

SYMPOSIUM ON THE PERMANENT
INTERNATIONAL CRIMINAL COURT

Sponsored By

The Research Centre of Criminal Jurisprudence of Renmin
University China, Beijing, People's Republic of China

Assisted by

The International Centre For Criminal Law Reform and Criminal
Justice Policy, Vancouver, British Columbia, Canada

Held at Renmin University School Of Law, Beijing, PRC
October 27,2001

AN OVERVIEW OF THE ESTABLISHMENT OF THE
PERMANENT INTERNATIONAL CRIMINAL COURT

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AN OVERVIEW OF THE INTERNATIONAL CRIMINAL COURT

INTRODUCTION

The Twentieth Century witnessed some of the worst atrocities committed in the history of mankind, accounting for more than eighty six million civilian deaths in over 250 conflicts in the past fifty years alone. Since the Second World War with the principles established by the Nuremberg and Toyko Tribunals, the international community through the United Nations decided to take action to bring the perpetrators of the most heinous crimes against mankind to justice. After some 50 years of prolonged discussion and debates the creation of a permanent international tribunal became a reality in July 1998 with the adoption of the Rome Statute. The Statute will enter force after 60 states have ratified it. At present 139 countries have signed and 47 states have ratified. It is anticipated that the 60th ratification will take place sometime in mid 2002. The Court will be located in The Hague, Netherlands, and will have jurisdiction over the crimes of genocide, crimes against humanity and war crimes. It will be complementary to national jurisdictions, only proceeding with a case where a state is unwilling or unable to investigate and prosecute itself. Finally, The Court will only deal with crimes that occur after it comes into force.

THE CRIMES

The Rome Statute gives jurisdiction to The Court over the most serious crimes of international concern, namely, genocide, crimes against humanity and war crimes. The definitions of these crimes are very detailed based and are based on existing customary international law. Crimes against Humanity consist of certain acts-such as murder, torture or inhumane acts-which form part of a widespread or systematic attack directed against the civilian

population. The significant element of these crimes is that they must be “widespread or systematic”. In terms of what this means there is no one source that identifies a precise definition of these terms under customary law. Further, the ICC Statute and the Annex on the Elements of Crime do not define the terms. However, it is recognized that the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) have considered and interpreted the substance of their meaning by applying them to real factual situations. With regards to the definition of war crimes it is those crimes that are committed in both external and internal armed conflicts. This is most significant given that internal armed conflicts have become the most prevalent and troublesome conflicts in our times. War crimes are defined as serious violations of international humanitarian law, which involves individual criminal responsibility including crimes relating to the conduct of hostilities, and crimes against protected persons. The Crime of Genocide is set out in the Statute and reflects the definition in the Genocide Convention. The crime of aggression is also set out in the statute on the basis that The Court will not be able to exercise jurisdiction over this crime until such time as states can agree upon a definition and relevant preconditions are established and are adopted by a Review Conference to take place seven years after the creation of The Court.

JURISDICTION AND PROCEEDINGS

International law recognizes the right of states to exercise criminal jurisdiction to prosecute these international crimes. The principles governing the exercise of jurisdiction by national courts include the state where the crime occurred, the state of the nationality of the suspect or the nationality of the victim. In addition, for certain serious international crimes universal jurisdiction can be available to prosecute. A growing number of states including Canada have put in place laws to exercise universal jurisdiction over these international crimes such as, genocide, crimes against humanity, war crimes and torture. Recent significant developments, including the Pinochet case, indicate that universal jurisdiction is becoming a real tool to combat impunity and to deal with these serious crimes.

With respect to the ICC and its jurisdiction, any State Party can initiate proceedings against an individual accused of one of the crimes within the jurisdiction of The Court, by the Security Council or by the Prosecutor of the Court. The power of the Prosecutor to initiate proceedings on his own

motion was considered essential by the drafters of the Statute in light of States Parties and the Security Council being reluctant to do so because of political considerations. The Prosecutor is subject to carefully crafted checks and balances to ensure against frivolous and possibly improperly motivated prosecutions. This includes the need to obtain prior judicial approval from a Pre-Trial Chamber of The Court and a consultation procedure with concerned States to allow them to challenge jurisdiction. In addition, the power of the Security Council to refer situations to The Court and Prosecutor is considered a critical element since the Security Council can employ its enforcement powers under Chapter VII of the United Nations Charter to ensure that all United Nations member states will comply with the request made by The Court. The Statute provides that before The Court can exercise jurisdiction there must be some form of state acceptance. In the case of a referral by the Security Council the acceptance derives from the obligation of member states to carry out the decisions of the Security Council as provided for in the Charter and Chapter VII to take measures for international peace and security. However, in the absence of a Security Council referral it is essential that acceptance must be given by either the state of the nationality of the accused person or the state in whose territory the crime was committed. Thus, State Parties automatically accept the Court's jurisdiction without a requirement for case by case consent. However, there is a transitional provision which allows new States Parties to withhold automatic consent over war crimes for a period of seven years. Finally, non-States Parties may also give acceptance on an ad hoc basis.

COMPLEMENTARITY

In Articles I and 17 state parties recognize that it is states, not the Court that have the primary responsibility for bringing those responsible for genocide, crimes against humanity and war crimes to be held accountable for their crimes. The Statute states the Court can only take jurisdiction when states are unwilling or unable to investigate and prosecute the case themselves. The Court can also assume jurisdiction where a proceeding by a state is not considered genuine or is seen to be a sham to protect their nationals from facing justice. Thus, if the Court is to be an effective complement to states in the international system of justice for such crimes, states must fulfill their obligations. States must enact national legislation, which provides these crimes under international law are also crimes under national law wherever committed, no matter who has committed them or who is the victim.

PRINCIPLES OF CRIMINAL LAW IN THE STATUTE

Part 3 The Statute enumerates the basic general principles of criminal law as follows:

- . The Statute applies prospectively after The Court comes into force.
- . The Court can only deal with persons who were over the age of 18 years of Age at the time of the commission of the offence. This is consistent with Other UN Conventions particularly the Convention on The Rights Of The Child.
- . The title or official capacity of the accused person is irrelevant. This means That a person who has committed a crime cannot escape responsibility as a Result of their position in government or the military.
- . Statutes of limitation against prosecutions do not apply.
- . Persons accused of crimes are held individually responsible for there Crime.
- . A commander or superior in positions of authority can be held liable for Crimes committed by their subordinates.

COMPOSITION OF THE COURT

The Statute set outs in Part 4 the structure of the Court with its three component bodies: The Office of the Prosecutor, The registry, and The Judiciary with the Pre-Trial Chamber, The Trial Division and the Appeal Division. The Assembly of State Parties is responsible to elect the 18 judges of the Court, the Prosecutor and the Registrar. Removal of Officials is also by the Assembly of States Parties based on serious misconduct or breach of duty.

PRE-TRIAL, TRIAL AND APPEAL PROCEDURES

Part 5 of the Statute set outs the procedures in the investigation and prosecution stages including the initiation of proceedings, the functions of the Prosecutor and the Pre-Trial Chamber, arrest proceedings and initial proceedings before the Court.

Part 6 governs the trial process, including the functions the Trial Division. It also provides that only serious cases are to be brought before the Court. It specifies that the proceedings will be conducted in accordance with international standards, including the presumption of innocence and the basic rights of an accused person including the right to counsel to assist in the defence. Further, victims and witnesses are protected through the establishment of a special unit set up to provide protective measures, security arrangements, counseling and other assistance.

Part 7 deals with penalties, including the determination of the sentence, the applicable penalties and the creation of a trust fund for victims. In keeping with the United Nations Charter the maximum penalty that the Court can impose is life imprisonment. The death penalty is not permitted.

Part 8 deals with appeals. The Prosecutor and the convicted person have a right of appeal based on procedural error, error of fact or error of law. The convicted person can also appeal on any other ground that affects the fairness or reliability of the proceedings or the decision.

STATE COOPERATION

Part 9 governs international cooperation and assistance, especially the obligation on the part of states to cooperate fully with the Court. It provides details on the cooperation measures required such as the arrest and surrender of persons to the Court. In effect, this means that States must ensure that their national procedures allow compliance with the Statute and are no more exacting than their usual extradition requirements. Therefore, once the Court has determined that it may exercise jurisdiction in accordance with the principle of complementarity, State Parties agree under Article 86 to cooperate fully with Court in the investigation and prosecution of crimes within the jurisdiction of the Court. This extends to ensuring that the Prosecutor and the defence can conduct effective investigations in their jurisdictions, that their courts and other authorities provide full cooperation in obtaining documents, locating and seizing assets of the accused, conducting searches and seizures of evidence, locating and protecting witnesses and arresting and surrendering accused persons. Detention facilities should also be made available to assist the Court.

Part 10 states that sentences of imprisonment will be carried out in States that choose to accept sentenced persons under the supervision of the Court.

MANAGEMENT OVERSIGHT AND FUNDING OF THE COURT

Part 11 deals with the Assembly of State Parties, which will provide management oversight to the Court. This includes the power to consider and decide the budget of the Court and to establish oversight mechanisms to enhance the efficiency and economy of the Court.

Part 12 governs the financing of the Court, which is provided from assessed contributions made by the States Parties and any funds provided by the United Nations as well as any voluntary contributions that may be made to defray the cost of the Court's operations.

FINAL CLAUSES

No reservations may be made to the Statute. The Statute may be amended at a Review Conference, to be held seven years after the entry into force of the Statute. Any amendment must first be adopted by 2/3 of the State Parties at the Review Conference and thereafter must be ratified by 7/8 of All State Parties. Any amendments to the definitions of crimes will enter into force only for those states that have ratified them. The Statute enters into force upon 60 ratifications.

CONCLUDING REMARKS

The adoption of the Rome Statute is an incredible achievement in the development of international law. It has struck an appropriate balance between respect for national sovereignty and the quest for international justice. This has been achieved by enshrining the principle of complementarity giving primary jurisdiction to states, by imposing specific limits on the power of the prosecutor to initiate proceedings and providing carefully crafted Rules of Procedure and Evidence to govern the proceedings of the Court. The Rome Statute is without a doubt the culmination of a long journey to accountability for the heinous crimes committed against humanity. It is also the foundation for the ongoing and enduring struggle

towards achieving the vision of the Universal Declaration of Human Rights to bring about universal respect for and observance of human rights and fundamental freedoms.