effect warrants of arrest, search homes or buildings or even force witnesses to attend trial. The ICC depends on national authorities to

---

16. See Rome Statute, supra note 1, part 9 (violence in early 2006 forced the temporary closure of the court’s field office in Chad, which is operated in connection with the investigations into the Darfur situation).
18. Article 17 of the Rome Statute states that a case is inadmissible if: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute. See generally Rome Statute, supra note 1, art. 17 §§ 1(a)-(b).
19. Id. at art. 86.
perform these functions except if states consent to the ICC doing so.\textsuperscript{20} It is therefore important for the effective working of the ICC that countries that have ratified the Rome Statute cooperate fully from the opening of an investigation to the enforcement of the sentence. Unfortunately, this has not been the case. There are outstanding warrants of arrests in Uganda, Democratic Republic of Congo (DRC) and Darfur. Some States Parties have in recent times also failed to enforce warrants of arrest even when suspects have been on their territory.

States parties have a general obligation to cooperate with the Court in its investigations and prosecutions under Article 86 of the Statute. There are a number of specific commitments on cooperation made by States Parties in the Rome Statute. These are:

- State parties agree in Article 88 to ensure that there are procedures available under their national law for all forms of cooperation.
- Although there is no express requirement in the Statute itself requiring non-party states to cooperate, Article 87(5) authorizes the ICC to invite any state, which has not ratified the statute to provide assistance on an ad hoc basis.
- States have agreed in Article 93 to provide a wide spectrum of assistance to the ICC during investigations and prosecutions including but not limited to identifying and locating witnesses, taking evidence, questioning persons who are being investigated or prosecuted, serving legal documents to facilitate the voluntary appearance of witnesses examining sites and exhuming graves, conducting searches and seizures, providing documents protecting witnesses, and preserving evidence.
- Article 59(1) requires state parties to comply immediately with requests by the ICC to arrest and surrender accused persons in their territories.

\textsuperscript{20} For example in December 2003, the government of Uganda, a state party, referred to the Prosecutor the situation concerning the Lord's Resistance Army in Northern Uganda. The Prosecutor decided to open an investigation and on 8 July 2005, the court issued its first arrest warrants for the Lord's Resistance Army leader Joseph Kony, his deputy Vincent Otti, and LRA commanders Raska Lukwia, Okot Odiambo, and Dominic Ongwen. Lukwia was killed in battle on 12 October 2006; the other four suspects have yet to be captured. A further challenge in this matter is that Ugandan President Yoweri Museveni has made overtures for peace talks with the leader of the Lords Resistance Army, Joseph Kony and has offered amnesty as part of the deal. The challenge arises in that amnesty is contrary to the mandate of the ICC as the ICC seeks to punish individuals responsible for these extremely serious crimes; bring justice to victims: and over time, to deter the commission of such crimes and create a culture of accountability.
• States Parties have agreed under Article 86 to cooperate fully with the ICC and such compliance includes requests for surrender.

• States further agree in Article 75(5) to give effect to ICC awards of reparations to victims. They also agree to make offenses against the administration of justice by the ICC crimes under national law and to submit cases involving such offenses to their prosecutors.

• Article 94 permits state parties to postpone the immediate execution of a request that would interfere with an active investigation or prosecution but the length of the postponement must be subject to an agreement with the ICC.

• Article 72 permits a state party, in narrowly described circumstances, to deny requests for the disclosure of information or the production of documents that would prejudice its national security interests.

In sum, the operational cooperation of States and international organizations is particularly important to the Court. All States Parties are obliged by the Statute to comply with the requests of the Court but organizations can also assist the Court in its work.

c. Complementarity

As a court of last resort, it stands to reason that all domestic remedies must be exhausted prior to a matter being referred to the ICC. However, in instances where states are unwilling or unable to prosecute offenders or perpetrators of offenses that fall within Articles 5 of the Rome Statute, then the ICC is permitted to institute proceedings against such persons. The principle of complementarity is based on both respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings.

The complementarity regime serves as a mechanism to encourage and facilitate the compliance of states to investigate and prosecute core crimes. Accordingly, there are two guiding principles, which may inform the approach to complementarity; partnership and vigilance.\(^{21}\)

• Partnership highlights the fact that the relationship with States that are investigating and prosecuting can and should be a positive, constructive one. The prosecutor can encourage the state concerned to initiate national proceedings and possibly provide advice as well as certain forms of assistance to facilitate national efforts.

• Vigilance marks the converse principle that at the same time, the ICC must diligently carry out its responsibilities under the Statute. The prosecutor must be able to gather information in order to verify that national procedures are carried out genuinely. Cooperative states should generally benefit from a presumption of *bona fides* and very basic levels of scrutiny but where there are indications that a national process is not genuine the Prosecutor must be ready to take follow up steps which may lead to the exercising of jurisdiction.

To ensure that the principle of complimentarity works as envisioned, the ICC is currently stimulating broad discussion as to how to actualize it,22 that is, how to build States Parties’ capacity to exercise jurisdiction over Rome Statute crimes. This issue formed a key part of the recent Rome Statute Review Conference held in Kampala, Uganda. Present at the Review Conference were States Parties, observer States, international organizations, non-governmental organizations, academics and other participants.

At the Review Conference, the participants emphasized the need for States and organizations to “work together to close the impunity gap and ensure that domestic systems [are] prepared to deal with the crimes within the jurisdiction of the Court”.23 The participants acknowledged the importance of international assistance for complementarity to work. Three key areas of international assistance were identified namely, legislative and technical assistance as well as capacity building, including development of physical infrastructure.24 Needless to say, assistance in the form of information sharing between the ICC, international organizations and member States, training of the judiciary and law enforcement personnel and improvement of phys-

---

22. This formed a key part of the Rome Statute Review Conference held in June 2010 in Kampala, Uganda.


itical infrastructure will go a long way to empower states to address Rome Statute crimes and help to eliminate gaps in impunity. Such support could in the long run have a domino effect not only on the criminal justice system of a State but in other key areas as well.

Evidently, the ICC is not in a position to directly assist national efforts at improving domestic legal systems. But, it has the ability to galvanize national, regional and international support for that purpose. This kind of support is crucial for complementarity to have maximum effect.

Complementarity can only work if States Parties enact implementing legislation to ensure that they are in a position to investigate and prosecute the crimes within the jurisdiction of the ICC should they occur on their territories or by their nationals. So far, the ICC is known to have led to changes to more than 55 domestic legal systems with legislation pending in 40 more. It has also inspired some legislative and institutional reform in Uganda, Kenya, the Central African Republic and the Democratic Republic of the Congo (DRC). In Sudan, for instance, in addition to attempting to set up structures to investigate and


28. Review Conference of the Rome Statute, Focal points compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes 29, 30 May 2010, RC/ST/CM/INF.2. The revised Penal Code was adopted on 29 September 2009 and includes provisions on genocide, crimes against humanity, war crimes and other principles of international criminal law. A revised Criminal Procedure Code was also adopted on 30 September 2009. This provides for cooperation with the ICC and the holding of trials in the Central African Republic.

29. Mirna Adjami & Guy Mushita, International Center for Transitional Justice, The Rome Statute Review Conference, June 2010, Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court, 3. Having ratified the Rome Statute in 2002, the DRC set up a military court in November 2002 with jurisdiction over crimes included in the Rome Statute. The first sentence relating to the crime of sexual violence was handed down in February 2006. However, these efforts were marred by the escape of some of the convicts from prison. Given the unsatisfactory conduct of trials before the military court, a bill aimed at transferring jurisdiction to civilian courts was introduced in the Parliament of the DRC in March 2008.
prosecute crimes committed in Darfur, the threat of the ICC’s indictments contributed to the revival of the stalled peace talks. While these efforts may be modest, they are still encouraging developments in the move towards entrenching the rule of law and eradicating impunity.

In spite of these positive developments, there is still a lot of room for improvement. The ICC must therefore continue to encourage and support all States Parties to enact implementing legislation.

d. Lack of universal jurisdiction

For the ICC to be a truly international court capable of exercising jurisdiction over crimes wherever committed, it must have universal jurisdiction. However, as a treaty based institution, the ICC currently does not enjoy universality. This, in some ways, weakens its deterrent effect. There are still many countries that are not party to the Rome Statute and over whom the ICC cannot exercise its jurisdiction unless there is a UN Security Council referral.

It is hoped that as the ICC establishes its legitimacy and independence, many more countries will become States Parties. More importantly, it is anticipated that States, and even non-State Parties will begin to see the benefits of having a permanent international criminal court and hence, be more proactive in cooperating with the Court. This is beginning to happen, albeit slowly, with the referrals to the ICC of the situation in Darfur, Sudan and Libya by the UN Security Council. It is also evident in the willingness of powerful non-State parties to view the Court as part of the solution to end impunity in the world. While these developments, for now, may have to be viewed with cautious optimism, they are no doubt significant steps towards achieving the goal of a well-functioning international criminal court.

e. Prospects

In spite of the challenges facing the ICC, I believe that it can still make a meaningful contribution to international rule of law. I will emphasize at the outset that the ICC on its own cannot bring about the accountability that we all desire. That will be achieved through a multiplicity of

31. Id. at 6.
actions, the ICC being only one of them. It is also important to note that 7 years of operation is not enough time for the ICC’s real impact on impunity and the rule of law to be felt. This will become more apparent over time.

I believe that the ICC has a significant role to play in achieving world peace through the establishment of international rule of law. This it can do in a number of ways.

1. Criminal Prosecutions and the threat of prosecutions

The obvious way in which the ICC could make a difference in the promotion of the rule of law is through actual prosecutions. Such prosecutions signify the international community’s intolerance for impunity. The ICC is currently trying four (4) warlords from the DRC and Central African Republic and has began pre-trial proceedings in the case of two (2) persons suspected of killing African peacekeepers in Haskanita, Sudan. Without the ICC, these prosecutions would not be taking place.

The prosecutions now taking place before the ICC are also a strong indication that while States or political leaders may thwart efforts at enforcing international arrest warrants, they cannot ignore them forever. The possibility of bringing perpetrators of mass atrocities to justice has therefore become more real with the advent of the ICC than ever before. This potential threat underlies some of the strong opposition to the ICC by States. Yet, the message is clearly out that impunity for mass atrocities is no longer the norm, no matter who the perpetrator.

Moreover, I believe that the ICC will embolden States to exercise universal jurisdiction over genocide, crimes against humanity and war crimes. In November last year, the foreign minister of Israel was forced to cancel a trip to the United Kingdom because of the threat of an arrest for alleged crimes against humanity committed against the Palestinian people.32 This is only one of several similar events that have occurred in recent years. The ICC’s influence in such developments should not be underestimated. The message of accountability seems to be sinking in as some world leaders suddenly find themselves losing the safety nets they once counted on.

---

The threat of international prosecution should of itself be a deterrent to the commission of international crimes. But so far this has not yet happened as demonstrated by the stalemate in the Ivory Coast, for instance, which has, almost degenerated into a full-scale armed conflict.

Interestingly, in the current turmoil engulfing some states in the Middle East and North Africa, the latest being Libya, many voices started calling on the ICC to step into the situations where human rights are being violated in order to bring a stop to it. This prompted the UN Security Council, in its resolution 1970, to refer the situation in that country to the ICC. This demonstrates the fact that in the broad context of the prevention of international crimes, the Court is increasingly being seen as part of the solution. Possibly, the considerable scrutiny by the ICC and other international actors of the upheavals in North Africa and elsewhere resulted in some of the incumbent governments restraining their responses to the mass protests in those countries.

It is expected that as the Court demonstrates its credibility by carrying out independent, fair and impartial investigations and judicial proceedings in strict accordance with the Rome Statute, there is a good chance that it will win over the sceptics and convince them of the need for all to become a part of the Court.

2. Complementarity

The complementarity principle acknowledges the ICC as a Court of last resort, which cannot assume the full responsibility over crimes within its jurisdiction wherever committed. It also recognizes that the surest way of ensuring accountability is for States to investigate and prosecute serious crime themselves. Undoubtedly, States are in a better position to collect evidence, secure witnesses and understand the context in which the relevant crimes occurred. Provided it is even-handed, domestic criminal justice tends to have more legitimacy and therefore wider acceptance. It also creates a lasting impression on a community as it engenders local discourse, demonstrates intolerance for impunity and bolsters the image of law enforcement institutions. Domestic jurisdiction thus strengthens the understanding and respect for the rule of law.

At the Review Conference, participants brainstormed on ways to actualize the principle of complementarity through capacity building schemes at various levels. Discussions such as these will continue as will the implementation, in the future, of concrete strategies aimed at
enhancing complementarity between States and the ICC. If this is achieved, the international community’s dream of prosecuting genocide, crimes against humanity and war crimes (and possibly aggression) at both the national and international levels would have been realized. These preliminary efforts are therefore positive steps in that direction.

In sum, the Court is determined to carry out its functions to the highest standards, but its ultimate success depends on those who created it and determined its mandate.

3. De-legitimizing perpetrators of mass atrocities

International indictments and prosecutions have the potential to stigmatize leaders, isolate them and weaken their power and legitimacy.\textsuperscript{33} This outcome is not an event but a process that takes place over time. The case of former President Charles Taylor of Liberia, who was the first sitting president to be indicted by a transnational criminal tribunal, is a clear example of this.

In the long term, the Court will have a deterrent effect given that arrest warrants tend to stigmatize and undermine especially leaders who commit egregious international human rights violations. As of now, all would-be perpetrators of serious crimes of concern to the international community are on notice that they cannot get away with their crimes. Impunity is no longer the norm. They will be held accountable for their crimes, even if not immediately.

4. Development of international criminal law

The development of international criminal law started in earnest with the work of the Nuremburg tribunals. Although 50 years have elapsed since the establishment of those tribunals, international criminal law could still be said to be in a nascent state. While the ICTY/R contributed significantly to its development, it was not until the Rome Statute that international criminal law became codified. The Rome Statute is thus a ready source of international criminal law.

As mentioned earlier, the Rome Statute builds on the work of earlier tribunals while taking account of its own uniqueness. As such, it has in many ways been innovative in its development of substantive interna-

tional criminal law. For instance, not only does it include the crime of aggression as an international crime but the crime of aggression has now been defined in the new amendments to the Rome Statute. The Rome Statute also codifies the crimes of genocide, crimes against humanity and war crimes in a more coherent way. It incorporates new crimes such as crimes based on gender and the recruitment of child soldiers, which were hitherto not recognized under international law.

The Rome Statute for the first time also codifies general principles of law in Part 3 of the Statute. These principles are based on customary international law and general principles recognized by civilized nations as recognized under Article 38(1)(b) and (c) of the International Court of Justice Statute. In the absence of such codification, the earlier tribunals had to turn to rules common to domestic legal systems for guidance in determining these general principles.34

The Court is thus beginning to develop and expand the substantive and procedural jurisprudence on international criminal law, by providing more clarity to the definitions of the crimes and the applicable procedural rules before the Court. Given the scope of the crimes contained in the Rome Statute, there are still a lot of crimes that have not been addressed by the Court, but this is only a matter of time. The Court will in the years to come, establish a body of jurisprudence that resolves questions left open by the Rome Statute and thereby increase the efficiency of its proceedings. It will continue to give effect to the rights of victims to participate in proceedings and respect the rights of the accused in the process.

5. Vindication of victims’ rights

The ICC is the only international criminal court that has recognized the participation of victims in its proceedings. While the Court has been careful to ensure the victims do not become the second prosecutor, it has given a voice to victims whose concerns are sometimes overlooked by the criminal justice system.

The Court only allows the participation of victims when their personal interests are affected and only if it is considered appropriate by the Court and presented in a manner not prejudicial to the rights of the

accused and a fair and impartial trial.\textsuperscript{35} Thus, victims’ participation is circumscribed in practice by the Court.

The opportunity for victims to participate in the proceedings is thus a triumph for them as the ability to voice their concerns can be cathartic and empowering. It also increases their awareness and understanding of international criminal justice thereby giving the process more legitimacy.

Victims are not only allowed to participate in the proceedings; they are also entitled to reparations.\textsuperscript{36} A trust fund has been set up for this purpose.\textsuperscript{37} The Rome Statute thus addresses the needs of victims in a more comprehensive way as compared to previous international tribunals. It is hoped that the ICC will become a good example of how the criminal justice system can meaningfully address the concerns of victims while respecting the rights of the accused.

\section*{VI. Conclusion}

The establishment of the ICC ultimately serves as a deterrent as its permanence signals the fact that current and would-be perpetrators of the crimes that fall within the jurisdiction of the ICC now know that there can be no impunity. The very nature of the Rome Statute encourages the establishment and strengthening of democratic institutions in State Parties. Furthermore, the sensitivity to issues that concern women is manifested both structurally and substantively.

More fundamentally, states, international organizations and civil society must continue to respect, uphold and to defend the Court’s independent judicial mandate. The effectiveness of the ICC depends on its credibility as a non-political institution. Any effort to use the Court for political purposes must be rejected. Any attempt to subject the Rome Statute to non-judicial considerations must be resisted. The credibility of the Court cannot be traded away for reasons of political expediency.

The Rome Statute is not just an international treaty. It is a manifestation of the fundamental principles that serious crimes cannot go unpunished, that victims deserve justice and that peace and security also thrive under conditions of justice.

\textsuperscript{35} Rome Statute, supra note 1, art. 68.
\textsuperscript{36} Id. at art. 75.
\textsuperscript{37} Id. at art. 79.