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# Issues Facing the International Criminal Court's Preparatory Commission

Richard Dicker\*

The conclusion of the Treaty establishing the International Criminal Court (ICC) was a historic achievement. The ICC has the potential to curtail the sense of impunity all too often associated with genocide, crimes against humanity, and war crimes. With widespread ratifications, the ICC can help create a culture of accountability. Over a period of time, and not without problems in the initial phases, the ICC will provide victims with justice, strengthen national courts, and deter the commission of these crimes. The ICC Treaty creates a viable, independent, and effective international forum functioning according to the highest standards of international justice. The ICC Statute codifies the balance between divergent political interests and legal traditions. It is a complex document, negotiated by officials representing scores of States and contains many compromises. For example, its provisions give the ICC less authority than the Human Rights Watch organization, among others, considers necessary and desirable.<sup>1</sup> However, despite these compromises, the ICC can hold the individuals accused of these crimes to account. Nevertheless, even the ICC's most ardent supporters realize the ICC will not be a panacea for the world's violations of international humanitarian law. There is much work to be done and serious challenges lie ahead before the Court becomes a reality.

There was an overwhelming support at the end of the Diplomatic Conference in Rome for these objectives: 120 States voted in favor of the Treaty, seven voted against. A powerful coalition of States north and south engineered the Treaty, including Canada, the United Kingdom, Australia, Germany, the Netherlands, South Africa, the Republic of Korea, and Senegal. The cooperation suggests optimism regarding the future success of the ICC. Unfortunately, the U.S. government, along with a few others including China, Iraq, and Libya, voted against the Statute.

The first session of the Preparatory Commission for the ICC (PrepCom), which met in February 1999, was successful. Under Chairman Philippe Kirsch's leadership, delegates plunged into their substantive

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1. See *Non-Governmental Organization Action Alert (No.1, Volume 2)*, May 1999 <<http://www.hrw.org/hrw/campaigns/icc/may99aa-1.htm>>.

tasks. In addition to drafting the ICC's Elements of Crimes,<sup>2</sup> the PrepCom was mandated to draft Rules of Evidence and Procedure for the ICC.<sup>3</sup> The PrepCom established a Working Group on Rules of Evidence and Procedure.

This Working Group has critical tasks before it. The elaboration of principled and practical rules is critical to the functioning of the ICC. The Rules must ensure that the ICC can function effectively while guaranteeing unequivocal respect for the rights of suspects. The Rules must protect the interests of witnesses who may put themselves at risk as a result of giving evidence, especially since the ICC may ultimately depend on their testimony in prosecuting the accused. The Rules must balance clarity and precision with flexibility.<sup>4</sup>

Specifically, there are three issues that the PrepCom must address in formulating the Rules of Evidence and Procedure. First, the length of pre-trial detention. Second, the standard for disclosure. Third, the protection of witness interests and disclosure.

## I. Pre-Trial Detention

Article 60(4) of the ICC Statute states that "[t]he pre-trial chamber shall ensure that a person is not detained for an unreasonable period of time prior to trial due to inexcusable delay by the prosecutor."<sup>5</sup> When this text went to the drafting committee on June 24, 1998, it was accompanied by a footnote stating that the time frame should be addressed in the Rules of Evidence and Procedure. Any such detention should be as short as possible and never exceed a reasonable period of time. While what constitutes a reasonable period will vary depending on the nature of the particular case, pre-trial detention should be limited to a specified maximum period.<sup>6</sup>

Nevertheless, in recognition of the complexity of the crimes likely to be under investigation and the need for a degree of flexibility, the Rules should allow for the possibility of extending the period in exceptional circumstances where the interests of justice so require. No such extension should be granted where the need for it is "due to inexcusable delay by the Prosecutor."<sup>7</sup> The accused should be entitled to challenge, before the Pre-Trial Chamber, any decision to extend the period of detention, irrespective of whether the accused has already challenged the lawfulness of the detention *per se*. Furthermore, the rules should explicitly state that the accused

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2. See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/9 (1998) [hereinafter Rome Statute].

3. See *id.*

4. See *Non-Governmental Organization Action Alert (No.3) Feb. 1998* <<http://www.hrw.org/hrw/campaigns/icc/act-ahrt.htm>>.

5. Rome Statute, *supra* note 2, art. 60, para. 4.

6. See *Justice in the Balance – Recommendations for an Independent and Effective International Criminal Court Pre-Trial Arrest and Detention* (last visited Sept. 21, 1999) <[http://www.hrw.org/hrw/reports98/icc/jitbwb-11.htm#P1547\\_260623](http://www.hrw.org/hrw/reports98/icc/jitbwb-11.htm#P1547_260623)>.

7. See Rome Statute, *supra* note 2, art. 60(4).

has the right to be released if he or she is not charged in accordance with the time frame and procedure established in the Statute.

## II. The Standard for Disclosure

The rules of the International Criminal Tribunal for Yugoslavia, consistent with the ICC Statute, suggest that the Rules should instruct the prosecutor to disclose the "existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or might mitigate the guilt of the accused or which may affect the credibility of prosecution evidence."<sup>8</sup>

Disclosure is essential to ensure that the defendant has access to all information that may be relevant to the preparation of his or her defense. Similarly, disclosure will enable the ICC to have all the materials relevant to its determination of the suspect's guilt or innocence. Therefore, the disclosure requirement should be broad. However, legitimate concerns about the disclosure of information being seriously detrimental to ongoing investigations or to the interests of victims or witnesses, should be addressed through specific rules designed to protect certain categories of information.<sup>9</sup>

## III. The Protection of Witness Interests and Disclosure

The prosecutor should have due regard to the protection of the interests of victims and witnesses in making any determination as to disclosure. Consistent with the rights of the accused, measures should be taken not to disclose information, or to delay disclosure, where victims' or witnesses' interests would be adversely affected. The prosecutor should consult with the Victim and Witness Protection Unit if he or she considers that disclosure may raise issues of specific concern to the interests of victims and witnesses.

## IV. The ICC's Jurisdictional Regime

While the PrepCom session went reasonably well in both substance and tone, the positive sense of progress may signal the calm before the storm. The whole undertaking may be at serious risk if the U.S. government attempts, by itself or perhaps working with a surrogate, to re-open negotiations concluded at the Diplomatic Conference. During the February session of the PrepCom there were numerous reliable reports that delegates were being canvassed by the U.S. Delegation for their reactions to a possible protocol amending Article 12 of the Rome Statute.

Article 12 was the focus of the most difficult negotiations at the Diplomatic Conference.<sup>10</sup> The U.S. government has objected to Article 12. Article 12 contains the core of the ICC's jurisdictional regime. According to

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8. Rules of the International Criminal Tribunal for Yugoslavia, IT/Rev.14.

9. See *Justice in the Balance – Recommendations for an Independent and Effective International Criminal Court, The Protection of National Security* (last visited Sept. 21, 1999) <[http://www.hrw.org/hrw/reports98/icc/jitbwb-11.htm#P1957\\_329240](http://www.hrw.org/hrw/reports98/icc/jitbwb-11.htm#P1957_329240)>.

10. See Rome Statute, *supra* note 2, art. 11.

this provision, in cases other than those referred by the Security Council, the ICC will be able to act where the state on whose territory the crimes were committed or the state of nationality of the accused have ratified the Treaty or accepted the ICC's jurisdiction over the crime.<sup>11</sup>

This jurisdictional structure is based on two principles: 1) the principle of territoriality where a State exercises jurisdiction over an offender because the offense was committed on the territory of that State and 2) the principle of active nationality where a State exercises jurisdiction over an offender on the ground that the offender is a national of the State concerned. Thus, Article 12 is rooted in two longstanding jurisdictional principles of international law. Given the alternative bases of jurisdiction codified in Article 12, it is indeed possible that the citizen of a State that is not a party to the Treaty could, in situations where the other multiple safeguards of complementarity are satisfied, be tried by the ICC. There is, however, nothing unusual about the conferral of jurisdiction over nationals of non-state parties through the mechanism of treaty law. There are many international conventions that grant such competence to national courts.<sup>12</sup> The United States is a party to these treaties. In fact, U.S. District Courts have exercised jurisdiction over nationals of non state parties to various treaties in a number of cases on the basis of the treaty provisions empowering the courts to do so. One example involved a Lebanese citizen suspected of hijacking a Jordanian aircraft in the Middle East. Based on domestic legislation implementing the International Convention Against the Taking of Hostages and the Convention for the Suppression of Unlawful Seizure of Aircraft, the United States exercised jurisdiction as the state of nationality of two U.S. citizens who were the victims of these crimes.<sup>13</sup>

The U.S. government has criticized the Rome Treaty and the ICC because the ICC's jurisdiction over the national of a non- state party contravenes international law. At the Rome Conference the U.S. Delegation threatened to actively oppose the ICC if it had this authority. In Rome, the U.S. Delegation sought an ironclad guarantee that no U.S. citizen could ever be investigated or tried by the ICC without the consent of the United States. The other delegations decisively rejected this approach. Now, the U.S. government appears to be pursuing by other means what it could not obtain through the negotiations in Rome. One proposal the United States suggested at the February PrepCom meeting would create two separate jurisdictional regimes: one for crimes committed in international situations and another for crimes committed in internal situations. This suggestion would codify a bifurcated regime that requires different jurisdictional standards for internal and external crimes. The U.S. Delegation arranged many bilateral meetings to discuss this option. However, before a final decision is made, one must consider several drawbacks to the U.S. proposal.

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11. *See id.*

12. *See, e.g.,* United Nations General Assembly: Convention on the Safety of United Nations and Associated Personnel, 34 I.L.M. 482 (1995).

13. *See U.S. v. Yunis*, 924 F.2d 1086 (D.C.Cir. 1991).

As a matter of principle, no state ought to be able to write an exemption for its citizens under this Treaty. Any measures guaranteeing that a U.S. citizen or any other national could not be investigated or prosecuted by the ICC would undermine its authority. Such exemption cannot be justified by any conception of international law or international criminal responsibility. Furthermore, since the ICC's Statute must be applied equally to all individuals, whether they are serving the most powerful or the least powerful state, any exemption for a U.S. citizen would have to apply to all.

The U.S. proposal is problematic for practical reasons as well. The Rome Treaty was negotiated by delegates representing scores of States. The Treaty contains many compromises. No State achieved everything it wanted and many were disappointed with several provisions. If one State or group of States initiates an effort to change the text overwhelmingly approved in Rome, it will trigger a process that would be impossible to manage. Amending one provision risks unraveling the whole Treaty. Moreover, this would create an undermining precedent for future multilateral negotiations.

There are additional reasons why this type of amendment is dangerous. Doubts about the final substantive content of the Treaty could chill signature, ratification, and entry into force. States might delay complicated ratification procedures if the final content of the instrument remained in doubt. An effort to re-open the ICC Statute could lead to a significant delay in ratification and entry into force. This would prevent the ICC from prosecuting impunity regimes.

Finally, there are domestic political reasons particular to the United States that make re-opening these negotiations an ill-conceived effort. Despite the desire of States to accommodate reasonable U.S. concerns, this effort will fail. The failure will engender bitterness and resentment. This will inflame the ill-informed opposition to the ICC. Ultimately, a failure to reach a compromise could strengthen the already powerful unilateralist trends within the United States. For all these reasons, U.S. policy makers should avoid any amendment and adopt a reasonable negotiated stance.

## V. Constructive Engagement

There is another possible approach. The ICC will be a means to establish a culture of accountability. It will also advance U.S. policy objectives concerning human rights. Rather than jeopardizing the ICC or actively opposing it, the United States should pursue a policy of constructive engagement. The U.S. Delegation has a contribution to make to the Rules of Evidence and Procedure and the Elements of Crimes in the Rome Statute. The United States can, without signing or ratifying, influence the ICC's functioning. Once the ICC is established, the U.S. government can fashion its policy based on the ICC's actual practice. U.S. policy makers would long regret any attempt to undermine *a priori* the most important humanitarian law enforcement institution created in decades.

