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14th ANNUAL ANZSIL CONFERENCE:  
PACIFIC PERSPECTIVES ON INTERNATIONAL LAW

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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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VICTORIA UNIVERSITY OF WELLINGTON

*Te Whare Wānanga o te Ūpoko o te Ika a Māui*



FACULTY OF LAW  
*Te Kauhanganui Tatai Ture*

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# TOWARDS UNIVERSAL JUSTICE — WHY COUNTRIES IN THE ASIA— PACIFIC REGION SHOULD EMBRACE THE INTERNATIONAL CRIMINAL COURT

*Steven Freeland\**

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*The International Criminal Court has been operating since July 2002 and is now entering its judicial phase of activities. Coupled with this, as the number of States Parties to the Rome Statute of the International Criminal Court grows, the importance of the Court as a mechanism of international justice is further highlighted. Despite this momentum, the number of ratifications by countries of the Asia–Pacific region has been relatively small. There are a number of possible reasons suggested in this paper for this general lack of enthusiasm for the Court, particularly in the early years of its existence. However, this paper argues that there are tangible benefits for countries in the Asia–Pacific to embrace the Court and become an active State Party to the Statute, and encourages these countries to give this matter serious consideration.*

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## **I INTRODUCTION — THE PROGRESS OF THE INTERNATIONAL CRIMINAL COURT**

On 17 March 2006, Thomas Lubanga Dyilo, a Congolese national and alleged founder and leader of the rebel group *Union des Patriotes Congolais*, was arrested and surrendered by the Congolese authorities to the International Criminal Court (ICC or the Court),<sup>1</sup> as part of the judicial

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1 See International Criminal Court "First Arrest for the International Criminal Court" (17 March 2006) Press Release.

procedures under the Rome Statute of the International Criminal Court (Rome Statute).<sup>2</sup> Mr Lubanga appeared in The Hague before a preliminary Pre-Trial Chamber hearing shortly afterwards, having been charged with war crimes relating to the conscription and enlisting of children under 15 years of age and using them to participate in hostilities.<sup>3</sup> Although there are still a number of preliminary matters to be determined,<sup>4</sup> the charges against him were confirmed on 29 January 2007.<sup>5</sup> His trial will commence later in 2007, once various applications for appeal from the confirmation decision are resolved.<sup>6</sup>

Mr Lubanga is the first person to appear before the ICC since the entry into force of the Rome Statute in July 2002. His appearance constitutes a highly significant landmark for the ICC, the world's first permanent international criminal court. It represents a further indication of the shift towards a globalised system of international criminal justice that has taken place over the past decade, as the international community moves to establish tangible enforcement mechanisms intended to deal with those international crimes that represent a gross violation of universal human rights norms and international humanitarian law principles. There remain imperfections in this still-evolving system of international justice. However, what is clear is that the broader international community, and civil society, have accepted the need to institute mechanisms designed to put an end

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- 2 Rome Statute of the International Criminal Court (Rome Statute) (17 July 1998) 2187 UNTS 3.
- 3 The Rome Statute specifies that such actions constitute a war crime, constituting a serious violation "of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law..." (Rome Statute, *ibid*, art 8(2)(e)(vii)). For a discussion of the regulation under international law of the use of child soldiers, see Steven Freeland "Child Soldiers and International Crimes — How Should International Law be Applied?" (2005) 3 NZJPIL 303.
- 4 One of these issues concerns the role that victims may play in proceedings instituted against the accused. The Rome Statute provides that the Court is to "establish principles relating to, or in respect of, victims, including restitution, compensation and rehabilitation" (Rome Statute, above n 2, art 75(1)) and can make orders in relation to such reparations (Rome Statute, *ibid*, art 75(2)). Rule 89 of the Rules of Procedure and Evidence of the ICC (ICC Assembly of States Parties (ASP) "Rules of Procedure and Evidence" (10 September 2002) ICC-ASP/1/3, rule 89) enables victims to make an application to the Registrar of the Court to participate in proceedings before the Court. The precise scope of this right is the subject of consideration by the Court, with the ICC Prosecutor arguing that it does not extend to the investigative phase of a situation, see, for example, *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo* (Prosecution's Observations on the Applications of Applicants a/0001/06 to a/0003/06) (6 June 2006) ICC-01/04-01/06 (Pre-Trial Chamber I, ICC).
- 5 International Criminal Court "Pre-Trial Chamber I Commits Thomas Lubanga Dyilo for Trial" (29 January 2007) Press Release.
- 6 Rome Statute, above n 2, art 61(1) provides for a hearing before the Pre-Trial Chamber "to confirm the charges on which the Prosecutor intends to seek trial". This confirmation hearing is to take place "within a reasonable time after the person's surrender ... before the Court...". The other provisions of Article 61 specify the procedure to be undertaken at the confirmation hearing (Rome Statute, *ibid*, art 61).

to the era of impunity that existed for many decades prior to the 1990s for the perpetrators of these crimes.

This is evident by the pace of acceptance of the Rome Statute itself. Even as it was being finalised at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome during July 1998, some predicted that it would be many years before the requisite 60 State ratifications for it to come into force would be achieved.<sup>7</sup> Instead, within four years, this had been achieved and, in October of last year, Mexico submitted its formal ratification, bringing the number of States Parties to the highly symbolic number of 100. Since then, a further four countries have ratified the Rome Statute, bringing the number of States Parties to 104, over half the countries in the world.<sup>8</sup> There are approximately 40 other signatory States, several of which are likely to ratify the Rome Statute soon, including Japan — which will then become the largest financial contributor towards the Court's annual budget.

There is no doubt that there is much work to be done in order to "convince" other States — particularly the larger and more powerful countries such as the United States, Russia and China — that the ICC does not represent a threat to their sovereignty, but rather is one important tool in a broader scheme to protect international peace and security. However, it is clear that the need for a permanent international criminal court, such as the ICC, "with jurisdiction over the most serious crimes of concern to the international community as a whole" has been generally accepted.<sup>9</sup>

Even from the perspective of the United States, for example, the issue has not been so much the existence of the Court, but rather the potential for an American national to be brought to trial in The Hague.<sup>10</sup> There have been recent suggestions that the United States may be reappraising its opposition to the Court, particularly in relation to its aggressive strategy of pressuring developing

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7 See Rome Statute, *ibid*, art 126(1).

8 On 1 November 2006, Chad deposited its instrument of ratification with the Secretary-General of the United Nations. As a result, the Rome Statute will enter into force for that State on 1 January 2007, making it the 104<sup>th</sup> State Party, see Rome Statute, *ibid*, art 126(2).

9 Rome Statute, *ibid*, preamble, para 9.

10 For an overview of the various actions taken by the United States after the Rome Statute had been finalised, see Steven Freeland and Michael Blissenden "The International Criminal Court: Politics, Justice and Impunity" in Australian and New Zealand Society of International Law: Proceedings of the 11<sup>th</sup> Annual Meeting *International Governance and Institution: What Significance for International Law?* (ANZSIL, Wellington, 2003) 319-326.

countries to enter into so-called "Article 98" bilateral immunity agreements.<sup>11</sup> Moreover, it should be noted that the United States ultimately chose to abstain from voting on (rather than vetoing) United Nations Security Council Resolution 1593, which referred the situation in Darfur since 1 July 2002 to the Prosecutor of the Court.<sup>12</sup> In a recent speech in Japan, the President of the Court, Philippe Kirsch, suggested that the activities of the Court to date have "had an effect of relaxation on the part of states that were initially very opposed to the court and now are much more sympathetic and interested in the court".<sup>13</sup>

Despite this generally positive momentum indicating a gradual and broader acceptance of the Court, it is noteworthy that the number of States within the Asia-Pacific region that have thus far ratified the Rome Statute, or have indicated that they are taking practical measures aimed towards ratification in the near future, is relatively low when compared to the European, African and American regions. Those other regions of the world are already well represented in the ICC system, whereas the Asia-Pacific region is not. This paper discusses a number of the reasons for this, and argues that there are several important benefits for those countries in the region that do decide to ratify the Rome Statute. It is submitted that these benefits outweigh any disadvantages, real or perceived, associated with being a State Party to the Rome Statute and, thus, those States that are yet to ratify the instrument should carefully consider undertaking the necessary domestic procedures necessary to lead to eventual ratification (or accession).<sup>14</sup>

In the end, it is concluded that for States in the region, ratification of the Rome Statute represents an opportunity to play a role in the important work of the Court and in shaping its future

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11 Rome Statute, above n 2, art 98(2) provides that "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of the sending State is required to surrender a person of that State to the Court...". Purporting to be acting in conformity with this provision, the United States has sought to enter into bilateral immunity agreements with as many States as possible, threatening to withhold aid from specific developing States that do not agree to enter into such agreements. It is estimated that the United States has entered into approximately 100 such agreements. It remains to be seen exactly what the legal effect of these agreements may be in the context of proceedings before the Court.

12 Having said this, the Resolution did specify a number of rather exceptional "safety valves" largely at the insistence of the United States, which ensured that, in practice, no United States national (or a national of any other non-State Party to the Rome Statute) would fall within the jurisdiction of the Court in relation to "all alleged acts or omissions arising out of or related to operations in Sudan established or authorised by the Council..." (UNSC Resolution 1593 (31 March 2005) S/RES/1593/2005 para 6).

13 "Japan's Expected to Support International Criminal Court" (6 December 2006) *Voice of America News* <[www.voanews.com/english](http://www.voanews.com/english)> (accessed 12 December 2006).

14 Rome Statute, above n 2, art 125(3) provides that the instrument is "open to accession by all States".



direction and activities. It would also further enhance the movement towards universal acceptance of the Court.

## **II THE LACK OF REGIONAL ACCEPTANCE OF THE ICC**

As mentioned above, the general support for the Court in other parts of the world has not been matched thus far in the Asia-Pacific region. Despite the fact that two of the initial 18 Judges of the ICC have come from countries situated in the region and that the Court is developing a clear momentum — having now entered into its formal judicial phase of activities in earnest — the level of its acceptance within the region has been low. The number of States Parties from the Asia-Pacific region is currently only nine, with the last of those ratifications having taken place over four years ago.<sup>15</sup>

Of course, it is the case that several regional countries are currently considering ratification. At the first session of the Fourth Assembly of States Parties (ASP) held in The Hague in late November 2005, Japan — which, as a signatory to the Rome Statute, had observer status at the Assembly<sup>16</sup> — indicated that it was closely monitoring the activities of the Court and was working towards eventual ratification. At the same time, however, it was clear from the Japanese Delegate's comments that the level of that country's financial contributions to the ongoing costs of the Court, once it was a State Party to the Rome Statute, would be a matter for negotiation prior to such ratification.<sup>17</sup> In October 2006, Japanese Prime Minister Shinzo Abe confirmed that Japan was intending to ratify the Rome Statute in 2007.<sup>18</sup> As mentioned earlier, it would then become the largest financial supporter to the Court, with an initial annual contribution of approximately

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15 The States Parties from the region, and the dates of their ratification, are as follows:

Fiji (29 November 1999), New Zealand (7 September 2000), Marshall Islands (7 December 2000), Nauru (12 November 2001), Cambodia (11 April 2002), Australia (1 July 2002), Timor-Leste (6 September 2002), Samoa (16 September 2002) and Republic of Korea (13 November 2002). It can be seen from this list that the level of ratification in countries situated in the Pacific is significantly higher than those situated in Asia. It should also be noted that this list does not accord with the States Parties in the broader United Nations grouping of Asian States, which does not include Australia and New Zealand, but does include Cyprus (7 March 2002), Mongolia (11 April 2002), Jordan (11 April 2002), Tajikistan (5 May 2002) and Afghanistan (10 February 2003).

16 Rome Statute, above n 2, art 112(1).

17 The European Union, the United States and Japan together currently contribute approximately 82 per cent of the total budget of the United Nations.

18 "Chief Justice of ICC lauds Japan to pledge to join tribunal" (7 December 2006) *Japan Times* <[www.search.japantimes.co.jp](http://www.search.japantimes.co.jp)> (accessed 12 December 2006).

US\$17.2 million towards the Court's annual budget, thus representing almost 15 per cent of the 2007 ICC budget approved at the Fifth ASP.<sup>19</sup>

Notwithstanding those possible future developments, it is undeniable that regional countries as a whole have, up till now, not embraced the ICC. This is an unfortunate situation, though perhaps not totally unexpected. There are a number of possible explanations for this. One suspects that a primary reason may be that several regional countries take the view that a global institution such as the ICC may either not be relevant or is inappropriate to deal with regional issues and that, instead, any issues relating to possible gross violations of human rights are best dealt with from within.

Whatever the merits of this argument, one should bear in mind that, unlike the European, American and African regions, there does not yet exist a well developed regional system of human rights protection in the Asia-Pacific region. There are widely accepted instruments on human rights and fundamental freedoms in those other regions,<sup>20</sup> reinforced with appropriately structured judicial enforcement mechanisms, and also an Arab Charter on Human Rights (albeit with minimal ratifications thus far).<sup>21</sup> On the other hand, matters regarding the protection of human rights and the prevention of human rights abuses in the Asia-Pacific region are, in the main, largely left to national jurisdictions.<sup>22</sup> This lack of regional cooperation in the development of an appropriate human rights system is all the more glaring given that, over the past few decades, regional cooperation in many other matters, particularly involving issues of trade, has blossomed.

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19 At the Fifth ASP held in late 2006, the States Parties agreed on a budget for 2007 for the ICC of 88,871,000 Euro (approximately US\$116,125,000). In addition, it was resolved that, for 2007, the scale of assessments of the United Nations — with adjustments to take account of the differences in membership between the United Nations and the ASP — would be adopted by the ICC, with the added proviso that "any maximum assessment rate for the largest contributor applicable to the United Nations regular budget will apply to the International Criminal Court's scale of assessments" ICC ASP "Resolution ICC-ASP/5/Res.4" (1 December 2006) ICC-ASP/4/32. This provided some comfort to alleviate Japan's concerns as to the extent of its required contributions to the Court once it became a State Party.

20 European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221; American Convention on Human Rights (22 November 1969) 1144 UNTS 123; African Charter on Human and Peoples' Rights (27 June 1981) 21 ILM 58.

21 Council of the League of Arab States "Resolution 5437: Arab Charter on Human Rights" (15 September 1994) reprinted in [1997] 18 Hum Rts LJ 151.

22 In 1997, largely at the behest of a group of interested non-governmental organisations, an Asian charter of human rights was concluded by the Asian Human Rights Commission. This instrument has, however, had little tangible effect in terms of "regionalising" human rights concerns. It should also be noted that 10 regional countries — Bangladesh, China, India, Indonesia, Japan, Malaysia, Pakistan, Philippines, Republic of Korea and Sri Lanka — were recently elected by the United Nations General Assembly onto the newly established Human Rights Council, which replaced the Human Rights Commission.

Of course, this is somewhat simplistic and there are some clear reasons why regional human rights systems have not been developed. The geographical breadth of the standard United Nations regional grouping of "Asia" — including, for example, countries in the Middle East — means that it is probably far more heterogenous than other regions. This complicates any attempt to unify a system dealing with matters that are (either in reality or perceived to be) impacted by differing cultural values and beliefs. Indeed, it raises a broader question as to whether one can really talk about an Asia-Pacific "region" at all — apart from in the geographical sense. Nevertheless, there are arguments to suggest that the Pacific countries (with or without Australia and New Zealand), and many of the Asian countries, might be appropriate "units" for the creation of a cooperative human rights mechanism.<sup>23</sup> This has simply not happened.

This "leave well enough alone" mentality means that, to the extent they have been addressed on a regional basis, sensitive issues involving the violation of human rights, even involving the possible commission of international crimes, have in the past usually been dealt with through the language of diplomatic nicety. As an indication of the "sovereign" approach to human rights that has prevailed in the region, in 1993, a group of Asian countries (in the broader United Nations sense)<sup>24</sup> concluded the Bangkok Governmental Declaration on Human Rights, in which they emphasised "...principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure".<sup>25</sup>

Even where stronger language has been used in response to situations where fundamental human rights may be under threat, it has only infrequently been supported by tangible and concerted regional action. We are, of course, seeing some changes to this hitherto largely "diplomatic" approach to human rights concerns in the Asia-Pacific region — notably in relation to the use of regional military and police personnel to deal with violence in the Solomon Islands and Timor-Leste. The growing sense of instability in some of the countries in the region, particularly among Pacific Island States — witness also the recent riots in Tonga and the military coup in Fiji — has led

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23 See Henry J Steiner and Philip Alston *International Human Rights in Context* (2 ed, Oxford University Press, Oxford, 2000) 781.

24 Bahrain, Bangladesh, Bhutan, Brunei Darussalam, China, Cyprus, Democratic People's Republic of Korea, Fiji, India, Indonesia, Iran, Iraq, Japan, Kiribati, Kuwait, Lao People's Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Oman, Pakistan, Papua New Guinea, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Syrian Arab Republic, Thailand, United Arab Emirates and Vietnam. Australia and New Zealand were among the observer States present at the Meeting.

25 L M Singhvi, Rappoorteur to the World Conference on Human Rights "Report of the Regional Meeting for Asia of the World Conference on Human Rights" (9 April 1993) A/CONF.157/ASRM/8 and A/CONF.157/PC/59 4 para 5.

other regional countries, particularly Australia and New Zealand, to play a more active role. This has involved not only diplomacy but also the use of foreign military personnel on the ground.

The reality is, however, that these changes stem not so much from an increased concern in the region for human rights abuses, but rather from recognition that internal strife in some of these countries has a knock-on effect in neighbouring countries and can lead to some regional instability. More than once, we have heard from those countries participating in these operations that the primary concern is to avoid having a "failed State" in the region.

Yet this gradual transformation towards more regional cooperation and action has not yet led to a marked change on issues involving human rights and international criminal justice in the Asia-Pacific region, particularly in many of the Asian countries. In recent history, we have seen reports and allegations of very serious violations of human rights in places such as Timor-Leste, Thailand and Burma. Very little has been done in response to these reports. There has, of course, been much discussion on a regional basis, and indeed more broadly in relation to these situations; sadly very little has been done by way of tangible action in order to address these allegations in an effective manner, let alone by way of any legal processes.

In early 2006, a significant political controversy arose between Australia and Indonesia, stemming from a decision by Australian immigration officials to grant temporary protection visas to 42 West Papuans, who claimed that they were seeking refuge from a "genocide" taking place in their home province.<sup>26</sup> To its credit, Australia accepted its responsibilities under the Convention Relating to the Status of Refugees in the face of Indonesian protests.<sup>27</sup> However, having done so, the Australian Government went out of its way to assure Indonesia that it would not investigate further any of the claims of genocide made by the West Papuans, despite the general obligations incumbent upon it, and all countries, under the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).<sup>28</sup> In reacting to the political difficulties that ensued, the priority for Australia was to shore up its relationship with Indonesia, with discussion at the political level focussing very much on the need for mutual respect for the sovereignty of each country. As a result, a consideration by Australia of the underlying allegations of gross human rights violations raised by those seeking asylum would, it appears, have been considered (on both sides) as

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26 "42 West Papuan Asylum Seekers get Temporary Australian Visas" (24 March 2006) *Wikinews*, <[en.wikinews.org/wiki/42\\_West\\_Papuan\\_asylum\\_seekers\\_get\\_temporary\\_Australian\\_visas](http://en.wikinews.org/wiki/42_West_Papuan_asylum_seekers_get_temporary_Australian_visas)> (accessed 12 December 2006).

27 See Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 150 and Protocol Relating to the Status of Refugees (21 January 1967) 606 UNTS 267.

28 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (9 December 1948) 78 UNTS 277.

an undue interference in the internal affairs and territorial integrity of Indonesia. This reflects a broader regional approach to human rights violations, even where a State might have been involved in the commission of a serious international crime.

Of course, if one casts one's mind back a little further, the details of what exactly transpired in Tiananmen Square in June 1989 have still not been made public.<sup>29</sup> Similarly, the deaths of millions of people in the so-called "killing fields" of Cambodia during the period of Khmer Rouge control in the 1970s have yet to be properly addressed.<sup>30</sup>

### **III LOCALISED SYSTEMS TO DEAL WITH INTERNATIONAL CRIMES IN THE REGION**

In terms of any individual criminal responsibility that may stem from such occurrences, there have been a small number of judicial mechanisms that have been instituted in the region. These have, in keeping with the general approach described above, largely been initiated and implemented at a national level. Reference can be made to two examples in the region — the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Panels for Serious Crimes in Timor–Leste — in an effort to indicate that these "localised" tribunals may not always be in the best position to satisfactorily address the complex issues that are involved. In this context, it is suggested that the ICC may, therefore, represent an important and useful alternate mechanism of justice for regional countries should similar circumstances arise in the future.

In saying this, it must be recognised that, although being a legal institution operating in a judicial capacity, the ICC (like other international criminal tribunals) is, by its very nature also a "political" institution. This arises not only from the fact that it is created by treaty and subject to the oversight of the ASP, but also by the very subject matter with which it deals — often involving conflicts that reflect upon the existing, and previous, governments and military and political leaders of a particular country. As other commentators have argued, the political environment in which a particular international criminal tribunal or court operates fashions its design, establishment, mandate and jurisdiction, and may ultimately have a limiting effect of the overall effectiveness of the tribunal itself.<sup>31</sup>

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29 There have, however, been some positive developments in China. At the March 2004 annual meeting of the National People's Congress in China, the country's Parliament formally approved 13 constitutional amendments, including some that addressed the issues of private property ownership and human rights. Chris Buckley "China Approves Amendments to Constitution on Human Rights" (15 March 2004) *The New York Times* A6.

30 See Part III(A).

31 See, for example, Steven D Roper and Lilian A Barria *Designing Criminal Tribunals — Sovereignty and International Concerns in Protection of Human Rights* (Ashgate Publishing, Burlington (VT), 2006).

These are, of course, extremely relevant and important observations. There is no doubt that the evolution of international criminal justice has been, and continues to be, dependent upon the political will and determination of governments, as well as the broader international community, to work towards what many commentators see as the ultimate goal: "to put an end to impunity for the perpetrators" of gross violations of human rights.<sup>32</sup> Even though this noble goal may ultimately be unattainable, it is still something towards which international law and politics must strive. The unsatisfactory experience of the ECCC and the Special Panels for Serious Crimes in Timor–Leste, as discussed in more detail below, makes it clear that without this resolve, such mechanisms may not be effective in meeting both (or either) of the expectations of victims and the general aims leading to their establishment, which might include issues of retribution, deterrence, reconciliation, compensation and rehabilitation.

These concerns are equally applicable to the ICC itself. The cooperation of States is essential to its effectiveness.<sup>33</sup> The Court must also be provided with adequate resources to allow it to properly undertake the often painstaking and laborious work entailed in undertaking international criminal trials involving complex and difficult factual matrices. Yet, without wishing to over-simplify the difficulties that the Court undoubtedly still faces, it is certainly true to say that the general movement towards eventual widespread acceptance of the Rome Statute, coupled with the fact that its budget requests have been largely met by the ASP, mean that the ICC is in a far stronger position to operate more effectively than other tribunals in the region, which have lacked adequate political support or resources (or both).

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32 Rome Statute, above n 2, preamble, para 5.

33 Part 9 of the Rome Statute sets out the various obligations of States Parties to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court" Rome Statute, *ibid*, art 86. These obligations do not, however, extend to non-State Parties, apart from those that lodge a declaration under Article 12(3) of the Rome Statute. For a discussion of the terms of Article 12(3) and the broader legal and procedural issues arising from a declaration lodged by a non-State Party, see Steven Freeland "How Open Should the Door Be? Declarations by non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court" (2006) 75(2) *Nordic J Intl L* 211. It should also be noted that the position regarding obligations of State cooperation is different for the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Both of those ad hoc tribunals were established by United Nations Security Council resolutions, (UNSC Resolution 827 (25 May 1993) S/RES/827/1993 and UNSC Resolution 955 (8 November 1994) S/RES/955/1994), and the Statutes obligate *all* states to cooperate with them. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art 29 and Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, art 28.

One must also be cognisant of the sensitivities and potential advantages associated with having a court process that is accessible — in terms not only of geography, but also language, culture and familiarity — to all those that have been affected in some way by the commission of gross violations. These will include victims and their families, as well as the broader community. A localised criminal judicial process would normally be an appropriate mechanism, assuming that the procedures that it incorporates represent a credible and transparent attempt to deliver real justice in the circumstances. These issues are presently the subject of significant discussion in relation to the decision, based primarily on security concerns, to relocate the Special Court for Sierra Leone to The Hague for the trial of former Liberian President Charles Taylor.<sup>34</sup>

However, where, for whatever reason — political, economic, cultural — the national process does not represent, or is incapable of providing, a credible methodology of addressing the trauma and criminal responsibility arising from very grave abuses of human rights, it may in the end achieve very little — apart from perhaps satisfying short-term political goals. In doing so, it may unduly compromise the fundamental rights of the accused. By way of example, there is a danger that the trial of Saddam Hussein before the Iraq Special Tribunal, a national court process operating under Iraqi law, can no longer be regarded as a credible process, since it appears that the minimum rights to which an accused is entitled under general international criminal law principles were not available to Saddam and his co-accused.<sup>35</sup>

In view of the recent decision of the United States Supreme Court in *Hamdan v Rumsfeld*,<sup>36</sup> which confirmed that the structures and procedures of the special military commissions established to try suspected terrorists imprisoned at Guantánamo Bay constituted a breach of the Geneva

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34 On 16 June 2006, the United Nations Security Council, acting under Chapter VII of the United Nations Charter, noted the decision of the President of The Special Court for Sierra Leone to transfer the trial of Mr Taylor from the seat of that Court in Freetown to the Netherlands (UNSC Resolution 1688 (16 June 2006) S/RES/1688/2006). The trial and any appeal remain within the jurisdiction of The Special Court for Sierra Leone, but will take place at the premises of the International Criminal Court in The Hague.

35 The Trial Chamber of the Iraqi High Criminal Tribunal imposed the death penalty on Saddam Hussein and two associates in relation to crimes against humanity committed against the people of the town of Dujail, following a failed assassination attempt there in 1982. Several commentators and NGOs have criticised this trial process as being flawed and failing to protect the fundamental rights of the accused: see, for example, Steven Freeland "Is It Iraqi Justice — Or Revenge?" (7 November 2006) *The Canberra Times* 9.

36 *Hamdan v Rumsfeld* (2006) 126 S Ct 2749. On 29 June 2006, the Supreme Court, by a 5 to 3 majority, strongly limited the power of the Bush Administration to conduct trials in the Military Commissions. Writing for the majority, Justice John Paul Stevens said: "[w]e conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the (Uniform Code of Military Justice) and the Geneva Conventions": *Hamdan v Rumsfeld*, *ibid*, 2759 Stevens J.

Conventions, it is also timely to note that the same criticism has frequently been made in the past in relation to the trial of Australian David Hicks.

By contrast, one of the primary justifications of the system of international justice represented by the ICC is that it ensures a fair trial for all accused — even those accused of the most heinous of crimes — so that the credibility of the process will itself reinforce the importance of the decision and the historical record that arises from the evidence presented.<sup>37</sup>

In order to gain a further understanding as to how international criminal justice has thus far been applied in response to violations of human rights law in the region, it is appropriate to spend some time considering the ECCC and the Special Panels for Serious Crimes in Timor–Leste. The experience of these two "hybrid" tribunals represent important case studies as to whether and how such localised processes might ever be effectively utilised in the region. Although the ECCC has yet to begin its work, it is submitted that neither of these tribunals have satisfied the aims for which they were established and that a more focussed, resourced, qualified and widely accepted institution such as the ICC would be significantly more effective in dealing with such regional issues in the future.

#### *A The Extraordinary Chambers for Cambodia*

In the case of the ECCC we are, of course, yet to witness any court proceedings. In this sense, it may be a little unfair and premature to judge too harshly the process that has been set up. The Chambers have only recently been formally inaugurated, with the international and Cambodian judges and prosecutors being sworn in on 3 July 2006. At the inauguration ceremony in Phnom Penh, United Nations Under-Secretary-General for Legal Affairs, Nicolas Michel, noted in a statement that "a historic landmark has been reached today, on this road to justice and sustainable peace".<sup>38</sup> Yet, by any stretch of the imagination, the establishment of the ECCC in the mid-2000s — over 30 years after the Khmer Rouge came to power — is far too little, far too late. The genocide carried out by the Khmer Rouge regime represents one of the most cataclysmic events the region

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37 Rome Statute, above n 2, art 67 provides, for example, that the accused in any trial before the ICC is entitled to a series of "minimum guarantees, in full equality". Article 66 reinforces the right to a presumption of innocence and Articles 22 and 23 reaffirm the applicability of the *nullum crimen sine lege* and *nulla poena sine lege* principles respectively. Moreover, the ICC, like the other international and internationalised criminal tribunals, cannot impose the death sentence, with the maximum penalty being "[a] term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person" Rome Statute, above n 2, art 77(1)(b).

38 UN Department of Public Information *Daily Press Briefing by the Office of the Spokesman for the Secretary-General* (3 July 2006) <[www.un.org/News/briefings/docs/2006/db060703.doc.htm](http://www.un.org/News/briefings/docs/2006/db060703.doc.htm)> (accessed 6 July 2006).



has ever experienced. By most estimates, almost two million people, representing over 20 per cent of the total population at the time, died directly as a result of the four-year reign of terror.<sup>39</sup>

In practical terms, no one has yet been brought to account for these crimes by a transparent judicial process.<sup>40</sup> A death sentence in absentia was pronounced on the Khmer Rouge leaders in 1979, but this had not been preceded by any semblance of due process and was not recognised internationally as a credible trial. In any event, the accused were by that time already safely in Thailand, where their protection was also supported by both China and the United States, thus rendering futile any attempt to have them extradited back to Cambodia.

It was not until the late 1990s that any serious suggestion of bringing the Khmer Rouge to account before a legal process was initiated in Cambodia. However, the subsequent wrangling between the Cambodian Government and the United Nations as to the precise structure of the ECCC has severely denigrated the integrity of the process, even before it has begun its operations in earnest.<sup>41</sup> The Government had rejected the recommendation of a United Nations appointed group of experts that an international tribunal be established to try those responsible for crimes of genocide and crimes against humanity in the period 1975-1979.<sup>42</sup> China had also publicly opposed the establishment of an international tribunal, thereby raising the spectre of a Security Council veto. The situation was further complicated by the fact that Prime Minister Hun Sen had been a Khmer Rouge official during the 1970s.<sup>43</sup>

Eventually, after over three and a half years of tortuous "on-again, off-again" negotiations, an agreement was reached in June 2003 between the United Nations and the Cambodian Government

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39 Yale University "Cambodian Genocide Program" <[www.yale.edu/cgp](http://www.yale.edu/cgp)> (accessed 12 December 2006).

40 "Prosecutor Sees Khmer Probe This Year" (4 October 2006) *Washington Post*.

41 In June 1997, the Government of Cambodia first wrote to the Secretary-General of the United Nations, seeking assistance in bringing to justice persons responsible for genocide and crimes against humanity committed during the period of Democratic Kampuchea. Negotiations between the Government and the United Nations were halted in February 2002, but were resumed a year later, culminating in an agreement between the parties signed in June 2003.

42 Human and Constitutional Rights "UN and Cambodia Agree on Court to Try Khmer Rouge" (16 May 2003) <[www.hrcr.org/hottopics/UNKhmer.html](http://www.hrcr.org/hottopics/UNKhmer.html)> (accessed 12 December 2006).

43 "Justice in Cambodia: Khmer Rouge Tribunal at Risk" *Spiegel Online* (15 February 2007) <[www.spiegel.de/international/0,1518,466460,00.html](http://www.spiegel.de/international/0,1518,466460,00.html)> (accessed 19 April 2007).

for the establishment of an "internationalised" court to deal with the issue.<sup>44</sup> The agreement came into force in April 2005, 30 years after the Khmer Rouge had seized power in Cambodia.

As it stands, however, it may well be that the Chambers will only hear one, or perhaps two, major trials, although this is a matter for the Prosecutor. The United Nations High Commissioner for Human Rights, Louise Arbour, has recently questioned the training, independence and integrity of the Cambodian judiciary, including some of those legal officials who may be involved in the work of the Chambers.<sup>45</sup> Under the terms of the Cambodian Extraordinary Chambers Agreement, Cambodian judges are to make up the majority of the composition of both the Trial Chambers and the Supreme Court Chambers (the latter acting as the appellate court).<sup>46</sup> One cannot help but form the impression that, despite the undoubted calibre and experience of some of the international judges, prosecutors and other experts who will also play a part in the Chambers once they begin the investigative and judicial phases of their activities, the end result will not satisfy those who have been most directly affected by the horrors that took place during the period of Khmer Rouge control of the country.

There is, of course, value in the symbolism of trials before the Chambers, as well as the benefits of closure that they may bring and an examination of the truth about what happened and why. The process may well contribute to reconciliation and the sustainable peace referred to by the United Nations Under-Secretary-General. The work of the Chambers will also be of interest in that it will be the first judicial opportunity to determine whether the tragic events that took place actually constituted genocide within the legal definition of the crime, which has remained unchanged since 1948. This definition stems from the Genocide Convention, and requires intent to destroy, in whole or in part, a group based on national, racial, ethnic or religious grounds.<sup>47</sup> This is an extraordinarily high threshold to prove, and there have been very few convictions of individuals for genocide in the period since the Convention came into effect. This has been partly due to the lack of political will by

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44 Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (Cambodian Extraordinary Chambers Agreement) <[www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf](http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf)> (accessed 24 March 2007). See also UNGA Resolution 57/228 (22 May 2003) A/Res/57/228B.

45 "UN urges Cambodia judicial reform" *BBC News* (19 May 2006) <[news.bbc.co.uk](http://news.bbc.co.uk)> (accessed 19 May 2006).

46 Cambodian Extraordinary Chambers Agreement, above n 44, art 3(2)(a) and (b).

47 Genocide is defined as "an intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such..." Genocide Convention, above n 28, art 2.

most countries to pursue, in their court system, individuals suspected of committing such crimes, though the conviction of Adolf Eichmann by the Israeli Courts in 1961 was an exception.<sup>48</sup>

Indeed, it would be a full 50 years from the signing of the Genocide Convention before the meaning of genocide would be examined by an international court. Even then, the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR), when dealing with a charge of genocide against Jean Paul Akayesu, the bourgmestre of the Rwandan commune of Taba, concluded that the Tutsis might not fall within any of the four prescribed groups in the definition.<sup>49</sup> Though the Chamber still convicted Akayesu by expanding the definition to "any stable or permanent group"<sup>50</sup> — an approach subsequently rejected by the ad hoc tribunals — the case clearly demonstrated the need to "upgrade" the entire definition of the crime of genocide to accord with existing values.

While it is beyond the scope of this paper to analyse this question in any further detail, the possibility remains that the victims of the "killing fields" might not fall squarely within any of the specific groupings mentioned in the definition of the crime of genocide. One can only speculate as to the local and international reaction to such a finding, and this would further highlight the inadequacies of the current definition of what is regarded as the "crime of crimes".<sup>51</sup>

However, whatever the eventual outcome of any proceedings that do take place before the Chambers, reliance on this essentially national process so long after the events to which it relates — with no other possible mechanism, either on a regional or international basis, to deal with the perpetrators of these crimes in a timely fashion — is not satisfactory. Certainly it is arguable whether it contributes to the laudable goal espoused in the Rome Statute by the international community of putting "an end to impunity for the perpetrators of [international] crimes and thus to contribute to the prevention of such crimes".<sup>52</sup>

### ***B The Special Panels for Serious Crimes in Timor–Leste***

Another localised approach utilised to deal with serious crimes in the region was undertaken in Timor–Leste. After almost 25 years of Indonesian annexation, during which an estimated 200,000

48 *Attorney-General of the Government of Israel v Eichmann* [1961] 36 ILR 5.

49 *The Prosecutor v Jean-Paul Akayesu* (Judgment) (2 September 1998) ICTR-96-4-T (Trial Chamber I, ICTR).

50 The Chamber concluded that "it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group", *ibid*, para 516.

51 See, for example, *The Prosecutor v Jean Kambanda* (Judgment and Sentence) (4 September 1998) ICTR-97-23-S para 16 (Trial Chamber I, ICTR).

52 Rome Statute, above n 2, preamble, para 5.

people<sup>53</sup> — representing approximately two-thirds of the local population at the time — died either directly or indirectly as a result of the Indonesian occupation, a United Nations-organised process was implemented in mid-1999 to allow the people of Timor–Leste to determine the future status of the territory. As part of these arrangements, the responsibility for security during this process was left to the Indonesian police.

On 30 August 1999, the referendum took place. One option on the table was a package of autonomy measures which would have meant that Timor–Leste remained a part of Indonesia. An estimated 98 per cent of the people of Timor–Leste voted, and the result was an overwhelming rejection of the Indonesian autonomy proposal, with the consequence that arrangements were instead put in place for full independence for what was to become known as Timor-Leste. What followed in the immediate aftermath of the rejection of the autonomy proposal was a period of very significant and widespread violence, during which Indonesian-backed militia groups, as well as the Indonesian army itself, took retributive action against those who they believed supported the independence movement in Timor–Leste. During this period, it is estimated that up to 2000 people were killed and more than 250,000 people fled (or were forced to relocate) to Indonesian-controlled West Timor.<sup>54</sup>

A United Nations appointed commission of inquiry was set up specifically to advise on the establishment of an appropriate administrative mechanism of criminal justice to deal with the events of 1999.<sup>55</sup> The commission concluded that the level and nature of the widespread violence that had been directed against the Timor–Leste population during that time strongly supported the view that charges of crimes against humanity should be brought by a competent authority against those responsible. The Commission recommended that an ad hoc international tribunal be established to try those responsible for the 1999 violence. However, despite the fact that the entire justice system of the country had collapsed in the wake of the violence of 1999,<sup>56</sup> this recommendation was not implemented by the United Nations Security Council.

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53 National Security Archive "Timor–Leste Revisited" (6 December 2001) <[www.gwu.edu/~nsarchiv/nsaebb/nsaebb62/](http://www.gwu.edu/~nsarchiv/nsaebb/nsaebb62/)> (accessed 12 December 2006).

54 "Timor–Leste Alert. Stop Transmigration!" (20 September 1999) *Human Rights News* <[hrw.org/english/docs/1999/09/20/eastti1636.htm](http://hrw.org/english/docs/1999/09/20/eastti1636.htm)> (accessed 12 December 2006).

55 Independent Special Commission of Inquiry for Timor-Leste.

56 Hon Phillip Rapoza, Chief Judge of the Special Panels for Serious Crimes "The Serious Crimes Process in Timor-Leste: Accomplishments, Challenges and Lessons Learned" (Speech, Dili, 28 April 2005) (copy with author).

Instead, the United Nations Security Council, acting under Chapter VII of the United Nations Charter,<sup>57</sup> established the United Nations Transitional Administration in Timor–Leste (UNTAET), with "overall responsibility for the administration of Timor–Leste and ... to exercise all legislative and executive authority, including the administration of justice".<sup>58</sup> Following undertakings by the Indonesian authorities that they would also investigate and prosecute any alleged offences, UNTAET proceeded to set up a "hybrid" criminal tribunal to prosecute the alleged perpetrators.<sup>59</sup> Under this proposal, the localised system of courts<sup>60</sup> and the Serious Crimes Panels for Timor–Leste (SCPT) were established in 2000.<sup>61</sup> The SCPT were created as a part of the Dili District Court; indeed for the initial stages of its operation, proceedings before the Panels were held in the District Court building.

In addition, the Serious Crimes Unit (SCU) was established to conduct investigations and prepare indictments to bring to justice before the SCPT those persons responsible for genocide, war crimes, crimes against humanity and other serious crimes.<sup>62</sup> Even though the SCPT were established in 2000, the Defence Lawyers Unit of the Panels was not opened until September 2002 and was not sufficiently staffed until April 2003. Even then, the expertise of those Defence counsel involved in the cases before the SCPT was minimal, given that they were often young lawyers with no significant trial experience.

By the time that the SCPT had completed their mandate in May 2005, they had passed judgment in relation to 84 convictions and acquitted three accused. Most of those who faced trial before the SCPT were low-level militia members with very little formal education. The process of justice did not manage to encompass those "most responsible" for the crimes committed in 1999.<sup>63</sup> Unlike the other hybrid criminal tribunals in Sierra Leone and Cambodia — and also the ad hoc international tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR, in

57 Charter of the United Nations (26 June 1945) 59 Stat 1031.

58 UNSC Resolution 1272 (25 October 1999) S/RES/1272/1999 preambular para 17 and para 1.

59 In November 2000, the Indonesian Parliament enacted legislation that provided a legal basis upon which to try within its domestic judicial processes gross violations of human rights. As part of this process, the Indonesian Human Rights Court was established with a temporal jurisdiction of April–September 1999. The general consensus among human rights experts is that this Court has not fulfilled its tasks of investigating and prosecuting the events in Timor–Leste with sufficient rigour or determination.

60 UNTAET Regulation 2000/11 (6 March 2000) UNTAET/REG/2000/11.

61 UNTAET Regulation 2000/15 (6 June 2000) UNTAET/REG/2000/15.

62 UNTAET Regulation 2000/16 (6 June 2000) UNTAET/REG/2000/16.

63 The jurisdiction *ratione temporis* of the Serious Crimes Panels for Timor–Leste was 1 January 1999 – 25 October 1999.

accordance with the terms of their respective "completion strategies"<sup>64</sup> — it was not at all clear what the precise investigatory and prosecutorial policy of the SCU (and by extension the SCPT) was intended to be. There was no specific reference within the relevant instruments establishing the SCPT to investigate and prosecute only those most responsible for the various crimes — instead the scope of accused was left open. Coupled with this fact, of course, it must be noted that many persons responsible for the violence in 1999 were able to find a safe haven in Indonesia, where they remain to this day.

Despite all of this, and notwithstanding the fact that over 800 of the murders that took place during the violence had not been addressed, the Security Council, while reaffirming "the need to fight against impunity and the importance of the international community to lend its support in this regard", ordered that all investigations by the SCU should end by November 2004 and all trials before the SCPT should be completed by 20 May 2005.<sup>65</sup>

While the SCPT did make a positive and admirable contribution in a number of areas, particularly in light of the lack of staffing, logistical and financial resources under which it was required to operate,<sup>66</sup> it appeared that its work was seen to increasingly conflict with the *realpolitik* of the day — the establishment of a viable working relationship between the new Government of Timor–Leste and Indonesia. In the end, neither the Government nor the international community (including countries in the region) was comfortable with the continuation of this particular process of criminal justice in the broader context of the reality of the newly formed State of Timor–Leste.

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64 See UNSC Resolution 1503 (28 August 2003) S/Res/1503/2003 preamble, para 7, which refers to "ICTY Completion Strategy" (23 July 2002) Presidential Statement S/PRST/2002/21. This involves the completion of investigations by the end of 2004, of all trial activities at first instance by the end of 2008 and of all of the work of the Tribunal in 2010, with a focus on the "prosecution and trial of the most senior leaders suspected of being most responsible" for the crimes within the jurisdiction of the Tribunal. Preambular paragraph 8 of the same Resolution relates to a similar completion strategy for the ICTR. UNSC Resolution 1534 (26 March 2004) S/Res/1534/2004 para 3 emphasises the "importance" of the ad hoc tribunals implementing their respective completion strategies and called upon the tribunals to "plan and act accordingly". Of course, the fact that the ad hoc tribunals are specifically required to focus on those most responsible for violations of international humanitarian law does not automatically mean that the alleged perpetrators will be brought to account. The most obvious (but not only) examples of this are the fact that, at least thus far, neither Radovan Karadzic nor Ratko Mladic have been brought before the ICTY to face the respective charges against them, some of which relate to events that took place over 10 years ago.

65 UNSC Resolution 1543 (14 May 2005) S/RES/1543/2004 para 8.

66 As an indication of the lack of resources available to the Serious Crimes Panels for Timor–Leste, a number of the judgments stressed that "there were no audio or video recording apparatus, no stenographers and no shorthand writers available to the judicial administration in Timor–Leste", see, for example, *The Prosecutor v Francisco dos Santos Laku* (Judgment) (25 July 2001) 08/2001 (Trial Chamber I, TPSPSC).

Indeed, the Chief Judge of the SCPT, Judge Phillip Rapoza, noted at the time that "it is a shame to bring this effort to a close when it is doing its best work and is poised to do even more".<sup>67</sup>

Recent unrest in Timor–Leste has resulted in the need for international assistance, for military and police personnel to restore law and order, and a reassessment of how best the country can function as an independent state. Unfortunately, this provides further evidence that, despite its best efforts, the SCPT have not been able to provide a solid impetus towards national reconciliation in this still very fragile emerging nation situated on our very doorstep.

#### ***IV WHY THE ICC IS NOT A "THREAT" TO REGIONAL COUNTRIES***

It is in this context of both the lack of regional cooperation on the question of human rights, and the strong interdependence between politics and localised criminal courts dealing with human rights abuses, that one must consider the worth of the ICC for countries in the Asia–Pacific region. It certainly appears that the Asia–Pacific experience in dealing with the question of international crimes in the region has been less than exemplary. Of course, the same could be said, to a greater or lesser degree, about other regions of the world; however, that is not a justification for the general resistance of countries in the Asia–Pacific region towards the ICC.

Before looking at the possible "benefits" to be gained by regional countries embracing the Court, it is important to note that, unlike suggestions made by countries such as the United States, the ICC does not represent an unacceptable threat to the sovereignty of countries in our region. By accepting the Court and becoming a State Party to the Rome Statute, countries do not expose themselves to unreasonable or unacceptable burdens or unwelcome levels of scrutiny. Indeed, by *not* embracing the Court, a State may find itself the subject of more detailed international examination and pressure in other (perhaps political or economic) ways. Questions would invariably arise as to the political will of the relevant country to address gross violations of human rights and the commission of international crimes that may take place within its territory. Such pressure would normally arise in the geopolitical arena rather than through the operation of the Court itself. Indeed, despite the arguments initially expressed by the United States that the *proprio motu* powers of the ICC Prosecutor under the Rome Statute would allow for "politically motivated prosecutions",<sup>68</sup> the experience of the ICC thus far supports, at least to a significant degree, the comments of the

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67 Rapoza, above n 56, 14.

68 The Prosecutor is authorised to "initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court" Rome Statute, above n 2, art 15(1).

President of the Court, who recently asserted that "[t]here's not a shred of evidence after three-and-a-half years that the court has done anything political".<sup>69</sup>

At the same time, the principle of complementarity, which underpins the structure of the Court within the broader context of criminal justice and accountability for those perpetrators of international crimes, provides States in practical terms with an assurance that the ICC will not, or perhaps more correctly put, cannot operate in an arbitrary manner.<sup>70</sup> As a result, the ICC has often been labelled as a "court of last resort", meaning that all States have the primary responsibility — or perhaps viewed in another way, the primary opportunity — to exercise their national criminal jurisdiction over those responsible for international crimes. Although there are, undoubtedly, some uncertainties as to precisely how aspects of the complementarity principle may apply in practice — matters that in the end may require clarification by the Court itself — the principle does represent a safeguard to those States who would otherwise be concerned that one of their nationals would face trial before the Court.<sup>71</sup>

Of course, some might argue that there is a price to be paid for this: the "upgrading" of domestic laws in order to ensure that the relevant country does not fall within the "unable" criteria set out in Article 17 of the Rome Statute.<sup>72</sup> Indeed, one of the positive "by-products" arising from accepting the Court's jurisdiction is the incentive it provides for States Parties to implement appropriate domestic laws designed to ensure that their domestic courts would have jurisdiction to deal with any alleged act that constituted an international crime within the mandate of the ICC. Even though several States Parties to the Rome Statute have yet to do so, as this international system of criminal justice evolves, national governments can no longer ignore the moral imperative to recognise these crimes within their own legal systems. Naturally there will be issues relating to the implementation

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69 President Philippe Kirsch, quoted in "Japan's Expected to Support International Criminal Court" (6 December 2006) *Voice of America News* <[www.voanews.com/english](http://www.voanews.com/english)> (accessed 12 December 2006).

70 Under the principle of complementarity, a case is inadmissible *inter alia* where it "is being investigated or prosecuted by a State which has jurisdiction over it, unless that State is unwilling or unable genuinely to carry out the investigation or prosecution." Rome Statute, above n 2, art 17(1)(a).

71 For a discussion of various issues that may require further clarification in relation to the application of the complementarity principle, see Alexis Goh and Steven Freeland "Australia and the International Criminal Court" in Gabriel A Moens and Rudolphe Biffot (eds) *The Convergence of Legal Systems in the 21<sup>st</sup> Century — An Australian Approach* (The Australian Institute of Foreign and Comparative Law, The University of Queensland, NSW, 2002) 285.

72 In a recent report to the United Nations Security Council in relation to the situation in Darfur, the Prosecutor of the ICC stated that "the admissibility assessment is a *case specific* assessment and not a judgment on the Sudan justice system as a whole" Office of the Prosecutor of the ICC "Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)" (14 June 2006) <[www.icc-cpi.int/library/cases/OTP\\_ReportUNSC\\_3-Darfur\\_English.pdf](http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf)> (accessed 12 July 2006).



in, and the capacity of smaller countries within the Asia–Pacific region regarding the enforcement of these principles in their respective domestic criminal justice systems. However the binding nature of the fundamental norms of international criminal law and the legal "status" of these international crimes cannot be denied.

For example, following ratification of the Rome Statute, the Australian Parliament enacted both the *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) which, among other things, provided for cooperation between the Court and the Australian Government and, more importantly, introduced the crimes defined in the Rome Statute into Australian domestic law.<sup>73</sup> Indeed, Australia has recently been approached by the Court for the first time with a request for cooperation in relation to the situation in the Democratic Republic of the Congo.<sup>74</sup>

For Australia, the enactment of implementing legislation following ratification of the Rome Statute was particularly significant and symbolic, given that it had failed to effectively implement the Genocide Convention into domestic law,<sup>75</sup> with the result that it was very difficult to assert that a crime of genocide existed under Australian law.<sup>76</sup> As such, ratification of the Rome Statute has placed Australia in a position where it has to accept — albeit perhaps for pragmatic reasons — the inevitability that crimes such as genocide and crimes against humanity are, and should be, recognised as fundamental elements of any domestic criminal code.

This certainly does not, however, impinge unacceptably on national sovereignty. Instead, the introduction of such domestic laws sends a signal to the international community that a State is, and is seen to be, willing to accept its responsibilities to contribute in a positive way to the enforcement and progression of international justice, as well as fulfilling its "duty ... to exercise its [national] criminal jurisdiction over those responsible for national crimes".<sup>77</sup>

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73 New Zealand has implemented the Rome Statute into its domestic laws through the International Crimes and International Criminal Court Act 2000.

74 Comment made by the representative of the Australian Attorney-General's Department at the 14<sup>th</sup> Annual Conference of the Australian and New Zealand Society of International Law (Wellington, 28 June–1 July 2006).

75 The Australian Parliament had enacted the Genocide Convention Act 1949 (Cth), the purpose of which was to endorse Australia's ratification of the 1948 Genocide Convention, which had taken place on 8 July 1949. There was, however, no legislation specifically implementing the Genocide Convention into Australian domestic law.

76 See, for example, *Nulyarimma v Thompson* [1999] 165 ALR 621 (FCA), where the Full Court held, by a majority, that rules of customary international law making genocide a crime were not part of Australian common law.

77 Rome Statute, above n 2, preamble, para 6.

## V *WHAT THE ICC HAS TO OFFER COUNTRIES IN THE ASIA-PACIFIC REGION*

Following on from the above discussion, it is suggested that, by embracing the Court, the countries of the region may be able to gain various benefits, which might include the following:

### A *"Seat at the table"*

Under the terms of the Rome Statute, each State Party is entitled to be represented in the ASP meetings which are held at least once a year. The ASP has a wide range of responsibilities and is closely involved in the ongoing management of the Court.<sup>78</sup> Indeed, it will shortly be reviewing a "strategic plan" prepared by the Court, which sets out the proposed context of the ongoing activities and operation of the Court. The ASP has the power to review and amend the proposed budget of the Court — submitted annually for its consideration — and to direct the expenditure for initiatives such as outreach activities.

In addition, the member States of the ASP are to participate in a Review Conference of the Rome Statute, which will be held in 2009.<sup>79</sup> Significantly, this conference will consider any amendments to the Rome Statute, including, but not limited to, the list of crimes specified in Article 5 that currently fall within the jurisdiction of the Court.<sup>80</sup> At the same time, "new" crimes might be added to the mandate of the Court. Indeed, it is possible that, along with the incorporation into the Rome Statute of a definition of the crime of aggression, there will be proposals raised at the conference to include additional crimes — most likely the crimes of terrorism and drug trafficking — within the jurisdiction of the Court.<sup>81</sup>

Each of these new crimes would carry with it very significant political overtones and their inclusion within the jurisdiction of the Court would have an effect on all countries in the Asia-Pacific region, whether or not they are States Parties to the Rome Statute — particularly in the prevailing geopolitical environment. Therefore, it would be in the interests of regional states to participate in the ASP as a State Party — with full voting rights — and play an active role in these

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78 For a list of the various functions of the ASP, see Rome Statute, *ibid.*, art 112(2).

79 Rome Statute, *ibid.*, art 123(1) provides that the Review Conference is to be convened by the Secretary-General of the United Nations "[s]even years after the entry into force of this Statute...".

80 Rome Statute, *ibid.* These are genocide (defined in Article 6), crimes against humanity (defined in Article 7), war crimes (defined in Article 8) and the as yet undefined crime of aggression. Provision is also made in the Rome Statute for the convening of subsequent Review Conferences for the same purposes (Article 123(2)).

81 Coalition for the International Criminal Court "Crime of Aggression Background" <[www.iccnw.org/?mod=aggressionbackground](http://www.iccnw.org/?mod=aggressionbackground)> (accessed 29 April 2007).

developments, as well as in the future direction of the Court. This would also include the right to vote in future elections of Judges and other senior officials of the Court, such as the Prosecutor and Deputy Prosecutors.

***B Contribution to Ongoing Evolution of Internationalised Justice***

As mentioned earlier, there appears to be an irreversible momentum towards the establishment and ongoing refinement of a system of international criminal justice directed towards bringing to account those responsible for international crimes. While thus far certain aspects of this evolution have not been ideal, the effects of this trend are already clear to see. For instance, there has been a quantum leap in worldwide consciousness about both the need to prevent international crimes and their potential effects on international peace and security. Moreover, the jurisprudence of the international courts has broadened the scope of these crimes, for example affording proper recognition to the true nature of rape and other forms of sexual violence, which can now constitute a crime against humanity or even genocide.<sup>82</sup>

It has become clear that courts can play an important role in this regard, by providing a strong deterrent, advancing justice, encouraging reconciliation, providing a forum for the creation of a credible historical record and bringing the perpetrators of such crimes to account.

As a consequence, we have seen tangible results. Former leaders such as Milosevic, Pinochet and Taylor have been brought within the legal processes. Hissène Habré, the head of state in Chad from 1982 to 1990, is currently being prosecuted on charges of crimes against humanity, war crimes and torture.<sup>83</sup> Even Saddam Hussein was brought before a court, although, as suggested above, it appears that the procedures underlying his trial were so badly flawed that an international tribunal now appears to represent a far better option from the point of view of a fair and credible trial.

Of course, no one pretends that this evolving process of international justice is perfect. Some of the crimes are still too narrow in their scope. In addition, the ICC will, by necessity, only be in a position to prosecute relatively few people. As a result, a degree of selectivity is inevitable, although it is to be hoped that more countries may eventually follow the lead of the small number of states that have already instituted domestic actions against the perpetrators of these crimes. The point is, however, that it would have been unthinkable even 10 years ago that leaders or former leaders such as these would ever have faced trial in such a public forum for international crimes.

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82 See, for example, *The Prosecutor v Jean-Paul Akayesu* (Judgment) (2 September 1998) ICTR-96-4-T para 734 (Trial Chamber I, ICTR).

83 Human Rights Watch "The Case Against Hissène Habré, an 'African Pinochet'" <[hrw.org/justice/habre/](http://hrw.org/justice/habre/)> (accessed 12 December 2006).

Ratification of the Rome Statute by regional countries represents an acceptance of this process and an acknowledgement of its inevitability. Indeed, given the economic and geopolitical strength of the Asia–Pacific region, such action would greatly contribute to this ongoing evolution. It would indicate that the countries of the region not only recognise the importance of this process, but wish to play an active part in its continuing development. Compliance with human rights norms contributes to good government policy. To ratify the Rome Statute would allow regional countries to enhance their own reputations in relation to the recognition of universal norms of human rights and international criminal law and to adopt a "moral high ground" on such issues, which may also be useful in discussions with other countries that remain opposed to the Court.

### ***C Contribution towards Greater Respect for Human Rights in the Region***

In a similar vein, ratification would play an important and pragmatic part in the development of a more broadly applied regional approach to the recognition of human rights. In one sense, given the system of complementarity under which the ICC operates, ratification represents a relatively "risk-free" way of acknowledging the application of universal human rights norms, without necessarily moving towards a fully-fledged regional system at this stage. Although some may regard this as a cynical view, one could argue that ratification by a broader range of Asia–Pacific countries represents a pragmatic way of delaying the need for other more formalised regional human rights enforcement mechanisms. It would also contribute to an even greater acknowledgement of fundamental human rights norms within the region without encompassing some of the complex issues — including the structure, funding and purpose of such a system — that must be considered in the establishment of formal regional enforcement mechanisms.

These universal norms are increasingly recognised throughout the international community, as evidenced by the regular conclusion of new and more comprehensive treaties aimed at the protection of specific human rights, as well as the expansion of principles of human rights in a globalising world (for example, the gradual recognition of environmental rights). In the light of this trend, such actions by regional countries would be seen as complimenting the contemporary view of international legal regulation. In other words, it would help to avoid a claim that the region represents an "odd man out" when it comes to the protection of fundamental human rights.

Moreover, by ratifying the Rome Statute and implementing its primary provisions into domestic law, countries within the region would be countering any perception — either justified or not — that the rule of law in situations where international crimes may have been committed is determined by political factors rather than important legal principles. Acceptance of the Court would convey a clear message that the relevant regional country does not tolerate atrocities; this is an important and highly significant signal to be sent to the rest of the international community.

#### ***D An Increase in International Profile***

As a State Party to the Rome Statute, a country has the right to nominate a candidate for election as a Judge of the Court.<sup>84</sup> That candidate need not necessarily be a national of the nominating State Party, but must be a national of a State Party. As mentioned above, at the election of the first 18 ICC Judges, two were eminent jurists from the Asia–Pacific region: Judge Tuiloma Neroni Slade of Samoa and Judge Sang-Hyun Song of the Republic of Korea.<sup>85</sup>

Naturally, it represents an important milestone for a State, particularly for a smaller or developing regional country, to have one of its nationals elected as a Judge in an international court with the standing of the ICC, and also serves to promote that country's domestic legal system and reputation for adherence to important international legal principles. Under the terms of the Rome Statute — as with many United Nations agencies — one relevant consideration in the election of judges is the need for an "[e]quitable geographical representation", with the practical result that the region will always be represented within the make-up of the ICC Chambers.<sup>86</sup> Indeed, there will be an election of six new judges of the Court in 2009, which might include a judge from the region.

In addition, although there are exceptions, the employment policies of the Court for other senior positions generally give a priority to the nationals of States Parties or of a State which has signed the Rome Statute and is engaged in the ratification or accession process.

#### ***E A Credible and Important Alternative Mechanism for Enforcement***

Perhaps above all, and despite the imperfections and vagaries associated with some of the provisions of the Rome Statute, acceptance of the ICC by regional countries allows for an important alternative mechanism for the enforcement of fundamental norms of international criminal law. This is particularly important where the relevant State may not, for various reasons, be in a position to deal with the alleged commission of international crimes either within its territory or by its nationals. It would allow for the application of international standards and international expertise in relation to very serious violations of human rights norms, perhaps in circumstances where they would otherwise not be subject to a proper legal process, while at the same time providing a balance between the rights and interests of all stakeholders — including the accused, victims and witnesses.

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84 Rome Statute, above n 2, art 36(4)(a).

85 If one considers the United Nations grouping for Asian States, then there is a third Judge from the region, Judge Georgios M Pikis of Cyprus.

86 Rome Statute, above n 2, art 36(8)(a)(ii).

The Rome Statute provides mechanisms by which a State Party can refer a situation to the ICC Prosecutor.<sup>87</sup> We have already seen a number of so-called "self-referrals" to the Prosecutor by States Parties — Uganda, the Democratic Republic of the Congo and the Central African Republic.<sup>88</sup> While it is acknowledged that the circumstances of these countries are very different to those in the Asia–Pacific region and that there may be many reasons why a State may (or may not) choose to make such a referral, the ability of a State Party to access this mechanism may prove to be useful from a practical, or perhaps political, viewpoint.<sup>89</sup> Certainly it would have been a useful "tool" for a subsequent government to consider following events such as occurred in Cambodia in the 1970s or in Timor–Leste in the late 1990s.

This is not to say, of course, that the acceptance of the ICC by regional countries would inexorably lead to a rush of referrals to the Prosecutor. Indeed, the position would probably be the opposite. By embracing the Court, regional countries would be addressing the whole issue of how to deal with gross violations of human rights and would learn from the experiences of other countries. It is to be hoped that this would in itself provide further momentum to the implementation of appropriate systems and protections at the state level.

## **VI CONCLUDING REMARKS**

It is true to say that the establishment of the first permanent international criminal court was an event as political as it was significant in the evolution of international criminal justice. The negotiating states, as well as the other stakeholders at the Rome Conference, represented a multitude of differing views as to how the Court should be structured, particularly in relation to the extent of its jurisdiction. There were significant divisions among the participating delegations in a number of important areas. However, in the end, the conclusion of the Rome Statute and its ratification thus far by 104 States, demonstrates that the principles necessitating the establishment of the ICC were more important than the (impossible) task of satisfying the concerns of all of those involved.

At this early stage in its development, it is to be expected that there will be many unanswered issues in relation to the extent of the Court's powers and the effect that its activities will have on both States Parties to the Rome Statute and other States. Many of these issues will only become clear after the Court has had the opportunity to consider, in detail, the terms of the Rome Statute during the course of proceedings brought before it. While some of these uncertainties remain, there

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87 Rome Statute, *ibid*, 13(a) and 14(1).

88 For a description of the procedural background to these "self-referrals", see The International Criminal Court "Situations and Cases" <[www.icc-cpi.int/cases.html](http://www.icc-cpi.int/cases.html)> (accessed 12 December 2006).

89 As mentioned earlier, there is also a mechanism available to non-States Parties — a declaration under the Rome Statute, above n 2, art 12(3) — to also accept the jurisdiction of the Court in certain circumstances. This mechanism has thus far been used by the Côte d'Ivoire and (for different reasons) by Uganda.

will be some States that may continue to regard the Court with a degree of suspicion, and may thus choose not to become a State Party to the Rome Statute, at least in the short term.

However, while the Court itself is still a relatively young entity, the principles that it applies are well-established norms of international law. The Rome Statute is intended to address "the most serious crimes of concern to the international community as a whole".<sup>90</sup> For these crimes to have attained the "status" of an international crime, it is necessary that they are regarded as an affront to us all. This is what the international community has done in enacting the Rome Statute, which reflects customary international law and builds upon the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

Moreover, the prohibition of genocide and the implementation of mechanisms designed to prevent the commission of that crime must be seen in the context of *erga omnes* obligations<sup>91</sup> arising from the Genocide Convention. The International Court of Justice has confirmed that, as a result of the nature of these obligations, every State has an obligation "to prevent and to punish the crime of genocide [which] is not territorially limited by the Convention".<sup>92</sup> Even more broadly, Judge Simma has recently observed that "at least the core of the obligations deriving from" international humanitarian law and international human rights law are also of an *erga omnes* nature.<sup>93</sup> As a result, these principles — and the associated obligation to prevent their breach and punish the perpetrators of international crimes — are binding on all States, irrespective of any specific treaty obligations they may, or may not, agree to take on through the political act of ratification.

This is not to say that every State has an absolute obligation to ratify the Rome Statute. The decision whether to do so remains one that each State must consider as a part of its own sovereign rights. However, what is clear is that States in the Asia–Pacific region must accept, as most already do, that these principles are fundamental notions of law that are already binding on them notwithstanding that they may not be a State Party to the Rome Statute. They should therefore also embrace the ICC, as this would represent another important way in which these principles are strengthened in practical terms and would further confirm the universal nature of the norms they represent. This is an important message that cannot be over-stated.

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90 Rome Statute, *ibid*, preamble, para 4.

91 Obligations that are owed to the international community as a whole.

92 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, para 31.

93 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (19 December 2005) Separate Opinion of Judge Simma, para 39 <[www.icj-cij.org/icjwww/idocket/ico/icoframe.htm](http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm)> (accessed 2 July 2006).

To deny the acceptance of the Court, plainly put, could be seen as a denial of the inevitability of the "internationalisation of justice" and the sanctity of the principles that this process seeks to protect and enforce. Many may argue that it also represents an unrealistic viewpoint, given the momentum that is developing towards a greater acceptance of the value of the Court and its important "central role as the only permanent international criminal court within an evolving system of international criminal justice".<sup>94</sup> The President of the Court, Philippe Kirsch, has recently expressed the view that "the court is destined to become a universal court soon[er] or later".<sup>95</sup> While commentators may disagree on the timing of such an eventuality, it is submitted that most will agree that current indications do point towards a broader acceptance, over time, of the significance of the Court within the matrix of international criminal justice.

By embracing the Court and ratifying the Rome Statute, regional States have nothing to fear and will be playing an important role in the ongoing recognition of human rights and the rule of law. To play a part in this process and to help shape the future activities of the Court would reinforce the significance of the Asia-Pacific region in the geopolitical makeup of the world, and would reflect a desire among the countries in the region to take a leading role in the future development of international legal regulation.

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94 ICC ASP "Resolution ICC-ASP/5/Res.3" (1 December 2006) ICC-ASP/5/32 preamble, para 5.

95 "World Court Chief Welcomes Japan, Wants More Asian Backing" *Agence France Presse* (6 December 2006) <[www.au.news.yahoo.com/061206/19/11orb.html](http://www.au.news.yahoo.com/061206/19/11orb.html)> (accessed 12 December 2006).