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THE INTERNATIONAL CRIMINAL COURT: AN INFORMAL OVERVIEW

Jerry E. Norton[†]

Introduction

International criminal law has been around for a long time. However, before the mid-twentieth century, international criminal law was basically a branch of national laws administered by national courts. For example, piracy was viewed as an international crime, yet enforcement of this crime, committed on the high seas beyond their national borders, required that nation states give extraterritorial jurisdiction to their domestic criminal courts.¹ National courts around the world had to determine the jurisdictional basis for extraterritorial prosecutions before them. The subject matter jurisdiction for prosecutions of piracy on the high seas became known as the universality principle— that is, certain crimes against humanity may be so universal that all civilized nations have jurisdiction to punish them regardless of where they were committed.² The number of international crimes for which universal jurisdiction is recognized by at least some states has expanded over time to include war crimes, crimes against humanity, genocide, and torture.³ This expansion is not solely because of practices among nations, but also because of the increased use of international treaties and conventions. In addition, national courts have expanded their jurisdiction to crimes committed outside the territories of their states by other jurisdictional enhancers such as nationality, passive personality, and national protective jurisdiction.⁴

However, to this point, international law remained a matter of national law and national courts. There was still no model for international courts applying international criminal laws. With the twentieth century this began to change. The Treaty of Versailles in 1919 ending World War I would have created an international tribunal to try the German Kaiser and others, but the United States did not support this tribunal and Germany was permitted to try the accused war criminals in domestic courts.⁵ The first international criminal court was created August

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¹ See generally M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 109-10 (Transnational Publishers 2003) and DAVID LUBAN, JULIE O' SULLIVAN & DAVID STEWART, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 208-12 (Wolters Kluwer 2010).

² At least one writer has argued that the crime of piracy does not provide justification for a more expanded universality jurisdiction. See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INTL. L. J. 183 (2004).

³ ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 44 (Cambridge University Press 2007).

⁴ See *id.* at 40-43.

⁵ ERIC K. LEONARD, THE ONSET OF GLOBAL GOVERNANCE: INTERNATIONAL RELATIONS THEORY AND THE INTERNATIONAL CRIMINAL COURT 22 (Ashgate Publishing Company 2005).

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8th, 1945— The International Military Tribunal at Nuremberg.⁶ A similar tribunal was also created in Tokyo.⁷ These military tribunals were criticized by human rights lawyers and others as being “‘victors’ justice”— administered against only the vanquished, and using rules and courts created only after the fact.⁸ Whatever the strengths and shortcomings of the World War II international military tribunals, the movement toward creating international courts to try international crimes that these courts may have signaled ended with the Cold War.⁹ During that time the world was divided into two competing spheres of state sovereignty. As one scholar put it, “[D]uring the Cold War, violations of human rights by the Enemy went unpunished because of its power, while violations by Friends were excused or justified on essentially strategic-diplomatic grounds.”¹⁰

With the end of the Cold War, the 1990s witnessed a strong resurgence in the quest for international criminal tribunals. Old ethnic, tribal and religious rivalries and new independence movements challenged the established spheres of control of the Cold War era.¹¹ In response to massive human rights violations in the Balkans, an International Criminal Tribunal for the Former Yugoslavia (ICTY) was created in 1993. A similar tribunal, the International Criminal Tribunal for Rwanda (ICTR) was created the following year. Unlike the Nuremberg tribunal in 1945 which was created by victorious allies, these tribunals were created by the United Nations Security Council. They could not be accused of being the products of “‘victors’ justice.” Nevertheless, the ICTY and ICTR are ad hoc tribunals created under charters drafted after the alleged crimes. Critics urge that these tribunals and the charters defining the crimes are ex post facto laws or violations of jurisdiction *ratione temporis*,¹² frowned upon in virtually all legal systems.¹³

Beginning even before the creation of the ICTY and ICTR, a third approach to trying international crimes was advanced— a permanent international court operating under general rules defining both the crimes and the court procedures.¹⁴ In 1994 the United Nations General Assembly created an *ad hoc* committee to study such a permanent international court. This led in turn to the creation of a U. N. Preparatory Committee (PrepCom) in 1996 designed to prepare a proposal for a

⁶ See Bassiouni, *supra* note 1, at 405-12, for an account of Nuremberg Tribunal creation and operation.

⁷ See *id.* at 414-20.

⁸ LEONARD, *supra* note 5, at 25-26.

⁹ *Id.* at 26-30.

¹⁰ LEONARD, *supra* note 5, at 151 (quoting Chris Brown, *Universal Human Rights: A Critique*, 1 INT'L J. HUM. RTS. 41 (1997)).

¹¹ *Id.*

¹² See, e.g., Rome Statute of the International Criminal Court, art. 11(1), 17 July 1998, A/CONF.183/9 (July 1, 2002) [hereinafter Rome Statute] (“The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.”).

¹³ See LEONARD, *supra* note 5, at 152-53 and David Tolbert, *International Criminal Law: Past and Future*, 30 U. PA. J. INT'L L. 1281, 1285-88 (2009), for further discussions of the shortcoming of the *ad hoc* tribunals.

¹⁴ BASSIOUNI, *supra* note 1, at 444-57.

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statute creating a permanent international criminal court. Based on a draft statute prepared by PrepCom, a major diplomatic conference was held in Rome from June 15 to July 17, 1998.¹⁵ Dozens of states were represented by 5,000 delegates. As described by participants, the states divided themselves into two principal groups—the “like-minded” ones supporting the proposed international criminal court, which increased to about 60, and a small group of opposing states among which the United States played a prominent role.¹⁶ With the assistance of 238 non-governmental organizations (NGOs) coordinated by the Coalition for the ICC, the delegates were able to work through many major differences to reach a proposed statute in 33 days. The final vote on July 17, 1998, was 120 yes, seven no and 21 abstentions. The Rome Statute entered into force on July 1st, 2002 after ratification by 60 countries. As of August, 2010, 113 countries are States Parties.¹⁷

In spite of the ambiguity of the United States in negotiations leading to the Rome Statute, President Bill Clinton signed the resulting treaty. However, after he took office, President George W. Bush withdrew President Clinton’s initial signature to the treaty creating the ICC.¹⁸ Hostile reactions to the statute were immediately expressed in some quarters in the United States, including Congress, which passed the American Service-members’ Protection Act of 2002.¹⁹

The act authorizes the President to use force to rescue covered Americans held by the ICC.²⁰ More recent reflections on the threat of the Rome Statute to American interests have suggested that the fears leading to passage of the American Service-members’ Protection Act were not only overstated but also counter-productive. As one military attorney has recently stated, “[T]he Act fails to actually protect U.S. nationals from this perceived threat, because the Act does nothing to

¹⁵ See *id.* at 462-94 and LEONARD, *supra* note 5, at 38-42, for this summary of the Rome Conference.

¹⁶ “More particularly, the U.S. had exhibited greater obstinacy than anyone had expected. In fact, most delegations, particularly the ‘like-minded states,’ were bending over backwards to accommodate the U.S., which secured broad concessions on almost everything that it had requested until then. . . . Many delegations were dismayed at such lack of diplomatic flexibility, which seasoned diplomats believed to be a weakness in the American negotiating approach. Many delegations, however, saw it as another sign of American intransigence.” BASSIOUNI, *supra* note 1, at 477.

¹⁷ INTERNATIONAL CRIMINAL COURT, THE STATE PARTIES TO THE ROME STATUTE, <http://www2.icc-cpi.int/Menu/ASP/states+parties/> (last visited Nov. 5, 2010).

¹⁸ Diane Marie Amann & M.N.S. Seller, *The United States of America and the International Criminal Court*, 50 Am. J. Comp. L. 381, 384 (2002).

¹⁹ “In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression.” See 22 U.S.C.A. § 7421.

²⁰ “The President is authorized to use all means necessary and appropriate to bring about the release of any person . . . who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.” 22 U.S.C.A. § 7427. This law was also called the “Invade the Hague” statute. ELIZABETH VAN SCHAAK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 81 (Foundation Press 2007). See Amann & Sellers, *supra* note 18, for additional discussions of the American reaction to the ICC.

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influence the mechanism and procedures of the Court from the *inside*. In reality, the Act does more harm than good, as it has been counterproductive to U.S. national security and the fight against terrorism. . . ."²¹

Crimes and Jurisdiction

Only three general crimes are defined under the Rome Statute: Genocide, Crimes against Humanity, and War Crimes, although each is quite broad in coverage. The Crime of Aggression, which caused such concern for the United States Congress when it passed the American Service-members Protection Act of 2002, is not yet a defined crime and could not be prosecuted as such under Article 22 of the Rome Statute. A Review Conference for the Statute was held in June 2010, at which a proposed definition of the crime of Aggression was submitted to the States Party for ratification.²² It will become part of the Rome Statute only when ratified. The three previously existing crimes— Genocide under Article 6, Crimes Against Humanity under Article 7, and War Crimes under Article 8— follow generally accepted definitions found in international treaties and conventions, including the Genocide Convention and the Geneva Conventions of 1949, all of which the United States has ratified.

Until a crime of aggression is included in the Rome Statute, the most controversial feature of the 1998 statute is not its definition of crimes, but its jurisdiction. The International Criminal Court may have jurisdiction over the three covered crimes if these crimes are committed in the territories of states which are parties to the Rome Statute (State Parties) or are committed by nationals of State Parties.²³ In addition to these two, where the crime is committed on the territory of a state not a party to the ICC, the state may opt to accept the territorial or nationality jurisdiction of the ICC. Finally, the court will have jurisdiction over cases referred to it by the Security Council, apparently regardless of whether a State Party is involved. However, the jurisdiction of the ICC is always complementary to national criminal jurisdiction, meaning no investigation or prosecution can be commenced or proceed if it is being investigated or prosecuted by a state with jurisdiction unless this investigation or prosecution is not genuine.²⁴

²¹ Stuart W. Risch, *Hostile Outsider or Influential Insider? The United States and the International Criminal Court*, ARMY LAW., May 2009, at 61, 80 (2009).

²² The proposed Crime of Aggression is defined as:

[T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

International Criminal Court, Review Conference of the Rome Statute, Draft Resolution Submitted by the President of the Review Conference: The Crime of Aggression 2, June 11, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-10-ENG.pdf. The fact that such a crime is being considered without the inside participation by the United States, which would be so concerned with the resulting definition of Aggression, is one factor that led Colonel Risch to conclude that the Service-Members Protection Act of 2002 was counterproductive and that national interests would be most advanced by having a seat at the table. Risch, *supra* note 21, at 72.

²³ Rome Statute, *supra* note 12, art. 12.

²⁴ *Id.* arts. 1, 17(1)(a).

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This jurisdictional language caused concern to the American representatives at the Rome Conference and later in Congress, since it is easy to see the prospect that American armed forces may be involved in states which are either signatories to the Rome Statute or would be willing to accept the jurisdiction of the ICC. Jurisdiction would then be exercised over American service-members and military and political commanders. Concern with the potential liability of Americans to ICC jurisdiction has caused the United States to enter into agreements with more than 100 countries under which those countries agree not to surrender Americans to the International Criminal Court. Such agreements are effective, the United States urges, under Article 98 of the Rome Statute.²⁵

Prosecutors' Discretion and the Pre-Trial Chamber

Related to the concern with the jurisdiction of the International Criminal Court is concern with the powers of the Prosecutor. The Prosecutor under the Rome Statute has substantial discretion in investigating and prosecuting the three crimes under the statute. In that regard, his powers are not that different from the powers American prosecutors possess and exercise.²⁶ However, critics of the Rome Statute argue that American state and federal prosecutors are directly or indirectly limited by the political accountability built into the American prosecutorial system. Most state prosecutors are politically elected and accountable to the electorate for their decisions. Federal prosecutors are accountable to the United States Attorney General, who serves at the pleasure of the elected president. The ICC Prosecutor is not elected by popular vote, but by vote of a majority of the Assembly of States Parties and for a term of nine years.²⁷ In other words, he or she may be elected by, based on the current membership, 56 nations, regardless of their population and regardless of their fidelity to democracy.²⁸ He or she is subject to removal from office only for cause and only by the same absolute majority vote of the Assembly of States Parties.²⁹ One point of conflict at the 1998 Rome Conference was the suggestion by the United States and others that the United Nations Security Council play a larger role in controlling the Prosecutor's discretion. Some urged that certain prosecutions be limited to cases referred by the Security Council, thus effectively maintaining the power of the United States, as a permanent member of the Security Council, to veto prosecutions. Short of that, it was urged that the Security Council be given the power to prohibit prosecutions on the initiative of the Prosecutor. Article 16 of the Rome Statute, as finally adopted, permits the Security Council, by resolution,

²⁵ See International Criminal Court – Article 98 Agreements Research Guide, available at http://www.ll.georgetown.edu/guides/article_98.cfm (last visited Nov. 5, 2010) for a discussion of these Article 98 agreements and a list of countries with which these agreements have been concluded.

²⁶ See 4 LAFAVE ISRAEL, KING & KERR, CRIMINAL PROCEDURE §13.2 (Thomson/West 3d ed., 2007.)

²⁷ Rome Statute, *supra* note 12, art. 42(4).

²⁸ See Amann & Seller, *supra* note 18, at 388-89 and Risch, *supra* note 21, at 78, for a discussion of the concern with politically motivated prosecutions in the ICC. “[A]lmost seven years of experience with the Court, and six with this Prosecutor, has demonstrated no evidence whatsoever of any willingness to politicize his, or the Court’s decisions.” Risch, *supra* note 21, at 78.

²⁹ Rome Statute, *supra* note 12, art. 46(2).

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to defer investigations and prosecutions for up to 12 months at a time, but it cannot prohibit them.

However, the International Criminal Court Prosecutor is not given unchecked power to initiate criminal investigations and prosecutions. Where the Prosecutor initiates an investigation, rather than having it referred by the Security Council or a State Party, he or she must submit an authorization for the investigation to the Pre-Trial Chamber (“PTC”) of the International Criminal Court.³⁰ At one level the Pre-Trial Chamber fulfills a function akin to a preliminary hearing in an American courtroom. At an ICC hearing, the PTC determines whether there is “sufficient evidence to establish substantial grounds to believe that the persons committed the crime charged.”³¹ If the Pre-Trial Chamber declines to confirm a charge, the Prosecutor may submit the matter again, but only if supported by additional evidence.³² The Pre-Trial Chamber also plays important roles in the investigation, such as issuing arrest warrants and other orders dealing with witnesses and gathering of evidence.³³ Under detailed Rules of Procedure and Evidence adopted by the States Parties the Pre-Trial Chamber maintains many controls over the prosecutor beyond that available to American courts.³⁴

Luis Moreno-Ocampo of Argentina was unanimously elected as the first Prosecutor of the Court in 2003. He is not a timid advocate. Between 1984 and 1992, as a prosecutor in Argentina, Mr. Moreno-Ocampo was involved in precedent-setting prosecutions of top military commanders for mass killings and other large-scale human rights abuses.³⁵ He is currently investigating four situations: Northern Uganda, the Democratic Republic of Congo, Darfur, Sudan, and the Central African Republic, with preliminary analyses in a number of other countries including Chad, Kenya, Afghanistan, Georgia, Colombia, and Palestine.³⁶

The Trial

While the International Criminal Court has yet to complete a trial, the Rome Statute of 1998 creates a system most resembling a trial under the European Civil Law system, yet incorporating some Anglo-American Common Law features. Some of these features are very recognizable to the American lawyer. Article 66 expressly states that the accused “shall be presumed innocent” and that the proof of guilt must be “beyond reasonable doubt.” The accused has other rights Americans associate with the Fifth and Sixth Amendments to the United States Consti-

³⁰ *Id.* art. 15(4).

³¹ *Id.* art. 61(7).

³² *Id.* art. 61(8).

³³ *Id.* art. 57.

³⁴ ROME STATUTE, R. PROC. & EVID., available at http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf (last visited Nov. 5, 2010).

³⁵ INTERNATIONAL CRIMINAL COURT, THE PROSECUTOR, <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Biographies/The+Prosecutor.htm> (last visited Nov. 5, 2010).

³⁶ INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor> (last visited Nov. 5, 2010).

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tution, including speedy trial;³⁷ assistance of counsel, including appointed counsel for the indigent;³⁸ production, confrontation, and cross-examination of witnesses;³⁹ freedom from compelled self-incrimination;⁴⁰ and *Brady* disclosures of information favorable to the accused on issues of guilt or punishment.⁴¹ In addition, the accused is given the right to a free interpreter⁴² and a right rarely found in the Common Law to “make an unsworn oral or written statement” in his or her defense.⁴³ This right, commonly found in Civil Law countries, gives the accused the right to make a statement without being subject to cross-examination or perjury prosecution. It also relieves the defense attorney of the ethical responsibility for assessing the credibility of his or her client in making such a statement.

The trial itself will also bear greatest resemblance to a trial in a Civil Law country. There will be no jury and the case will be tried before a panel of three judges of the Trial Chamber.⁴⁴ These judges are elected by the Assembly of States Parties, the member states of the ICC.⁴⁵ Because the matter is tried before judges, not jurors, the rules of evidence are surprisingly casual to the eyes of an American lawyer. The testimony of each witness must be in open court, with certain exceptions for recorded or video testimony, and each witness must testify under oath. Beyond this, the Trial Chamber judges are largely free of formal restrictions. “The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and the prejudice that such evidence may cause to a fair trial. . . .”⁴⁶ When a verdict is reached by the three judges it will not be in the form of a simple finding of “guilty” or “not guilty.” Consistent with Civil Law countries, “The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.”⁴⁷ In other words, the court must state its conclusions and justify them in writing by the evidence presented. While rules of evidence appear relaxed, the Trial Chamber judges must assess the weight and credibility of evidence in a written opinion.

³⁷ Rome Statute, *supra* note 12, art. 67(1)(c).

³⁸ *Id.* art. 67(1)(d).

³⁹ *Id.* art. 67(1)(e).

⁴⁰ *Id.* art. 67(1)(g).

⁴¹ *Id.* art. 67(2). The requirement is the same as that in *Brady v. Maryland*, 373 U.S. 83 (1963).

⁴² *Id.* art. 67(1)(f).

⁴³ *Id.* art. 67(1)(h).

⁴⁴ *Id.* art. 39(2)(b).

⁴⁵ *Id.* art. 36.

⁴⁶ *Id.* art. 69(4). In addition to Article 69 of the Rome Statute, judges are also subject to Rules of Procedure and Evidence for the International Criminal Court. Rule 64 of the procedure rules requires that, “A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings. . . .” ROME STATUTE, R. PROC. & EVID. 64, para. 2, available at http://www2.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf. As with other determinations, these rulings are subject to review by the Appeals Chamber.

⁴⁷ Rome Statute, *supra* note 12, art. 74(5).

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Other features of the trial are more mixed, with elements of both the Civil Law and Common Law traditions. The accused is given the right to be present and to cross-examine witnesses—a feature common to the adversarial Common Law tradition, yet Article 64 (8) gives inquisitorial-type powers to the presiding judge. “At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner.”⁴⁸ Another mixed feature is the way in which plea bargaining is treated. “The crucial difference between the common law and civil law view is whether the court must accept the facts as the parties have agreed them or whether it will conduct a further inquiry and perhaps require additional evidence.”⁴⁹ Article 65 of the Rome Statute and the supporting Rule 139 of the Rules of Procedure and Evidence allow the court to receive an admission of guilt once it has determined that it is voluntary and “supported by the facts of the case.” However, it also allows the court to demand additional evidence when the court “is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice”⁵⁰

The Trial Chamber decision must be in writing and must contain a reasoned statement of the evidence and conclusions.⁵¹ The three judges are admonished to “attempt” to reach unanimity, but failing that a majority is enough.⁵² The decision or a summary of it is to be delivered in open court, and should contain the views of the minority judge, along with those of the majority.⁵³ In addition to finding guilt or innocence, the judges of the Trial Chamber are also directed to address restitution and compensation to the victim by a convicted person.⁵⁴ Since the convicted person may not have sufficient resources for reparations, the court may direct that reparations be paid from a trust fund created by the Assembly of States Parties.⁵⁵

Appeals and Chambers of the ICC

Of the stages in prosecutions before the International Criminal Court, the one that will be most foreign to American Lawyers is the appellate stage. The powers of the Appeals Chamber almost entirely follow Civil Law traditions. First, *both* the prosecution and the defense can appeal, and not only can they appeal procedural errors and errors of law, but also factual errors.⁵⁶ Both can also ap-

⁴⁸ See CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 3, at 386-87, for a discussion of the mix of adversarial and inquisitorial models in the ICC trial rules.

⁴⁹ *Id.* at 385.

⁵⁰ Rome Statute, *supra* note 12, art. 65(1), (4). The extent to which plea bargaining is accepted under the ICC is still an open question. See CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 3, at 386.

⁵¹ Rome Statute, *supra* note 12, art. 74(5).

⁵² *Id.* art. 74(3).

⁵³ *Id.* art. 74.

⁵⁴ *Id.* art. 75.

⁵⁵ *Id.* art. 75. The trust fund is authorized under Article 79. See *id.* art. 79.

⁵⁶ *Id.* arts. 81(1)(a)-(b). The only difference between the rights on appeal of the prosecution and the defense is that the defense may raise “any other ground that affects the fairness or reliability of the

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peal the sentence.⁵⁷ These rules are significantly different from those found in American courts, where appellate courts rarely review factual determinations, and acquittals are rarely appealable at all. The Appeals Chamber of the ICC has “all the powers of the Trial Chamber” in an appeal.⁵⁸ It can either reverse or amend a Trial Chamber decision or sentence, or it can order a new trial if it finds that the lower court was “materially affected by error of fact or law or procedural error.”⁵⁹ The appellate chamber may sit, in effect, as a second trial court.

As the prior discussion has indicated, the judges of the International Criminal Court are organized in three largely independent chambers. All judges are elected by the States Parties to a term of nine years and may not be reelected.⁶⁰ The judges then elect the President of the court and two Vice-Presidents, who are in charge of administering the Court.⁶¹ They serve three year terms, and may be reelected once.⁶² The Appeals Chamber is made up of the President and four other judges who sit together.⁶³ They serve the full term of their office in this chamber.⁶⁴ Judges in the Trial Chamber sit in panels of three, and those in the Pre-Trial Chamber work either alone or in panels of three.⁶⁵ Judges in the Pre-Trial and Trial Chambers may move between these two chambers, but those in the Appeals Division must serve their entire term in that chamber.⁶⁶

The Rome Statute as a Criminal Code

While the focus of this informal overview has been on the procedural stages in prosecutions in the International Criminal Court, no examination of the Rome Statute should overlook the fact that the statute is both a code of criminal procedure and a code of criminal law. Articles 7, 8, and 9 define the specific crimes covered by the Code: genocide, crimes against humanity, and war crimes. These articles constitute the criminal code. Beyond the Rome Statute itself, the States Parties have adopted detailed Elements of Crimes designed to “assist the Court in the interpretation and application of articles 6, 7 and 8.”⁶⁷

Part III of the code, including articles 22 through 33, is what many scholars would call “the general part,” the general principles of criminal law. For the first

proceedings or decision.” *Id.* art. 81(1)(b)(iv). A similar right is not given to the prosecutor, unless he or she is acting on the defendant’s behalf.

⁵⁷ *Id.* art. 81(2).

⁵⁸ *Id.* art. 83(1).

⁵⁹ *Id.* arts. 83(1)-(2).

⁶⁰ *Id.* art. 36(9).

⁶¹ *Id.* art. 38.

⁶² *Id.* art. 38.

⁶³ *Id.* art. 39(2).

⁶⁴ *Id.* arts. 39(1)-(2).

⁶⁵ *Id.* art. 39(2).

⁶⁶ *Id.* arts. 39(3)-(4).

⁶⁷ *Id.* art. 9; *see also* ROME STATUTE, ELEMENTS OF CRIMES, http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf (last visited Nov. 5, 2010).

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time among international criminal tribunals the principles of *nullum criminal sine lege* and *nulla poena sine lege*, central to advanced national criminal law, are adopted.⁶⁸ Under these principles, convictions and punishment under the statute may only be for crimes defined by the statute, and the statute is to be interpreted in favor of the accused.⁶⁹ In addition, no person may be prosecuted for conduct prior to the date when the statute goes into effect.⁷⁰ The military tribunals at the end of World War II and the ad hoc tribunals for the former Yugoslavia and for Rwanda were not similarly restricted by these principles.

Article 30 of the Rome Statute prescribes the mental elements necessary for conviction under the code. Only intent and knowledge will suffice for convictions, and these two terms are defined in ways very similar to “purposely” and “knowingly” under the American Law Institute’s Model Penal Code.⁷¹ Reckless and negligent conduct is normally not sufficient for conviction under the Rome Statute. However, military commanders may be responsible for forces under their control if the commander “either knew or, owing to the circumstances at the time, should have known” these forces were committing crimes.⁷² Thus, for these commanders, only something more closely related to negligence need be shown.

The code also recognizes certain defenses. No one who was under 18 when the crime was committed may be prosecuted.⁷³ However, there is no head of state or other official exemption or defense,⁷⁴ nor is there a statute of limitations.⁷⁵ Article 31 contains rules defining defenses of insanity, intoxication, self-defense, and duress. The last two in particular may often be serious issues in prosecutions for war crimes and genocide.⁷⁶ The definitions of the defenses of mistake of law and of fact are very similar to the A.L.I. Model Penal Code.⁷⁷

The most troubling defense in international criminal law is obedience to superior orders. Many individuals who commit acts that would amount to a war crime are acting under orders. Military organizations in particular function on the basis of commands which legally must be obeyed by inferiors. The punish-

⁶⁸ *Id.* arts. 22-23. The statute creating the International Criminal Tribunal for the former Yugoslavia, in contrast, contains an Article 3, providing that the ICTY may “prosecute persons violating the laws or customs of war.” The article continues, “such violations shall include, but not be limited to” enumerated acts. See United Nations, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 3 (2009), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (last visited Nov. 5, 2010).

⁶⁹ Rome Statute, *supra* note 12, art. 22(2).

⁷⁰ Rome Statute, *supra* note 12, art. 24.

⁷¹ MODEL PENAL CODE § 2.02(2).

⁷² Rome Statute, *supra* note 12, art. 28(a). Article 28(b) also expands the potential responsibility of non-military superiors in more restricted ways. *Id.* art. 29(b).

⁷³ *Id.* art. 26.

⁷⁴ *Id.* art. 27.

⁷⁵ *Id.* art. 29.

⁷⁶ See CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 3, at 332-40, for a discussion of the defenses provided in Article 31.

⁷⁷ *Cf.* Rome Statute, *supra* note 12, art. 32, with MODEL PENAL CODE § 2.04(1)(a).

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ment for failure to obey may be severe.⁷⁸ Against this is a belief articulated in the statute creating the Nuremberg military tribunal in 1945 that the fact that one acts “pursuant to an order of his government or of a superior shall not free him from responsibility.”⁷⁹ Article 33 of the Rome Statute takes a more nuanced position. Obedience to an unlawful order may be a defense if there is a legal obligation to obey, but subject to two conditions: first, if the accused did not know the order was unlawful and second, if the order was not “manifestly unlawful.”⁸⁰ As a further limit on the defense, Article 33 also says that orders to commit genocide or crimes against humanity are always manifestly unlawful, so anyone obeying these orders will be guilty, regardless of his or her belief that the orders were lawful.

Conclusions

The International Criminal Court is less than a decade old and has yet to complete its first trial. Nevertheless, its influence is being felt throughout the world and throughout the field of international law. It offers a forum for the prosecution of those who would commit war crimes, crimes against humanity, and genocide. But even beyond the cases directly adjudicated in its chambers, it will provide an incentive for national prosecutors and courts throughout the world to investigate and punish these crimes in order to preempt the complementary jurisdiction of the ICC.⁸¹ A third influence likely to result from the creation of the ICC is its influence on mixed national and international criminal courts frequently created to help developing nations move past genocides and oppressive regimes. These “hybrid” tribunals use both local and international laws, prosecutors, and judges.⁸² The ICC will encourage these mixed local-international solutions and also provide a framework for the definition of the three crimes that may be applied by these hybrid courts. One day the United States may determine that the interests and ideals of this nation will be most effectively promoted by becoming an influential insider in this movement, rather than remaining a hostile outsider.

⁷⁸ For example, under the American Uniform Code of Military Justice, one who willfully disobeys a lawful command of his superior commission officer in time of war may be sentenced to death. UNIFORM CODE OF MILITARY JUSTICE, art. 90.

⁷⁹ CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 3, at 343 (citing Charter of the International Tribunal, art. 8 (1945), available at http://www.icls.de/dokumente/imt_statute.pdf (last visited Nov. 5, 2010)).

⁸⁰ Rome Statute, *supra* note 12, art. 33(1).

⁸¹ Rome Statute, *supra* note 12, art. 17.

⁸² Examples of hybrid courts are found in Sierra Leone, Cambodia, East Timor, Kosovo, and arguably other countries as well. See Tolbert, *supra* note 13, at 1287. See BASSIOUNI, *supra* note 1, at 545-81, for a more extended discussion of these courts.