

Introduction

Max du Plessis, Ben Brandon and Kimberly Prost

This Guide arises out of, and is a response to, the creation of the world's first permanent International Criminal Court (ICC). The Statute of the ICC was adopted on 17 July 1998 by an overwhelming majority of the States attending the Rome Conference. The conference was specifically aimed at attracting States and non-governmental organisations so that they might debate and adopt a statute that would form the basis for such a court.¹

The ICC and the Human Rights Inspiration

The general rule in international law is that States are able to exercise their domestic criminal law jurisdiction over criminal offences that affect their domestic concerns.² As such, criminal jurisdiction is usually exercised over crimes that are committed within a State's territory (like murder, theft and rape). It may also sometimes be exercised over crimes that are plotted abroad (such as high treason) because they threaten the domestic order.

However, some offences affect not only the domestic legal order but also the international legal order. The classic example of such a crime is piracy, whose perpetrators were described as enemies of the human race. Today, certain crimes are agreed to be of such a serious nature that their perpetrators are also rightly considered enemies of humankind. The crimes that fall under the ICC's jurisdiction are drawn from this category and include genocide, crimes against humanity and war crimes.

Because there has not until recently been a permanent international criminal court with jurisdiction to try these crimes, and leaving aside isolated examples such as the international criminal tribunals at Nuremberg and Tokyo, it was previously left to national courts to do the job. Where a national court exercised jurisdiction over an international crime with no jurisdictional link on the basis of, for example, territoriality or nationality, it was said to be exercising 'universal jurisdiction'. Perhaps the most famous example of this is the trial of Adolf Eichmann. In *A-G of Israel v Eichmann*,³ the District Court of Jerusalem decided that Israel had jurisdiction over atrocities committed during World War II by Eichmann, a Nazi officer, on the grounds that the said atrocities were not domestic crimes alone but crimes against the law of nations.

As we shall see, under the ICC Statute an important role has been retained for domestic courts, which are said to act in a complementary relationship with the Court in punishing the world's worst criminals.⁴ But where such courts are not willing or able to act against

1 The Statute was finalised at the Rome Conference, attended by 160 States, from 15 June to 17 July 1998. For an account of the negotiating process at the Conference, see Philippe Kirsch and John Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *American Journal of International Law* (AJIL) 2.

2 See Chapter 2 for further and comprehensive discussion of the topic of 'jurisdiction' under international criminal law.

3 (1961) 36 *International Law Review* (ILR) 5.

4 On 'complementarity', see further Chapter 2.

the enemies of humanity, the ICC ensures that impunity does not follow their actions. The rise of a court with the power and competence to try the likes of Eichmann, Pinochet or Mengistu, or their foot soldiers, torturers or henchmen, can only be properly appreciated against the backdrop of the immense strides that human rights and humanitarian law have taken in the 20th century.

Aspirations to establish such a permanent international criminal court can be traced back to shortly after World War II and the adoption by the newly created United Nations, on 9 December 1948, of a resolution mandating the International Law Commission (ILC) to begin work on a draft statute for such a court.⁵ In the climate of the Cold War, little was done to take the project forward, however, and the idea of an international criminal court was revived only in the 1980s with a proposal by Latin American and Caribbean States, led by Trinidad and Tobago, who envisaged it as their last resort to prosecute international drug traffickers.⁶ The ILC was thereafter directed by the UN General Assembly to again consider drafting a statute.

The early 1990s saw the Commission preparing the draft, and by 1994 it had adopted a formal Draft Statute for an International Criminal Tribunal and forwarded it to the General Assembly for consideration.⁷ At the same time, events compelled the creation of a court on an *ad hoc* basis to respond to the atrocities that were being committed in the former Yugoslavia. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the Security Council in 1993 and mandated to prosecute persons responsible for serious violations of international humanitarian law committed in that territory since 1991.⁸ Then, in November 1994, and acting on a request from Rwanda, the Security Council voted to create a second *ad hoc* tribunal, charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and in neighbouring countries during 1994.⁹

The Yugoslav and Rwandan Tribunals were important milestones in international criminal law. Not only were the Tribunals necessary responses to the atrocities that had been committed in these countries, they also fuelled the widespread belief that a permanent international criminal court was both desirable and practical. The ICTY Statute, for example, influenced the draft Statute that the ILC was busy drawing up in the early 1990s. By the time delegates convened in Rome, the Tribunals could provide a reassuring model of what a permanent international criminal court might look like. These two Tribunals – the first international criminal tribunals since Nuremberg – are close relatives, sharing virtually identical statutes, as well as the same Prosecutor and Appeals Chamber. One of their most important features has been the independence of the prosecutors. Indeed, the

5 See William Schabas, *An Introduction to the International Criminal Court*, 2001, p vii.

6 See Kriangsak Kittichaisaree, *International Criminal Law*, 2001, p 27.

7 See James Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal' (1994) 88 *AJIL* 140; James Crawford, 'The ILC Adopts a Statute for an International Criminal Court' (1995) 89 *AJIL* 404.

8 See UN Security Council Resolution 808 of 22 February 1993 and Resolution 827 of 25 May 1993. For detailed accounts of the creation of the ICTY, see M C Bassiouni and P Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 1996, chapters I-III. See also Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, 1995.

9 See UN Security Council Resolution 955 of 8 November 1994. For detail, see C Scheltema and W van der Wolf (eds), *The International Tribunal for Rwanda: Facts, Cases, Documents*, 1999.

integrity, neutrality and good judgment of the Tribunals' prosecutors, Richard Goldstone and his successors, Louise Arbour and Carla del Ponte, answered the critics who warned of a reckless, rogue and irresponsible prosecutor. Most significantly, for our purposes, is that the Tribunals stand together as a working model of international criminal justice. Unpacked, this model has certain defining characteristics that draw their inspiration from the rule of law: an international criminal forum applying rules of international law, staffed by independent prosecutors and judges, holding persons individually responsible for crimes against humanity and war crimes, after allowing them a fair trial.

The ICC displays all these features but, unlike *its ad hoc* predecessors, it is a permanent tribunal. After five weeks of intense negotiations in Rome, 120 countries voted to adopt the treaty, seven voted against it and 21 abstained. A number of important Commonwealth States were among those that supported the adoption of the treaty, which would come into force upon 60 ratifications. The magic number was reached by April of 2002. To date, the Rome Statute has been signed by 139 States and 97 States have ratified it. The Statute entered into force on 1 July 2002, at which time the Court's jurisdiction over genocide, crimes against humanity and war crimes took effect.

The ICC is situated in The Hague, the Netherlands. The judges for the Court were chosen in February 2003 and were sworn in on 11 March 2003 at its inaugural session. The President is the Canadian Philippe Kirsch. The Prosecutor has been chosen – the highly respected Argentine lawyer, Luis Moreno Ocampo – and the Court is expected to hear its first case soon. This will in all likelihood be an African affair, either a prosecution relating to the ongoing conflict in Northern Uganda¹⁰ or the targeting of recent crimes said to have been committed in the territory of the Democratic Republic of the Congo.¹¹

The import of the ICC ought not to be underestimated. Described by William Schabas as "arguably the most significant international organisation to be created since the United Nations", it has ushered in a new era in the protection of human rights. What makes this new era remarkable is that the idea of an international criminal court is something that international lawyers have struggled for many years to properly conceptualise, let alone realise. They have over time pointed to a conceptual problem associated with the idea of international criminal law that arises because of the structure of the international legal system itself.¹² Because international law was seen simply as the contractual relations between States, the idea of an international criminal law – involving a public law dimension with an underlying system of shared social ethics – seemed strangely inappropriate, given that the international regime has no global sovereign¹³ and is morally pluralistic.¹⁴

10 See UN Wire, 30 January 2004, 'First International Criminal Court Case Targets Uganda's Rebels'.

11 See Press Release of the Office of the Prosecutor of the International Criminal Court, 19 April 2004, 'Prosecutor Receives Referral of the Situation in the Democratic Republic of the Congo'.

12 See generally Gerry Simpson, 'War Crimes: A Critical Introduction' in Timothy McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches*, 1997, pp 16-17.

13 As George Schwarzenberger argued in 1950: "[A]n international criminal law that is meant to be applied to the world powers is a contradiction in terms. It presupposes an international authority which is superior to States". See Schwarzenberger, 'The Problems of International Criminal Law' (1950) 3 *Current Legal Problems* 263, quoted in Simpson, note 12 above at 17.

14 Simpson points out that "[t]he moral or naturalistic orientation of most criminal law depends on a system of shared social ethics or an underlying natural law. Conversely, the international law regime is morally pluralistic and normatively consensual" (Simpson, note 12 above at 17).

In order to overcome this conceptual difficulty, international lawyers have focused their attention on what ought to be obvious to any person committed to the attainment of justice under international law. This is that a truly successful international legal system needs to be built on a social system that denounces and punishes crimes that tear at the fabric of humanity. Under international law such a social system is realised in a number of ways, including the very notion of an international criminal court. This international social system and its 'international' public morality are evidenced in the strengthening of human rights and the humanitarian law of war in the second half of the 20th century. Moreover, there has been a growing conceptual awareness that because individuals live under the international legal system, they must necessarily have rights and obligations flowing from it. The fact that delegates at Rome were able to come together and finalise the Rome Statute suggests the existence of a social system built on universal respect for the idea of human rights. This system recognises that to allow the most serious war crimes and crimes against humanity to go unpunished diminishes and threatens all those who live under it.

The Commonwealth Guide to International Criminal Law

Due to the obvious importance of the ICC regime for Commonwealth States, the Commonwealth Secretariat has chosen to publish and distribute this Guide to International Criminal Law. The Guide has been produced by expert authors for government legal and judicial officers, the police and practising lawyers in Commonwealth States.

Those involved in criminal justice and law enforcement in Commonwealth States are increasingly expected to possess expertise in international criminal law. The ICC will in all likelihood begin prosecuting its first case in 2005, and already 27 of the 53 Commonwealth States have accepted the jurisdiction of the Court.¹⁵ Five of those States – Australia, Canada, New Zealand, South Africa and the United Kingdom – already have domestic laws that implement the provisions of the Rome Statute ('the ICC Statute') into their national legal systems. Already, some prosecutors, the police and other government law officers in Commonwealth States have received requests for the arrest and extradition of persons suspected of war crimes and crimes against humanity as well as invitations to assist in their investigation and prosecution.

The purpose of this Guide is to serve as a useful practical text. It contains two main sections: the first is a universal introduction to international criminal law; the second is intended to contain an in-depth analysis of the implementing legislation in each Commonwealth State. For the first edition of the Guide the editors have included chapters on the implementation legislation of the five States mentioned above. As other Commonwealth States adopt implementation legislation, chapters will be commissioned from authors in those States for inclusion in the second edition, planned for 2006. The Guide is intended to be an accessible resource, covering international criminal law issues that are likely to arise in day-to-day practice.

15 Antigua and Barbuda, Australia, Barbados, Belize, Botswana, Canada, Cyprus, Dominica, Fiji, Gambia, Ghana, Guyana, Lesotho, Malawi, Malta, Mauritius, Namibia, Nauru, New Zealand, Nigeria, Saint Vincent and the Grenadines, Samoa, Sierra Leone, South Africa, Trinidad and Tobago, United Kingdom and Zambia (as at 4 December 2004).

The Commonwealth Secretariat considers that there is a pressing need for such a Guide, and that it is in the interests of all members of the Commonwealth for legal professionals and all those working in the criminal justice system to be fully versed in the practical realities of bringing to justice those who have committed the gravest of international crimes.

Abstract of the Guide

As noted above, the Guide is divided into two parts. Part I is intended to serve as an overview of international criminal law. It begins in Chapter 1 with a discussion of the institutions of the ICC and provides an overview of Court procedures that are explored in greater detail in later chapters. Chapter 2 examines the different types of jurisdiction employed in the court systems of Commonwealth States and international tribunals, including the ICC. The discussion is particularly important in light of the complementarity regime under the ICC Statute. It should be appreciated in this respect that the ICC Statute is intended to encourage the prosecution of international crimes in domestic, not international courts. Under what is described as “the complementarity principle” the courts of domestic States parties to the ICC Statute have an obligation to prosecute international crimes and do so through their respective implementation legislation. For a proper understanding of that legislation, we have included a comprehensive discussion of the jurisdictional principles that underpin the domestic prosecution of international crimes.

Chapter 3 sets out the core crimes that lie at the heart of the ICC regime – genocide, crimes against humanity and war crimes – that, because of complementarity, will form the subject of domestic prosecutions. Many domestic criminal practitioners will be familiar with the terminology of international criminal law. Terms such as ‘genocide’ and ‘crimes against humanity’ have long been the common parlance of headline writers, politicians and warlords. But all of these terms have highly technical meanings, and this chapter therefore explains all of the relevant terminology by examining the history of international criminal jurisprudence, from Nuremberg to Rome, Jerusalem to The Hague.

Until the creation of the ICC, the experience of Commonwealth States in the investigation and prosecution of international crimes was limited to their participation in extradition and mutual legal assistance arrangements with other States. While many national, regional and international law makers have already begun to address the issue of mutual co-operation and assistance in the fight against international terrorism, organised crime and drug trafficking, the Guide details the relevant ICC provisions that oblige mutual co-operation and assistance in relation to the ICC crimes. Part 9 of the ICC Statute introduces a comprehensive framework for arrest and surrender, the gathering of evidence and other forms of assistance including asset forfeiture, that extends beyond the bi-lateral or regional co-operation that is a feature of existing mutual assistance and extradition arrangements. This new and innovative framework under the ICC Statute now involves States Parties in the joint and co-operative enterprise of investigation and prosecution of ICC crimes. Chapter 4 sets out in detail the relevant provisions of the ICC Statute pertaining to this new co-operative scheme.

Chapter 5 considers various doctrines that are essential to the proper understanding of international criminal law, from command responsibility to amnesties. The chapter explores legal doctrines that are more or less exclusive to international criminal law and

have emerged from the jurisprudence of the international *ad hoc* tribunals, national courts and international legal instruments. These doctrines are often linked to the unique nature of the core crimes prosecuted in international tribunals that will form the subject matter of prosecutions in domestic courts under the complementarity regime. Command responsibility, for instance, is a concept that can only have emerged from a legal system that seeks to punish those who are responsible for crimes committed by soldiers during an armed conflict. Other doctrines, such as the principle of immunity for Heads of State and State officials and the question of amnesties, remain acutely relevant to domestic attempts to prosecute the world's worst criminals.

Part II of the Guide is concerned with the implementation of the ICC Statute in those States that are members of the Commonwealth and party to the Statute. The main content is intended to be individual chapters for each Commonwealth State that has ratified the Statute and implemented its provisions into national law. In this first edition of the Guide there are chapters for Australia, Canada, New Zealand, South Africa and the United Kingdom. These chapters have been prepared by contributing authors who are expert lawyers with practical experience of criminal proceedings in the relevant jurisdiction and a working knowledge of international criminal law. Part II thus focuses on a practical analysis of the implementing legislation in each Commonwealth State and seeks to provide guidance to all those involved in the criminal justice system – including police, prosecutors, courts and defence attorneys – as to how to apply international criminal law in their own territory. Part II also provides a helpful collection of the various responses of Commonwealth nations to the ICC Statute, thereby facilitating comparative research and learning. These chapters will hopefully prove a valuable resource for officials throughout the Commonwealth as they tread into unfamiliar territory together.

Parts I and II, although self contained and quite distinct in content, are inter-related and share the same philosophy of approach. Both sections are aimed at providing a practical, comprehensible guide to international law, for everyday use in the offices, courts, police stations and chambers of legal professionals and others in the Commonwealth concerned with the investigation and prosecution of the most serious international crimes. It is hoped that the Guide will be an indispensable aid to achieving universal justice, for the victims and accused, and those who represent them.

Key documents of relevance with respect to the Court – namely the Rome Statute, the Elements of Crimes, the Rules of Procedure and Evidence and the Regulations of the Court – can be found at <http://www.icc-cpi.int/officialjournal/legalinstruments.html>. Hard copies can also be obtained from the Legal and Constitutional Affairs Division at the Commonwealth Secretariat.

The United States and the ICC

As part of the country chapters in Part II readers will notice a section that details the relevant country's response to American pressure to conclude what have become known as 'Article 98 agreements'. No contemporary guide to international criminal law would be complete without a discussion of the United States' position regarding the ICC.

Until quite recently the US was a vocal supporter of the idea of an international criminal court, with President Bill Clinton issuing calls for a permanent war crimes tribunal shortly

before the Rome Conference for the creation of the ICC when addressing genocide survivors in Rwanda.¹⁶ At the Rome Conference, US opposition to the Court first appeared during the drafting process, an opposition that had concretised in the closing days of the conference to the point that the US was one of seven States that voted against the Statute.¹⁷ Despite this position, in Bill Clinton's last days in office the US signed the ICC Statute.

Once in government, the Bush administration quickly took steps to set its face against the Court, and lodged with the UN Secretary-General a letter on 6 May 2002 giving formal notice that the US had no intention of becoming a party to the Rome Statute. The letter also requested that the US declaration be reflected in the Rome Treaty's official list – effectively cancelling out the US signature to the treaty that was entered by the Clinton administration on 31 December 2001. This measure – referred to as 'unsigned' – set the US in opposition to the Court. Under Article 18 of the 1969 Vienna Convention on the Law of Treaties, a State that has signed but not ratified a treaty is obliged to "refrain from acts which would defeat the object and purpose of the treaty...until it shall have made its intention clear not to become a party to the treaty". Having made its intention clear in this letter, the US then had a freer hand to act to use diplomatic means to oppose the Court.

The US has adopted three principal strategies to oppose the Court. The first measure, and one that lays the groundwork for the two others, is the passing of the American Servicemembers Protection Act 2001.¹⁸ The Act restricts US participation in peacekeeping missions and prohibits military assistance to those nations that ratify the Rome Statute, with the exception of NATO member countries and other major allies (Australia, Egypt, Israel, Japan, the Republic of Korea and New Zealand have been cited as members of this category). As it currently stands, the Act displays various features that militate against the Court. Among its most striking provisions are the following:

- Under the Act the US may not participate in any peacekeeping mission unless the President certifies to Congress that the Security Council has exempted US Armed Forces members from prosecution and each country in which US personnel will be present is either not a party to the ICC or has an agreement with the US exempting US Armed Forces members from prosecution.¹⁹
- The Act prohibits any governmental entity in the US, including state and local governments or any court, from co-operating with the ICC in matters such as arrest and extradition of suspects, execution of searches and seizures, taking of evidence, seizure of assets and similar matters.²⁰

16 During March 1998, at Kigali. See Lawrence Weschler, 'Exceptional Cases in Rome: The United States and the Struggle for an ICC' in Sarah Sewall and Carl Kaysen (eds), *The United States and the International Criminal Court*, 2000, p 91.

17 Although the vote was non-recorded at the US's suggestion, the US, China, Israel and India made explicit that they had voted against the adoption of the Statute. The other three States voting against the adoption of the Statute were presumably Libya, Iraq and either Algeria, Qatar or Yemen. (See Jonathan Charney, 'Progress in International Criminal Law' (1999) 93 *AJIL* 452 at 452 and fn. 17. Mexico, Singapore, Sri Lanka, Trinidad and Tobago, and Turkey explained that they had abstained. See generally in this regard Kittichaisaree, *International Criminal Law*, 2001, pp 36-37.

18 The Act has been adopted by the US Senate and the House of Representatives. At the time of writing it has not yet entered into force.

19 Section 5.

20 Section 4. These and other provisions in the Act are in addition to existing US law (the 2000-2001 Foreign Relations Act), which prohibits any US funds to the ICC once it has been established (see the Global Policy Forum Document, 'The American Servicemembers' Protection Act: An Overview', available at <http://www.globalpolicy.org/intljustice/icc/2001/0621usbl.htm>).

There is also provision in the Act to authorise the US President to use “all necessary and appropriate means” to free US or allied personnel detained by or on behalf of the ICC.

With the American Servicemembers Act in place, one can more easily appreciate the two further steps that the US has taken in opposing the Court. The first is that the US has insisted on the signing of bilateral immunity agreements with other States whereby the State agrees not to send US citizens and other persons connected to the US for trial to the ICC. Under the American Servicemembers Protection Act, US military assistance to States Parties to the ICC is prohibited unless they sign such an agreement. The US has reportedly extracted these agreements from over 90 countries. These agreements create a potential conflict of obligations for State Parties to the Rome Statute.

Finally, the US has taken action within the Security Council to obtain a one year ‘stay’ on any investigations or prosecutions involving non-State Party personnel contributing to the peacekeeping mission in Bosnia. The resolution, obtained initially in 2002, was renewed in 2003; however, due to pressures from other Security Council members, it was not renewed in 2004.

Conclusion

This Guide has been written by individuals who are excited about the prospects of international criminal law more generally and within the Commonwealth in particular. The Rome Statute of the ICC adopted in 1998 has its flaws – the nature of the drafting process and the political issues at stake ensured that. However, we have now reached a stage where the principle of individual criminal liability is established for those responsible for the most serious human rights violations, and where an institution has been established – on a permanent basis – to ensure the punishment of such individuals. The ICC, with independent prosecutors putting tyrants and torturers in the dock before independent judges, reflects a post-war human rights aspiration come true. Together with national courts acting in complement, the Court is a shining example of how human rights might be realised under international law. The vigour and energy with which Commonwealth States have supported the ICC is testament to the continuing relevance of the Commonwealth to the contemporary aspirations of the global community, one of which must be the eradication of impunity for international crimes.

Durban and London
6 December 2004

Part I: The International Criminal Court
