

The International Criminal Court — A Brief Introduction

Christiane E. Philipp

- I. Foreword
- II. The Road to Rome
- III. The Discussion at Rome and its Outcome

I. Foreword

At a United Nations Conference in Rome, Italy, held from 15 June to 17 July 1998 governments overwhelmingly approved a Statute to establish a permanent International Criminal Court (ICC).¹ On 1 April 2002 the so-called Rome Statute received more than the required 60 ratifications and entered into force on 1 July 2002.²

Located in The Hague, Netherlands, the Court consists of 18 internationally respected judges³ elected for a three to nine year term, a team

¹ 120 nations voted in favour, 7 against and 21 abstained. No official record of how states voted exists as no recorded voting was requested. Text of the Rome Statute, Doc. A/CONF.183/13 Vol. I. Reprinted in this Volume, see Annex.

² Senegal became the first State party to ratify the Rome Statute. As of August 2003 there are 91 countries which had ratified the Statute.

³ Elections were held from 3-7 February 2003. According to article 36 para. 8 (a) (iii) of the Statute there has to be a fair representation of female and male judges. The 18 candidates are the following – (term of office in brackets): R. Blattmann, Bolivia (6); M. Clark, Ireland (9); F. Diarra, Mali (9); A. Fulford, United Kingdom (9); P. Hudson, Trinidad and Tobago (9); C. Jorda, France (6); H.P. Kaul, Germany (3); P. Kirsch, Canada (6); E. Kou-

of investigators and a Prosecutor. It will not be part of the United Nations. A building has been provided by the Netherlands, and in July 2002 an Advance Team begun making practical arrangements for the Court as well as dealing with operational issues.

The ICC will be capable of investigating and trying individuals accused of the most serious violations of international humanitarian and human rights law, according to article 5 of the Statute, war crimes, crimes against humanity, the crime of genocide, and the crime of aggression. While the crime of genocide, crimes against humanity and war crimes have been defined in arts 6-8 of the Statute, the Statute does so far not contain a definition of the crime of aggression.⁴

The ICC will be accountable to the countries that ratify the Statute. Countries that ratify the Statute agree to prosecute individuals accused of such crimes under their own laws, or to surrender them to the Court for trial. Its jurisdiction is not situation specific, unlike the Tribunals for Rwanda and Yugoslavia, and is not retroactive.

II. The Road to Rome

The road to Rome was a long and often contentious one. The idea of an international criminal court predates World War I, when one of the founders of the International Committee of the Red Cross proposed a permanent court in response to the crimes of the Franco-Prussian war.

After World War I the Treaty of Peace Between the Allied and Associated Powers and Germany, concluded at Versailles in 1919, envisaged in its article 227 an *ad hoc* international criminal tribunal to prosecute the German Kaiser for initiating the war.⁵ Arts 228 and 229 of the

rula, Finland (3); A. Kuenyehia, Ghana (3); E. Odio Benito, Costa Rica (9); G. Pikis, Cyprus (6); N. Pillay, South Africa (6); M. Politi, Italy (6); T. N. Slade, Samoa (3); S. Song, Republic of Korea (3); S. Steiner, Brazil (9); A. Usacka, Latvia (3). The official inauguration took place on 11 March 2003. Immediately after the judges were sworn in, they conferred in what was their first private meeting as a Court, and elected P. Kirsch as their President, and two vice presidents. L.M. Ocampo of Argentina has been elected to be the chief Prosecutor in April 2003.

⁴ See in this respect article 5 para. 2 of the Statute.

⁵ Article 227 of the Treaty of Versailles reads: Para. 1 – “The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and

Treaty of Versailles also provided for the prosecution of German military personnel, accused of violating the laws and customs of war, before Allied Military Tribunals or before the Military Courts of any of the Allies or Associated Powers.⁶ However, arts 227 and 228/229 were never implemented.⁷ Whether the Allies were simply not ready to prosecute a Head of State or whether the wording of article 227, which created in fact a new international crime,⁸ was not precise enough, will not be resolved. As far as the implementation of arts 228 and 229 of the Treaty of Versailles is concerned the Allies had in 1921 already requested Germany to prosecute a limited number of war criminals before the *Reichsgericht* in Leipzig instead of establishing an Allied Military Tribunal.

The proposed prosecution of Turkish officials and other individuals for the large-scale killing of Armenians in Turkey in 1915 was also overlooked. The basis for such prosecutions, the Treaty of Sèvres of 1920, was never ratified⁹ and the Treaty of Lausanne, the ultimate peace treaty with Turkey, did not provide for the prosecution of the atrocities committed against the Armenians.¹⁰

the sanctity of treaties.” Para. 2 – “A special Tribunal will be constituted to try the accused, ... ”

⁶ Arts 228 and 229 of the Treaty of Versailles read: Article 228 para. 1 – “The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war ”

Article 229 para. 1 – “Persons guilty of criminal acts against the nationals of one of the Allied or Associated Powers will be brought before the military tribunals of that Power.”

⁷ The Kaiser sought refuge in the Netherlands and the Allies did not formally request his extradition.

⁸ Article 227 does not refer to any known international crime but seems to refer to the crime of aggression as a political crime.

⁹ During a speech in 1939 Hitler is reported to have said: “Who after all is today speaking about the destruction of the Armenians?”, cf. M. Cherif Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to establish a Permanent International Criminal Court”, in: P. Ungari/ M.P. Pietrosanti Malintoppi (eds), *Verso un Tribunale Permanente Internazionale sui Crimini contro L’umanità. Precedenti Storici e Prospettive di Istituzione*, 1996, 135 et seq. Bassiouni chaired the Committee of the Whole and the Drafting Committee in the Rome conference, see below.

¹⁰ L. Weber, “Lausanne Treaty (1923)”, in: R. Bernhardt (ed.), *EPIL* 3 (1997), 147 et seq.

It was only after the end of World War II and the establishment of the Nuremberg and Tokyo tribunals, which shall not be dealt with here any further, that serious efforts began to establish a permanent body.¹¹ Between 1948 and 1957 in particular the ILC undertook to elaborate a statute for an international criminal court,¹² but opposition from powerful states on both sides of the Cold War stymied the efforts. And it was clear that the Cold War would be an obstacle to the creation of a permanent court. The only remarkable developments in the field of the protection of Human Rights as such, after World War II until the early 1990s, were the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide,¹³ which calls for criminals to be tried “by such international penal tribunal as may have jurisdiction”,¹⁴ the Universal Declaration of Human Rights,¹⁵ with its detailed catalogue of human rights and fundamental freedoms, the definition of Aggression by the General Assembly of the United Nations,¹⁶ as well as the adoption of the two Covenants.¹⁷

The end of the Cold War changed things dramatically. For the first time it allowed discussions on the merits without any ideological interference and this was badly needed since the end of the Cold War unleashed ethnic tensions, in particular in central and eastern Europe, that resulted in an increase in the type of crimes that might be adjudicated by an international court. In 1989, mainly in order to prosecute the crime of international drug trafficking, President Robinson of Trinidad and Tobago resurrected the proposal for an International Criminal Court and this time such a proposal met with interest within the inter-

¹¹ For elaboration concerning the time after World War II, see Bassiouni, see note 9, 143 et seq.

¹² Cf. United Nations (ed.), *The Work of the International Law Commission*, 5th edition, 1996, 29-30.

¹³ A/RES/260 A (III) of 9 December 1948.

¹⁴ Article VI of the Convention.

¹⁵ A/RES/217 A (III) of 10 December 1948.

¹⁶ A/RES/3314 (XXIX) of 14 December 1974. Here one has to note that the General Assembly always wanted to deal first with the Report of the Special Committee on the Question of Defining Aggression and the ILC's Draft Code of Offences. Therefore the already 1953 submitted Draft Statute for an ICC elaborated by a Special Committee of the General Assembly was as well as the already 1954 finished Draft Code of Offences not tabled until the final definition of aggression was agreed on.

¹⁷ A/RES/2200 A (XXI) of 16 December 1966.

national community.¹⁸ This request was considered by the Sixth Committee (Legal) of the General Assembly of the United Nations, and the ILC was requested to consider the issue “to address the question of establishing an international criminal court ... with jurisdiction ... , including persons engaged in illicit trafficking in narcotic drugs ...” and to report later on to the General Assembly.¹⁹

The conflicts in Bosnia-Herzegovina, Croatia and Rwanda with their human rights violations demanded an immediate response from the international community and led to the establishment of the two *ad hoc* Tribunals.²⁰ But the establishment of a permanent court rather than maintaining an *ad hoc* approach to various conflicts was favoured and expressed the objective of many states which preferred the creation of a permanent court in order to respond to heinous crimes more effectively and without Security Council control. All that caused the General Assembly to broaden the scope of its above mentioned original request to the ILC and in 1992 the ILC presented a preliminary approach, produced a comprehensive text in 1993 and a Draft statute in 1994.²¹

The Sixth Committee of the General Assembly thereupon established an *ad hoc* Committee²² in 1994 to review the ILC Draft and in 1995 a Preparatory Committee (PrepCom) for the Establishment of an International Criminal Court was set up.²³ The PrepCom’s Report was submitted to the General Assembly in 1996. It contained the recommendation that the General Assembly extend the Committee’s term with a specific mandate to negotiate proposals in order to produce a consolidated text of a Statute and annexed instruments by 1998. Between 1995 and 1998 one of the major tasks of the draft was the resolution of the big question of complementarity,²⁴ an issue fundamental for the creation of the court. Apart from that, hundreds of proposals from the delegations were tabled and complicated the elaboration of the statute. But unexpectedly the PrepCom fulfilled its task in April 1998 with

¹⁸ Doc. A/C.6/44/L. 18 of 20 November 1989.

¹⁹ A/RES/44/39 of 4 December 1989.

²⁰ International Criminal Tribunal for the Former Yugoslavia-S/RES/808 (1993) of 22 February 1993 and International Criminal Tribunal for Rwanda-S/RES/955 (1994) of 8 November 1994.

²¹ GAOR 49th Sess., Suppl. No. 10.

²² A/RES/49/53 of 9 December 1994.

²³ A/RES/50/46 of 11 December 1995.

²⁴ As to this problem see the contribution of M. Benzing in this Volume.

the transmission of the draft to the Diplomatic Conference, which began its work two months later in Rome, Italy.²⁵

III. The Discussion at Rome and its Outcome

The discussion at Rome was a long and controversial one. In particular the issue of the death penalty proved to be problematic. Finding a compromise to satisfy states where the death penalty exists and those which reject it and/or are constitutionally prohibited from surrendering persons to jurisdictions using the death penalty, proved to be really difficult. The inclusion of a non-prejudice provision in article 80 of the statute turned out to be the solution.

The matter of “forced pregnancy” in the definition of crimes was another contentious point. The perception that the inclusion of such a crime would implicitly create a right to abortion stood against the strong opposition in favour of such a right.²⁶ Apart from that, many delegations wanted more crimes covered by the Statute than the three core crimes of genocide, crimes against humanity and war crimes. The coverage of the crime of aggression or the so called treaty crimes, like terrorism and the illicit trafficking in drugs was heavily discussed but finally no consensus could be reached. The latter two were therefore not included in the Statute,²⁷ and for the crime of aggression a special solution was found.²⁸ The provisions relating to the jurisdiction of the Court and the interplay between the Security Council, the States parties

²⁵ 160 countries participated in the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The draft was filled with some 1.400 square brackets – that were points of disagreement in connection with the proposed provisions – cf. Doc. A/CONF.183/2/Add. 1 of 14 April 1998. As to the draft as such and the proposed crimes see in detail, A. Zimmermann, “The Creation of a Permanent International Criminal Court”, *Max Planck UNYB* 2 (1998), 169 et seq.

²⁶ “Forced Pregnancy” was included both as a crime against humanity (article 7 para. 1 (g)) and as a war crime (article 8 para. 2 (b)(xxii)), and a definition was added to the Statute, see in this respect Zimmermann, see above, 183.

²⁷ But Doc. A/CONF.183/10 of 17 July 1998, Annex I, Resolution E referred to the possibility to include them later on. The issue of weapons of mass destruction where no consensus could be reached was deferred completely later on. See in this respect the article by K. Dörmann in this Volume.

²⁸ See below.

and the Prosecutor in order to refer situations to the court also proved to be a really difficult subject.

No agreement existed in respect of this fundamental points as the conference came to its end. The decision to present a package deal then was sponsored by the fear that deferring the conclusion of the statute would end for a long time all hope for the establishment of an international criminal court.

The package deal presented was aimed to attract as many states as possible otherwise, clearly, there would be no widespread support for the court in any respect in order to make it work effectively.²⁹ The crime of aggression e.g. was included in the list of crimes as it was found necessary to include it, but it was specified:

“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime”³⁰

Completely new was a provision which provided for an “opt out” mechanism. States were granted the possibility according to article 124 to declare “for a period of seven years after the entry into force of this Statute for the State concerned” not to accept the jurisdiction of the Court with respect to war crimes committed by their nationals or on their territory.³¹ One hoped that such a period would make states feel more comfortable as they could become a party to the Statute but would be in the position of observing for some time how the Court would deal with war crimes as such. The question of the jurisdiction of the Court and the above mentioned interplay was dealt with in article 16 and article 17 para. 1 (a) and (b).

Finally two things must be mentioned. Reservations to the Statute were not permitted³² and the Statute contains an article that provides for a Review Conference seven years after the entry into force of the Statute to consider any amendments to the Statute.³³

²⁹ Concerning e.g. the definition of aggression, see P. Kirsch/ J.T. Holmes, “The Birth of the International Criminal Court: The 1998 Rome Conference”, *CYIL* 36 (1998), 3 et seq. (30).

³⁰ Article 5 para. 2 of the Statute.

³¹ See here the contribution of M. Wagner in this Volume, under II. 4. c. In particular footnote 459.

³² Cf. article 120.

³³ Cf. article 123 of the Statute.

On 17 July 1998 the Statute was approved.³⁴ And several key documents were drafted later on by the established Preparatory Commission. These documents include the Rules of Procedure and Evidence³⁵, the Elements of Crimes³⁶, the Relationship Agreement between the Court and the United Nations, the Basic Principles Governing a Headquarters Agreement to be Negotiated between the Court and the Host Country, the Financial Regulations and Rules, the Agreement on the Privileges and Immunities of the Court and the Budget for the first financial year as well as the Rules of Procedure for the Assembly of States Parties (ASP). According to article 112 which establishes the ASP, it consists of one representative from each State party and functions as the administrative body of the ICC.³⁷

During a special ceremony at the United Nations on 1 April 2002, the Statute finally received more than the 60 ratifications necessary and could enter into force on 1 July 2002. The nomination period for the judges and the prosecutor of the Court was officially opened on 9 September 2002.³⁸ Only countries that had deposited their instrument of ratification of the Rome Statute at the United Nations by that date were eligible to nominate an official for these positions.

A subject of concern is article 98 of the Statute. The United States³⁹ is currently using this provision to seek immunity from the ICC prosecution for its personnel by entering into bilateral agreements with states that prohibit the respecting state to extradite United States citizens to

³⁴ See note 1.

³⁵ PCNICC/2000/1/Add.1, Report of the Preparatory Commission for the ICC-Addendum, Part I-Finalized draft text of the Rules of Procedure and Evidence of 2 November 2000.

³⁶ PCNICC/2000/1/Add.2, Report of the Preparatory Commission for the ICC-Addendum, Part II-Finalized draft text of the Elements of Crimes of 2 November 2000. See in this respect the contribution of K. Dörmann in this Volume.

³⁷ There exists a non exhaustive list of instruments to be developed by the Preparatory Commission, cf. Resolution F in the Annex to the Final Act of the Conference, Doc. A/CONF.183/10 of 17 July 1998.

³⁸ As to the election of the judges see note 3.

³⁹ The United States signed the Treaty on 31 December 2000. But on 6 May 2002 in a letter sent to the United Nations Secretary-General, the Bush administration formally declared its intention not to ratify the Statute and renounced any legal obligations arising from its signature of the Treaty. A United Nations spokesman said "the effect of the notification is a matter for parties to the Statute to decide."

the ICC. There are more than 50 countries that have signed these so called Impunity Agreements so far.⁴⁰ As some of the countries require parliamentary approval of the agreements, there is still a possibility that they will not be binding.

Finally one has to note that the Statute altogether is a balanced instrument. It is hoped that it will be strong enough to let the Court function effectively with strong international support. In any event the establishment of the Court is a historical achievement, which definitely will not stop further conflicts and atrocities but for the perpetrators of the crimes described in the Statute it will be more difficult from now on to escape responsibility as there is a respective body and the law waiting to be used in order to achieve justice. W. Gaddis words — “Justice? — You get justice in the next world, in this world you have the law”, will not sound as pessimistic any longer.⁴¹

⁴⁰ As of August 2003 - Uzbekistan; Mauritania; the Dominican Republic; East Timor; Israel; the Marshall Islands; Palau; Romania; Tajikistan; Honduras; Afghanistan; Micronesia; Gambia; El Salvador; Sri Lanka; India; Nepal; Djibouti; Tuvalu; Bahrain; Georgia; Azerbaijan; Nauru; Rwanda; Democratic Republic of the Congo; Tonga; Sierra Leone; Gabon; Ghana; Madagascar; Maldives; Albania; Bhutan; Philippines; Bosnia-Herzegovina; Bolivia; Egypt, Thailand; Nicaragua; Uganda; Mongolia; Tunisia; Seychelles; Togo; Mauritius; Panama; Cambodia; Macedonia; Botswana; Senegal; Mozambique; Zambia; Ivory Coast. Not all of them are signatories to the Rome Statute. Concerning the question of immunity, but in a different context, cf. also the United States led text of S/RES/1422 (2002) of 12 July 2002, which requires the ICC, initially for a period of one year, not to commence or proceed with the investigation or prosecution of any case concerning officials or personnel of United Nations operations from a state not party to the Rome Statute. This Resolution was prolonged by S/RES/1487 (2003) of 12 June 2003. Even S/RES/1502 (2003) of 26 August 2003, dealing with the protection of UN workers in conflict zones, does not mention the ICC explicitly, due to US pressure.

⁴¹ W. Gaddis, *A Frolic of his own*, 1994.