

A PERMANENT COURT FOR GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY

by David Stoelting

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The International Criminal Court (“ICC”) will start functioning next year. For the first time in history, persons committing genocide, war crimes and crimes against humanity will be subject to indictment, arrest, prosecution and imprisonment at the hands of a permanent court created by a multilateral treaty. The ICC will begin operations when sixty countries ratify the ICC treaty, and thirty-eight have already done so. The US government, despite its extensive involvement in the drafting of the ICC treaty, remains opposed. With or without the United States, however, the ICC is a done deal.

The terrorist attacks on the World Trade Center and the Pentagon are among the categories of “unimaginable atrocities that deeply shock the conscience of humanity”¹ the new court is designed to prosecute. The ICC’s jurisdiction, however, will not retroactively cover crimes committed before its creation, and it will be prohibited from acting if a national court can investigate and prosecute. But the conviction that a court must be created to prosecute the perpetrators of crimes such as these horrific attacks, when no government can do so, has been the driving force behind the creation of the ICC.

The ICC's jurisdiction and structure is described in its constituent document, a multilateral treaty called the Rome Statute of the International Criminal Court. The Rome Statute was approved by 120 countries on July 17, 1998 at the end of a five-week diplomatic conference. Since then, in a series of intensive sessions at UN Headquarters in New York, the legal architecture for the ICC has been mapped out as negotiators have finalized the Rules of Procedure and Evidence,² the Elements of Crimes,³ the financial regulations and rules,⁴ and the relationship agreement between the UN and the ICC. These draft texts will be approved by a new institution called the Assembly of States Parties, the ICC's governing body, which will be composed of states that have ratified the Rome Statute. Even the physical court is taking shape, as the Dutch have broken ground in The Hague on the construction of the future ICC Courthouse.

At the same time, the complex process of country-by-country ratification of the Rome Statute has been in full swing. For most countries, ratification is lengthy and burdensome, involving approval by the appropriate legislative body, criminal code modifications, and, in many cases, constitutional amendment. The determination with which the vast majority of the world has moved ahead with ratification underscores the ICC's legitimacy as an international legal institution whose time has come.

United States In Opposition

¹ Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, reprinted in 37 ILM 998, Preamble (1998).

² Report of the Preparatory Commission for the International Criminal Court, Finalized draft text of the Rules of Procedure and Evidence, PCNICC/2000/1/Add.1 (2 Nov. 2000).

³ Report of the Preparatory Commission for the International Criminal Court, Finalized draft text of the Elements of Crimes, PCNICC/2000/1/Add.2 (2 Nov. 2000).

⁴ Proceedings of the Preparatory Commission at its Seventh Session, Draft financial regulations and rules, PCNICC/2000/L.1/Rev.1/Add.2 (20 March 2001).

The United States, with its unique role and responsibilities in the global balance of power, remains the only Western democracy opposed. The irony of American opposition is that much of the Rome Statute was drafted by US diplomats, who devoted years to these painstaking negotiations. In the end, however, the Clinton administration failed to achieve its primary goal: a “fix” that would exempt US soldiers and government officials from the Court’s jurisdiction until the US ratifies the Rome Statute. President Clinton’s last-minute signature on the ICC treaty was, by its own terms, a commitment not to ratify but to rather to securing this “fix.” With the change in administrations, the US appears to have dropped efforts to fix the Rome Statute. Although officially the Bush Administration is undertaking a “high-level policy review,”⁵ the empty seats at the US table during the March 2001 preparatory session suggest the policy may be withdrawal.

The implacable Congressional opposition to the ICC presumes that the ICC will operate with an anti-American bias and improperly target American officials and peacekeepers. Recent events such as the loss of the US seat on the UN Human Rights Commission and the UN conference against racism have fueled these perceptions, and the administration has been urged to “unsign” the Rome Statute.⁶ Congressional opponents describe the ICC as “an international independent counsel with essentially unaccountable power,”⁷ “a clear and continuing threat to the national interest of the United States,”⁸ a “monster,”⁹ and an “international kangaroo court.”¹⁰

⁵ State Dep’t Press Briefing (Aug. 17, 2001).

⁶ Betsy Pisik, Conservatives Prepare to Contest Global Court, Washington Times, at A1 (Jan. 4, 2001).

⁷ “Dear Colleague” letter of Henry J. Hyde on American Servicemembers Protection Act (May 8, 2001).

⁸ Statement of Sen. John Ashcroft. Subcommittee on the Creation of the International Criminal Court, Hearing on the Creation of the International Criminal Court (July 23, 1998).

⁹ Statement of Sen. Rod Grams, Hearing on the Creation of the International Criminal Court (July 23, 1998).

The day before the attacks on the World Trade Center and the Pentagon, Senator Larry Craig of Idaho, in proposing anti-ICC legislation, stated that “I will be darned if American sovereignty and the U.S. Constitution become subject to the International Criminal Court on my watch.”¹¹ Over the objections of Senator Leahy and Senator Dodd, the Senate approved a rider to the Commerce, State, Justice Authorization Bill that prohibits the provision of funds “for cooperation with, or assistance or other support to, the International Criminal Court or [the preparatory sessions].”

Another piece of anti-ICC legislation, which has passed the House and is headed for conference, is the American Servicemembers’ Protection Act (“ASPA”). This bill would prohibit cooperation with the ICC by any federal, state or local government, prohibit US military assistance to countries that ratify the Rome Statute, and require that US peacekeepers be permanently exempted from prosecution by the ICC. One provision, derided as the “Hague Invasion Act,”¹² authorizes the President “to use all means necessary . . . to bring about the release from captivity” of any American held by the ICC. The Bush administration, perhaps concerned about ASPA’s constraints on executive power, has not openly supported the bill.

The coalition-building efforts in the aftermath of the September 11 attacks may temper hostility toward the ICC. Some countries, for example, might be more willing to surrender suspects to an international court rather than to the United States government, so the ICC might be seen as one element in a long-term anti-terrorism strategy. Indeed, one of the ICC’s harshest critics, Rep. DeLay, in the aftermath of the attacks has apparently dropped efforts to stop the payment of UN dues, which the Bush

¹⁰ Press Release of Sen. Jesse Helms (Dec. 31, 2000).

¹¹ 147 Cong. Rec. S9219 (Sept. 10, 2001).

administration has been eager to pay, without passage of ASPA. On the other hand, Sen. Craig's statements on September 10 are unequivocal: "no deal, or any compromise, is possible . . . we consider the ICC an illegitimate body . . . the United States will never become part of it."¹³

The ICC does have supporters, consistent with what President Clinton, in signing the ICC treaty in December 2000, called America's "tradition of moral leadership" and "long history of commitment to the principle of accountability."¹⁴ Thirty-two Representatives and seven Senators signed letters in December 2000 strongly supporting the ICC and American participation in the Court. The United States spearheaded the Nuremberg and Tokyo international tribunals following World War II, and the US led the drive to create the ad hoc tribunals for the former Yugoslavia and Rwanda. For many years, Congress has voted significant funding as well as contributions of personnel and resources for these tribunals, and has approved "sense of the Congress" resolutions supporting a permanent international criminal tribunal. The American Bar Association and the Association of the Bar of the City of New York also are on record recommending that the United States government become a party to the ICC treaty.¹⁵

Jurisdiction, Structure and Defendants' Rights

The ICC will be a court that American lawyers should be comfortable with. It will have real constraints on prosecutorial excess, a narrow subject matter jurisdiction, an independent judiciary and a wide array of rights for defendants. Indeed, the onerous

¹² Tremble, Holland, Tremble, *The Economist*, at 27-28 (Sept. 1, 2001).

¹³ 147 Cong. Rec. S9218 (Sept. 10, 2001).

¹⁴ Statement on the Rome Treaty on the International Criminal Court, 37 Weekly Comp. Pres. Doc. 4 (Dec. 31, 2000).

¹⁵ On February 19, 2001, at the ABA Mid-Year Meeting in San Diego, CA, the ABA House of Delegates adopted a Recommendation and Report endorsing the Rome Statute prepared by the ABA Section of International Law and Practice and co-sponsored by the Association of the Bar of the City of New York.

provisions on jurisdiction and consent in the ICC treaty, described infra, may well make the ICC ineffectual because they allow numerous opportunities for motion practice and appeals on preliminary issues of jurisdiction and “admissibility.”

The ICC will not be “an arm of the United Nations.”¹⁶ Rather, it will be an independent institution answerable to and funded by its member states through the Assembly of States Parties. Its jurisdiction, which encompasses crimes committed after its creation, will cover three specific crimes – genocide, war crimes and crimes against humanity – in narrow instances when national courts are unwilling or unable to do the job.¹⁷ The primary organs will be the Presidency, composed of three judges, serving an administrative role with respect to judicial functions; the Appeals Division, a Trial Division and a Pre-Trial Division; the Prosecutor’s Office; and the Registry, an administrative arm. The eighteen judges of the ICC will serve nine-year non-renewable terms. Judges shall be “persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices,” and must receive the votes of two-thirds of the Assembly of States Parties.

The Rome Statute includes “the most comprehensive list of due process protections which has so far been promulgated.”¹⁸ These rights include the right to remain silent, a presumption of innocence, the right to legal assistance, privilege against self incrimination, right to written statement of charges, right to examine adverse

¹⁶ 147 Cong. Rec. S9217 (Sept. 10, 2001) (Statement of Sen. Craig).

¹⁷ Article 5 of the Rome Statute nominally provides for jurisdiction over the crime of aggression, but such jurisdiction can only be exercised when the Rome Statute is amended to define aggression, and under Article 121 amendments can only be proposed seven years after the Statute enters into force.

¹⁸ International Criminal Court: Hearings Before the House Comm. on Int’l Relations, 106th Cong. 94 (prepared statement of Monroe Leigh).

witnesses and the right to be questioned only in the presence of counsel. There will be no death penalty or trials in absentia. The Rome Statute does not provide for trial by jury, but this is consistent with the Constitution. The Sixth Amendment only guarantees a jury trial for crimes committed in the United States, not for crimes overseas, and the Fifth Amendment specifically excludes servicemembers from the guarantee of grand jury presentment.

The ICC will not exercise “universal jurisdiction,” a developing principle allowing jurisdiction over international crimes by any court regardless of where the crime is committed or the nationality of the accused.¹⁹ Instead, the Rome Statute is consistent with traditional notions based on the territory where the crime occurred and the citizenship of the accused. Thus, in the absence of a Security Council referral (where the US has a veto), the ICC cannot exercise jurisdiction over a crime without the consent of the country where the crime occurred or the country of the nationality of the accused. These consent provisions are real constraints, and conceivably could prohibit the ICC from exercising jurisdiction over a dictator whose country has not ratified the Rome Statute, as long as the crimes occurred within the dictator’s national boundaries.

Further constraints arise from the Rome Statute’s provisions on “admissibility” and “complementarity,” which effectuate a bedrock principle that prosecution by national courts is in every case preferable to prosecution by the ICC. Thus, any country, even one that has not ratified the Rome Statute, can stop an investigation by the ICC in its tracks simply by giving notice that it is investigating. The ICC may proceed notwithstanding such notice only if a three-judge panel finds that the investigation is in bad faith or a sham. A case is “inadmissible” if another country is or already has investigated the

suspect, if the suspect has already been tried for the same conduct, or if the case is not “of sufficient gravity to justify further action.”

Additional procedural checks on the Prosecutor’s powers include the requirement that, before launching an investigation, the Prosecutor submit to the Pre-Trial Chamber a “request for authorization,” which may be granted only if there is a “reasonable basis to proceed” and “the case appears to fall within the jurisdiction of the Court.” Before an arrest warrant can be issued, the Pre-Trial Chamber must review evidence submitted by the Prosecutor and determine if “reasonable grounds” exist that the suspect has committed a crime within the ICC’s jurisdiction. Once a defendant appears before the Court, the Pre-Trial Chamber must conduct a “confirmation hearing” in order to examine the evidence and “determine whether there is sufficient evidence to establish substantial grounds to believe that the person has committed each of the crimes charged.” In addition, the Security Council can stop any investigation or prosecution for any reason, for renewable one-year periods.

Conclusion

Like it or not, the ICC will be a major force in the new millennium’s international legal order. While the US government has shown real concerns about multilateral treaties that simply set standards of behavior, the ICC arguably is different: it will be a living, breathing institution with its own importance and consequences, and one that most of our friends and allies readily embrace. One way or another, the United States will have to come to terms with the International Criminal Court.

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¹⁹ See The Princeton Principles on Universal Jurisdiction (2001).