

THE INTERNATIONAL CRIMINAL COURT: CURRENT ISSUES AND PERSPECTIVES

PHILIPPE KIRSCH, Q.C.*

I

INTRODUCTION

The creation of a permanent international criminal court has been seen as a desirable objective for a long time. Although the issue was actively considered soon after World War II, historical circumstances, particularly the Cold War, have prevented agreement on its establishment until a conference held in 1999 in Rome. By the time the Rome Conference began, there was wide agreement on the general objectives of such a court. Nevertheless, the Conference was difficult, as it became the theater of a number of conflicts between different legal systems and political interests. The Statute of the International Criminal Court (the "ICC") that emerged reflected an effort to find a balance between those interests, but could not be adopted by consensus because of the opposition of a few states, notably the United States. This essay develops four themes: (1) the objectives behind the establishment of an international criminal court; (2) the Rome Conference and the ICC Statute; (3) the future of the ICC, including signature and ratification and the work of the Preparatory Commission; and, finally, (4) the relationship between the ICC and the United States.

II

THE OBJECTIVES OF AN INTERNATIONAL CRIMINAL COURT

The basic objective of the establishment of an international criminal court was to replace a culture of impunity for the commission of very serious crimes, which has existed and still exists to a large extent, with a culture of accountability. The establishment of an international criminal court is in many ways the culmination of a series of international efforts in that direction. Those efforts, however, have often been frustrated for a variety of reasons, and, in any event, have been highly selective. After World War II, the Nuremberg and Tokyo Tribunals raised real expectations about a culture of accountability, but the re-

Copyright © 2001 by Philippe Kirsch, Q.C.

This essay is also available at <http://www.law.duke.edu/journals/64LCPKirsch>.

* Ambassador of Canada to the Kingdom of Sweden; Chair, Preparatory Commission for the International Criminal Court; Chair, Committee of the Whole of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; Legal Adviser, Canadian Department of Foreign Affairs and International Trade (summer 1994-summer 1999).

alities of cold war paralysis quickly settled in. The notion that those violating the most serious laws of humanity must be prosecuted faded, and a culture of impunity re-emerged.

This paralysis began to change with the end of the Cold War, not only because the major powers could begin to cooperate on more issues, but also because events in several conflicts, primarily internal, demonstrated tragically that there was a continuing need to take steps to try to put an end to the abominable crimes that continued to be committed. In this short time, the change has been remarkable. Humanitarian considerations are now a normal part of state policies in a number of broader areas, including the maintenance of international peace and security.

The ad hoc Tribunals for Former Yugoslavia and Rwanda were established but necessarily limited in scope. The idea of a permanent international criminal court continued to develop, partly as a result of “tribunal fatigue,”¹ but also, whether we like it or not, because a number of states wanted to remove the Security Council’s monopoly on international tribunals, which the states saw as being too selective in distributing justice. The question of the relationship between the international criminal court and the Security Council was settled in principle at the Rome Conference, but some of its aspects are likely to remain the subject of debate for some time to come, notably the role of the Security Council, if any, with respect to the crime of aggression.

Despite what was earlier identified as the shared objective—moving from a culture of impunity to a culture of accountability—there remains differences on modalities, and, rightly or wrongly, continuing and often successful attempts to maintain a high degree of selectivity in international justice. Nevertheless, a number of events in the past year alone demonstrate unprecedented and growing momentum for the punishment of past, present, and future crimes.

There is an ongoing argument on the deterrent effect, if any, of the action of international tribunals. Yet debate on deterrence is necessarily inconclusive. How can you demonstrate why something—in this instance, the commission of crimes—has not occurred or has diminished in magnitude?

The discussion about the effectiveness of international tribunals must be placed in a longer-term perspective. The impact of brand new institutions such as the ad hoc tribunals, let alone the ICC, cannot fairly be compared to that of longstanding institutions such as the Security Council and the International Court of Justice. The newer institutions must be given time to be seen as a natural part of the international scene, on the same footing as older institutions, with a role that imposes itself as equally evident and necessary, a role that is played in cooperation with existing institutions.

It must also be understood that no one expects the ICC, on its own, to deter all crimes. The ICC must be part of a framework of measures to sustain a cul-

1. Michael Scharf, *The International Criminal Court's Jurisdiction Over the Nationals of Non-party States: A Critique of the U.S. Position* (Mar. 1999 draft).

ture of accountability, including increased domestic prosecution of such crimes, greater use of universal jurisdiction, and greater international cooperation in suppressing international crimes. The United Nations, and in particular the Security Council, have an important role to play in this regard.

The establishment and affirmation of a culture of accountability has expanded beyond the two ad hoc tribunals and the ICC. The situation of General Pinochet and the Khmer Rouge leaders are cases in point. Change will not happen overnight, however. It will require sustained effort from everyone sharing a commitment to justice. Dramatic announcements of anticipated failure, which we have occasionally heard, are not helpful. If we agree on the objective of putting an end to a culture of impunity, let us be consistent and ready for an effort in the long term.

III

THE ROME CONFERENCE AND THE ICC STATUTE

A. The Rome Conference

The negotiating process in Rome was highly decentralized. The draft statute submitted by the Preparatory Commission was a rich document, but could hardly serve as an actual basis for negotiations if the goal was to conclude a statute in five weeks. It was simply too complex, with a myriad of options and sub-options. One cannot negotiate with a text that contains some 1,400 square brackets, representing so many points of disagreement.

To facilitate the negotiations, the draft statute was divided into different parts, which were allocated to coordinators and sub-coordinators. On most issues, the negotiating process was slow but proceeded beautifully. In this process, the contribution of the United States was uniformly useful and constructive. Indeed, the Statute that was adopted stands improved as a result of that contribution.

At the center of this process was the Bureau of the Committee of the Whole, which essentially put together the results of negotiations that had taken place elsewhere. These structures and working methods were well-known, indeed repeatedly explained to delegations. Contrary to what has been written about the process, there was nothing “mysterious” about it.² The Bureau was composed of five elected officials, one chairman, three vice-chairmen, and a rapporteur, coming from all regional groups and working with the assistance of advisers who themselves were the coordinators in charge of the relevant negotiations on subjects under discussion.

The process did not work as well when the Committee of the Whole considered Part 2 of the draft statute, covering crimes, jurisdiction, and admissibility. In successive debates, national positions were endlessly repeated, without much

2. David J. Sheffer, *The United States and the International Criminal Court*, 63 AM. J. INT'L L. 12, 20 (1999).

effort to find accommodation. To break the deadlock, the Bureau first convened a meeting of some thirty delegations at the Canadian Embassy and then prepared papers setting out simple proposals and options. At that time, the Bureau did not intend to present a "package," but wanted a real dialogue to begin. This was also explained to delegations, who welcomed the initiative.

Unfortunately, while some progress was made on the definition of crimes and related issues, nothing similar happened on the fundamental jurisdictional issues, and a vote ultimately occurred, at the request of the United States. Some commentators deplore the fact that the Rome Statute was adopted by vote, a situation characterized, essentially, as unprecedented and undesirable.³ Both elements of that description are inaccurate.

Historically, the record is uneven. For a long period, major conferences codifying and developing international law regularly resorted to voting, amendment after amendment. Later, for good reasons, more systematic efforts were made to reach agreement, but those efforts were not unqualified. The votes that took place on the two Conventions on succession of states, for example, or the Law of the Sea Convention, are cases in point.

Despite such examples, I personally was always uneasy about voting when the development of international law was at stake, partly because new law is stronger when it benefits from general support, and partly because voting, particularly at early stages of the development of a new instrument, may negatively affect the internal coherence of that instrument. For that reason, whenever I was involved as president or as chairman in the negotiation of new instruments, I pressed for negotiating methods that allowed adoption of those instruments by consensus: for example, the 1988 Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol on the Safety of Fixed Platforms located on the continental Shelf, the 1993 Declaration of the Conference on the Protection of War Victims, the 1994 Convention on the Safety of UN and Associated Personnel, the Resolutions and Plan of Action adopted respectively by the 1995 and 1999 Conference of the Red Cross and Red Crescent, the 1997 Convention for the Suppression of Terrorist Bombings, and the 1999 convention for the Suppression of the Financing of Terrorism.⁴ Whenever consensus did not seem possible, I deferred the conclusion of negotiations in order to allow further consultations to take place. A cur-

3. See William K. Lietzau, *International Criminal Law after Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 130-34 (Winter 2001).

4. See Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports, Feb. 24, 1988, 27 I.L.M. 627; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, I.M.O. Doc. SVA/CON/15, reprinted in 27 I.L.M. 668; Declaration of the Conference on the Protection of War Victims, 296 INT'L REV. RED CROSS 401 (Sept./Oct. 1993); Convention on the Safety of U.N. and Associated Personnel, General Assembly Res. A/Res/49/59 (1994); International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164 (1998); Resolutions and Plan of Action adopted at 1995 and 1999 Conference of Red Cross and Red Crescent, available at <<http://www.icrc.org>>; Convention for the Suppression of the Financing of Terrorism, U.N. Doc. A/54/109 (1999).

rent example is the draft Convention for the Suppression of Nuclear Terrorism, which was drafted in 1998 but not concluded because a point of fundamental concern to the United States could not be resolved. All that is a matter of record. It is in that spirit that I went to Rome.

Why then did a vote take place in Rome? Early in the Conference, I and other members of the Bureau were under strong pressure to allow a vote on specific issues, from groups of delegations that were confident their positions enjoyed comfortable majorities. The Bureau consistently resisted those pressures for the reasons I explained earlier. The problem came later on, when repeated appeals for genuine negotiations on fundamental issues remained unheeded. I hasten to say that this remark is not limited to the United States. Other states and groups of states seemed to have little interest in a dialogue, without which no consensus is possible.

The only alternative, a deferral of the conclusion of the Conference, was impossible because most delegations were adamant that a statute should be adopted in Rome. They believed that, should conclusion be deferred, states would be subject to so much pressure after Rome that either the process would not resume or a future statute would be much weaker than what was possible in Rome. Eventually, the Bureau, in the exercise of its responsibilities, prepared a package it deemed to be the best possible balance in the circumstances, and submitted it to the Conference. The results of the vote speak for themselves. I would simply add that the very last contact the Bureau had with anyone, late at night on Thursday, July 16, 1998, was with the delegation of the United States, in an ultimate attempt to see whether consensus might be possible.

B. The Statute

Since the Rome Conference, there has been considerable opportunity to reflect about its outcome. Some wish that the ICC Statute could be stronger. Others are concerned that the statute is over-reaching in its scope.

The statute reflects the need to reconcile very different perspectives. Presented for adoption by the Bureau of the Committee of the Whole—and indeed adopted by Plenary with a strong majority—the statute reflected a balanced effort to create a strong court, deriving its strength both from the provisions of its statute and from the support of states for the new institution. Uncompromising insistence on the strongest possible provisions could be made only at the expense of the support of a significant number of states that were concerned about an institution that was unknown—about fairness of its proceedings, political influences, and undue infringement upon national jurisdiction. Refusing to compromise on this point could have undermined support to such an extent that the court's future would be jeopardized.

Conversely, putting exclusive emphasis on those concerns would have meant a court that could be paralyzed. Indeed, the statute adopted in Rome contains so many safeguards that a major preoccupation of many states at the end of the conference was to avoid any further compromises in the form of more restric-

tions to the exercise of the ICC's jurisdiction. For them, such compromises would lead to the establishment of a court so weak that whatever support it theoretically enjoyed would be irrelevant.

Whether the balance was right can only be known with time. Consensus could not be attained, but the strong vote on the statute was a promising first sign. The number of signatures so far is another.

IV

PROSPECTS FOR THE FUTURE

The goals of those who participate in current work on the ICC probably continue to reflect the balance mentioned above: the need to build a strong, fair, effective court, and the need to ensure that the court enjoys as much support as possible.

Sixty ratifications are required for the statute to enter into force. The number of signatures that have been obtained so far—nearly one hundred—is significant, especially in comparison to other treaties that also required significant legislative, if not constitutional changes for most states. The high number of signatures on the ICC statute reflects the states' genuine commitment to pursue this process to completion. A number of other signatures are forthcoming, including from states that did not vote in favor of the statute in Rome. Many more states are expected to sign by December 2000, the date at which the Statute ceases to be open for signature. This momentum is encouraging a speedy ratification process.

There is no question that the statute will indeed enter into force. It is only a matter of a few years. Our objective therefore should be to ensure that the ICC is born in the best possible conditions with a view to making its jurisdiction as universal as possible.

The current focus is the work of the Preparatory Commission, which first met in February 1999 and completed its fifth meeting in June 2000. The Commission's task is to develop necessary documents concerning the technical aspects of the court's operation. Once the statute enters into force, these documents will be submitted to an Assembly of States Parties for consideration and adoption. Thus, in essence, the Commission's work is to set the stage.

The Commission's mandate has been defined by the Rome Conference: to develop rules of procedure and evidence and financial regulations and rules for the Court, as well as its first budget; to define in various ways the relationship between the court and the host country, including privileges and immunities, and the relationship between the court and the United Nations; to elaborate on the elements of crimes; and to make recommendations with respect to aggression.⁵ The General Assembly has also asked the Commission, in connection to

5. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Res. F., U.N. Doc. A/CONF.183/10* (July 17, 1998).

that mandate, to discuss ways to enhance the effectiveness and acceptance of the court.⁶

Clearly, through its technical work, an objective of the Commission is to reassure states that are still weary of the court that it will indeed operate fairly, not exercise its jurisdiction in an uncontrolled, capricious, political manner. Overall, the objective is a fair and effective implementation of the Rome Statute. The Commission is not authorized to revise the statute. That can be done only by a Review Conference. In other words, the Commission must respect the balance achieved at the conference, but it must also build on that balance to enhance support for the ICC.

The Commission's work so far has been encouraging. It completed and adopted by general agreement the "Elements of Crimes" and the "Rules of Procedure and Evidence," by the deadline of June 2000 set by the Conference. The Commission also touched upon the crime of aggression. The "Elements of Crimes," a successful U.S. initiative at the Rome Conference, more fully detail the crimes defined in the Statute. The "Rules of Procedure and Evidence" articulate the procedures of the court with more precision, in a manner acceptable to different legal systems, particularly common and civil law systems.

The Commission was also given a mandate to work toward a definition of the crime of aggression for submission to a Review Conference in the future, therefore with a much longer time frame than the two priority subjects. Discussion of aggression has been difficult. Many delegations consider aggression the most serious of the crimes in the court's jurisdiction, and want to move ahead on the issue. However, deep divisions about how to proceed remain, even among the strongest supporters of the crime. A working group was set up on this issue in August 1999.

Because of the deadline of June 2000, the Commission has focused so far on Elements of Crimes and Rules of Procedure and Evidence. It has not dealt with the other items in its mandate, with the exception of limited work on aggression. However, at its first session, two delegates were appointed to begin informal discussion with delegations of these issues in preparation to and at future meetings, including the question of ways to enhance the effectiveness and acceptance of the court.⁷

V

THE ICC AND THE UNITED STATES

It is a matter of regret for many that the United States was not persuaded that their concerns were addressed. The United States did obtain many safeguards, designed to prevent political and frivolous investigations by the court.

6. G.A. Res. 53/105 (Dec. 1998).

7. Others have referred to my general objective of "lowering the temperature," which indeed was very high in and after Rome. I wish to emphasize here that so far the U.S. delegation has done all it could to facilitate the achievement of that objective and to maintain a good atmosphere, and others responded. As a result, work which might have been very difficult, turned out to be quite productive.

For example, as part of the complementarity regime, the United States achieved rigorous provisions, including deference by the ICC to states with functioning legal systems. The United States also successfully proposed a specific provision requiring the prosecutor to cooperate with national systems, giving states a clear opportunity to carry out genuine investigations of their own. The crimes are carefully defined and are restricted to the most serious violations of international humanitarian law. A number of U.S. concerns were also accommodated, relating to due process, the rights of the accused, and the caliber of judges and officials. Yet, the U.S. government has indicated that it still has concerns that its efforts to maintain international security will be hampered by frivolous investigations.

The United States was not and is not targeted by the establishment of the ICC. The targets are the future Pol Pots, Saddam Husseins, and Milosevics who terrorize civilians on a massive scale. John Bolton has stated that the provision prohibiting reservations was a step taken against the United States.⁸ I do not know where this perception comes from, but nothing can be farther from the truth. That provision was adopted simply because of a general perception that the strength of the statute had been diluted through a long series of concessions to a variety of states, and that to allow for reservations in addition to all those concessions would make the adoption of the statute meaningless.

The natural relationship between the ICC and the United States should be a positive and constructive one. The United States played a central and supportive role in the work of previous Tribunals, such as the Nuremberg and Tokyo Tribunals, and more recently, the Yugoslav and Rwandan Tribunals.

Most States, organizations and persons, including myself, clearly recognize that the support of the United States would be most beneficial for the court. I and many others are therefore prepared to facilitate a dialogue that could lead to that. In this connection, it is comforting to see that the positive approach taken by the United States to the Commission's work so far was welcomed by many.

Everyone also agrees that the ICC should behave as a responsible judicial body, and should not engage in politically motivated investigations or prosecutions. For this reason, there has been a positive response to the many U.S. efforts to make the court as fair as possible.

Taking all the safeguards together (including the definition of crimes), however, and knowing the well-deserved U.S. reputation for genuine prosecution of serious crimes in the past, many states have difficulty understanding the depth of the U.S. concerns. A careful presentation by the United States of its position, as well as a proper understanding by the United States of the position of other states, are important if success is to be achieved. Several observations on this point may be useful.

8. See John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 LAW & CONTEMP. PROBS. 167, 169-70 (Winter 2001).

First, as noted above, the Commission's function is not to revise the statute. Revision can be accomplished only by a Review Conference. Any U.S. proposals should take that constraint, which is both legal and political, into account.

Second, most states consider that the statute already contains a very high number of safeguards, many of which were included specifically to accommodate the United States. Indeed, many believe that the statute already has too many safeguards, giving rise to concerns about the effectiveness of the court. In other words, the statute is already being criticized for unduly protecting potential authors of serious crimes, through its jurisdictional and other provisions, such as the definition of certain crimes and grounds for excluding criminal responsibility. In order for additional concerns to be accommodated, the United States should ensure that their new proposals are not seen as deepening that problem. Delegations are concerned that efforts to satisfy the United States may create loopholes for the Pol Pots, Saddam Husseins, and Milosevics of the future.

Third, it is also to be hoped that unnecessary, sterile debates can be avoided. In this issue of *Law and Contemporary Problems*, several papers engage in an interesting debate on the legality of the jurisdictional regime.⁹ I am not well placed to present my own views on this issue, but, irrespective of the merits of various positions, I doubt that arguments to the effect that this regime, which has been accepted as lawful and legitimate by 120 states and more, is void of a sound legal basis, would lead to a very fruitful dialogue in the future.

VI

CONCLUSION

At the time of writing, the number of signatures of the ICC Statute continues to grow rapidly and may be well above 100 by the end of the year 2000. The number of ratifications remains limited, fourteen at the time of writing, but many states are currently developing the necessary domestic legislation for them to accept the international obligations contained in the Statute. Entry into force of the Statute is probably a matter of few years. Nevertheless the road ahead will not be easy, as some concerns, notably on the part of the United States, remain unresolved. The Preparatory Commission does not have the power to alter the Statute, but it can work constructively to try to accommodate any legitimate concerns and therefore make support for the ICC universal, without undermining the Statute or the effectiveness of the ICC. This is the challenge of the future.

9. See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-party States*, 64 *LAW & CONTEMP. PROBS.* 13 (Winter 2001); Scharf, *supra* note 1.