The Rome Treaty on the International Criminal Court

DAVID STOELTING*

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome, Italy, from June 15–July 17, 1998, was a milestone in international law. Following the five week diplomatic conference, the governments of 120 countries voted in favor of a multilateral treaty that will establish the world's first permanent International Criminal Court (ICC) to try individuals accused of genocide, war crimes, and crimes against humanity.[1] In the six months after the conference, seventy-five governments have signed the treaty and, in February 1999, Senegal became the first country to ratify. The treaty enters into force upon ratification by sixty countries.

The Rome ICC treaty is a historic development in international law.[2] The court had been under discussion among governments in a series of U.N. meetings since 1995. Despite these extensive preparatory talks, most of the key issues were unresolved heading into the Rome conference. Thus, it is astonishing that the 120 countries voting in favor of the treaty achieved consensus despite widely varying legal traditions and systems of criminal justice. Uniting the delegations was an abhorrence that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."[3]

The United States, however, was one of only seven countries in opposition.[4] The irony of this opposition is inescapable. The United States spearheaded the creation of the Nuremberg, Tokyo, Rwanda, and Yugoslavia international tribunals. President Clinton frequently spoke

*David Stoelting is with Morgan, Lewis and Bockius in New York City. He is Vice Chair of the International Criminal Law Committee. A version of this article originally appeared in the August 28, 1998, edition of *New York Law Journal*.

1. A voice vote taken late in the evening on July 17 resulted in 120 countries voting in favor, twenty countries abstaining and only seven opposed.

2. The drive to create an international criminal tribunal began following the Nuremberg and Tokyo trials after World War II, but efforts foundered until the end of the Cold War. The Security Council's creation of two international criminal tribunals in 1992 and 1994 in response to atrocities in the former Yugoslavia and Rwanda provided a crucial impetus to the ICC proposal.

3. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, U.N. Doc. A/CONF.183/C.1/L.76, at Preamble (1998) [hereinafter Rome Treaty], *available in* 37 I.L.M. 999 (1998), or <www.un.org/icc>.

4. The United States, Israel, and China voted against the treaty. The remaining countries voting "no" reportedly were Quata, Yemen, Libya and Iraq.

in favor of the ICC, and had appointed David J. Scheffer as the first-ever Ambassador-at-Large for War Crimes Issues to focus the administration's efforts. Since 1995, the U.S. delegation participated extensively in all the preparatory negotiations. The Rome treaty also bears the imprint of numerous American proposals generated by the top-flight U.S. delegation led by Ambassador Scheffer.

In Rome, however, the U.S. negotiators had almost no flexibility to join the worldwide consensus, and became increasingly isolated during the conference. The United States never budged from its position that the ICC should operate only with the approval of the U.N. Security Council, where the United States has a veto. The conference, however, overwhelmingly wanted a court able to proceed independently from Security Council control. The United States also consistently opposed any possibility that American peacekeeping forces stationed abroad could be subjected to ICC jurisdiction. Finally, the Senate's hostility to the ICC treaty makes clear that the current Senate will never give its advice and consent to ratification. Jesse Helms, Chairman of the Senate Foreign Relations Committee, had already called the ICC treaty "dead-on-arrival."[5] In Senate hearings on the Rome conference held on July 23, 1998, Senator Rod Grams used inflammatory rhetoric in blasting the ICC as "truly a monster . . . [and] a monster that must be slain."[6] Senator John Ashcroft similarly denounced the ICC "as a clear and continuing threat to the national interest of the United States."[7] Thus, the U.S. negotiating posture throughout the Rome Conference was rigid, and in the final days the conference failed to bend to the American position. The result was diplomatic isolation.

The ICC will be the last major international institution created this century. The seat of the ICC will be The Hague but trials elsewhere will be permitted. The court will consist of four organs: (1) the Presidency, composed of three judges, serving an administrative role with respect to judicial functions; (2) an Appeals Division, a Trial Division and a Pre-Trial Division; (3) a Prosecutor's Office; and (4) a Registry, the administrative arm.

There will be eighteen judges, serving nine-year non-renewable terms. Judges, nominated by countries that ratify the ICC treaty (states parties) and elected by a two-thirds vote, 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."[8]

The Pre-Trial Chamber, which essentially serves as a check on the powers of the Prosecutor, is an institution that derives from the civil law tradition, although many of its functions are similar to that of a grand jury in the common law system. The Pre-Trial Chamber reviews evidence submitted by the Prosecutor and authorizes arrest warrants if "reasonable grounds" exist that the person 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."[9]

An ICC investigation may be commenced either by the Security Council, a state party or by the Prosecutor acting under the so-called *proprio motu* power. Inherent constraints, however,

5. Letter from Jesse Helms, United States Senate Committee on Foreign Relations, to The Honorable Madeleine K. Albright, U.S. Secretary of State (Mar. 26, 1998).

6. Statement of Senator Rod Grams, Subcommittee on the Creation of the International Criminal Court, Hearing on the Creation of the International Criminal Court (July 23, 1998).

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

8. Rome Treaty, *supra* note 3, art. 36(3)(a).

9. *Id.* art. 61(7).

limit investigations initiated by a state party or the Prosecutor. Because of the binding nature of Security Council resolutions under international law, these constraints do not apply to cases initiated by the Security Council.

For example, before launching a *proprio motu* investigation, the Prosecutor must submit to the Pre-Trial Chamber a "request for authorization," which may be granted if the Pre-Trial Chamber determines both that there is a "reasonable basis to proceed" and that "the case appears to fall within the jurisdiction of the Court."[10] In addition, the Security Council is afforded the power to stop, for renewable one-year periods, investigations or prosecutions.[11] Other constraints are reflected in the treaty's provisions on "admissibility" and state consent, and are described below.

The ICC will try individuals accused of genocide, war crimes, and crimes against humanity. The inclusion of genocide, as defined in the 1949 Genocide Convention, engendered almost no controversy. The debate over war crimes focused on the efforts of the United States and other governments to ensure that the ICC prosecutes only large-scale war crimes, as opposed to isolated instances. Thus, the treaty provides that war crimes must be "committed as a part of a plan or policy or as part of a large-scale commission of such crimes."[12]

War crimes committed in internal, as well as international, armed conflicts are within the jurisdiction of the ICC. Many delegations also were committed to including a gender perspective in the treaty, which resulted in the inclusion of "forced pregnancy,"[13] rape and other forms of sexual violence as war crimes and crimes against humanity. In an awkward compromise, though, poison gas and exploding bullets are punishable, but not nuclear weapons, landmines, or chemical weapons.

Crimes against humanity must be a "widespread or systematic" part of a plan or policy and directed against civilians. Specific acts included as crimes against humanity are murder, extermination, enslavement, and enforced disappearances. The crime of aggression is nominally included, but prosecutions for aggression are barred until the treaty can be amended by states parties to provide for an adequate definition.

The ICC's exercise of jurisdiction is circumscribed by a complex set of provisions relating to "admissibility" and state consent. The admissibility provisions ensure that the ICC functions only with respect to the most serious international crimes when national courts are unavailable or unwilling to prosecute. In general, a case is "inadmissible" if a state with jurisdiction is already investigating (unless that state "is unable or unwilling genuinely to carry out the investigation"); or if a state has made a good faith decision not to investigate; or if the accused has already been tried for the conduct alleged. A case is also inadmissible if it is "not of sufficient gravity to justify further action by the Court."[14]

Admissibility may be raised during the initial investigation. Thus, if a state notifies the Court that it is investigating or already has investigated the alleged crimes, the Prosecutor is required to defer to that state unless the Pre-Trial Chamber authorizes the investigation.[15]

10. *Id.* art. 15 (3-4).

11. *Id.* art. 16.

12. *Id.* art. 8(1).

13. "Forced pregnancy" is defined as "the unlawful confinement, of a woman made forcibly pregnant, with the intent of affecting the ethnic composition of any population." *Id.* art. 7(2)(F).

14. *Id.* art. 17(1)(d).

15. *Id.* art. 18(2). If the Pre-Trial Chamber authorizes an investigation despite a state's notification that it already is investigating, that state may appeal on an expedited basis to the Appeals Chamber. *Id.* art. 18(4).

Once an arrest warrant has been issued, the admissibility of a case may be raised by the Court, by the accused, by a state with jurisdiction over the crime, or by a state from which acceptance of jurisdiction is required. Challenges to admissibility are referred to either the Pre-Trial Chamber (prior to confirmation) or to the Trial Chamber (after confirmation) and may in all cases be appealed to the Appeals Chamber.

State consent provisions provide another significant check on the ICC's exercise of jurisdiction. (Consent is given by the act of ratification, although non-ratifying states may consent by filing a formal declaration accepting the ICC's jurisdiction in a particular case.) These provisions require that in investigations launched by a state party or the Prosecutor, the ICC must have the consent of either: (1) the state on whose territory the crime occurred; or (2) the state of the nationality of the accused. Without the consent of one of these states, and in the absence of a Security Council referral, the ICC cannot act.

The state consent provisions generated significant controversy during the conference. In particular, a proposal that would have facilitated the exercise of jurisdiction by allowing the consent of a third-party state with custody over an accused person was dropped in the final days. Thus, it could be argued that war criminals with the ability to travel can easily avoid the reach of the ICC. The United States also argued for a provision, which the conference dramatically voted down in the final minutes, requiring in every instance the consent of the state of nationality of the accused. Another controversy has ensued over a last-minute provision, added at the behest of France and Great Britain, that allows state's parties to opt out of war crimes prosecutions for seven years after ratification.

The rules of procedure and evidence will be adopted by state's parties once the treaty enters into force. The treaty also contains comprehensive provisions protecting the rights of defendants. Among other rights, persons under investigation have the right to remain silent, a presumption of innocence, the right to legal assistance, and the right to be questioned only in the presence of counsel. There will be no death penalty or trials *in absentia*.

The consensus in Rome demonstrates a commitment to a strong and independent international criminal court. The treaty, however, has a number of provisions that may allow states or the Security Council to hinder investigations and delay prosecutions. The conference also highlighted the isolation of the United States from its allies on this fundamental issue. Nevertheless, the Rome treaty stands as a giant step toward a just rule of law at the close of a century wracked by unparalleled injustice. Those governments that favor an effective ICC must dedicate themselves to making the promise of Rome a reality.