

The new International Criminal Court

A preliminary assessment

by Marie-Claude Roberge

After years of relentless effort and five weeks of intense and difficult negotiations, the Statute of the International Criminal Court (ICC) was adopted and opened for signature in Rome on 17 July 1998. This historic event represents a major step forward in the battle against impunity and towards better respect for international humanitarian law. For too long it has been possible to commit atrocities with total impunity, a situation which has given perpetrators *carte blanche* to continue such practices. The system of repression established by international law clearly has its shortcomings, and the time has come to adopt new rules and set up new institutions to ensure the effective prosecution of international crimes. A criminal court, whether at the national or international level, does not put a stop to crime, but it may serve as a deterrent and, consequently, may help reduce the number of victims. The results achieved in Rome should thus be welcomed, in the hope that the new Court will be able to discharge its mandate to the full.

The purpose of this article is to offer a preliminary assessment of the outcome of the Rome Conference in the light of existing international humanitarian law and the ICRC's activities in behalf of war victims.

The ICRC is, of course, intensively involved in conducting relief and protection operations in the midst of armed conflicts. Moreover, it has a

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This article reflects the views of the author and not necessarily those of the ICRC.

mandate conferred on it by the States party to the 1949 Geneva Conventions to work towards greater respect for international humanitarian law on the part of all those under an obligation to comply with it, and to encourage its development. Accordingly, the ICRC welcomes all steps taken with a view to meeting the obligations arising under humanitarian law, whether preventive activities such as education and training or measures of repression. Through its Advisory Service the ICRC provides States with technical assistance for the adoption of legislation necessary for the investigation and prosecution of suspected war criminals, as required by the Geneva Conventions.

For this reason, representatives of the ICRC took an active part in the negotiations conducted in New York and Rome on the establishment of an international criminal court. They made statements before the Preparatory Committee (PrepCom), the United Nations General Assembly and the Rome Diplomatic Conference on matters directly linked to the ICRC's mandate to act as guardian of international humanitarian law, and submitted a working paper at the February 1997 meeting of the PrepCom listing the war crimes the ICRC considered should come under the jurisdiction of the Court. Subsequently, a written commentary was prepared to explain and substantiate the structure and content of this working paper. The ICRC also prepared a document entitled "State consent regime *vs.* universal jurisdiction"¹, which set out in point form the precedents and developments which led to recognition of the principle of universal jurisdiction over war crimes, crimes against humanity and genocide, thus making a concrete contribution to the negotiations.

A first assessment of the Statute adopted by the Rome Conference

At first glance, the results of the Rome Conference are positive. There can be no doubt that the adoption of the Statute of the International Criminal Court is a milestone in the history of international humanitarian law and makes a decisive contribution to its implementation. However, it is important to look beyond this overall assessment and to examine more closely the results obtained in Rome in the light of the concerns expressed in the ICRC's position paper, since not all of these were addressed.² Accordingly, the present assessment of the Statute will concentrate on the

¹These working documents can be found on the ICRC Website: www.icrc.org.

²See *supra*, note 1.

definition of war crimes, including the proposal to establish a threshold in that respect, the ICC's automatic jurisdiction, and the role of its Prosecutor.

Jurisdiction of the ICC over war crimes committed in both international and non-international armed conflicts

Although not all serious violations of international humanitarian law appear on the list of war crimes given in Article 8, it does contain a large number of offences.³ The major accomplishment in this regard is certainly the inclusion — despite some resistance — of a paragraph on war crimes committed during non-international armed conflicts.

As regards particular offences, it is worth noting that the Statute specifies rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization as war crimes. Conscripting or enlisting children under the age of fifteen years into national armed forces (or, in the case of internal armed conflicts, into armed groups) or using them to participate actively in hostilities is also recognized as a war crime falling within the jurisdiction of the Court.

- (a) The exclusion of some war crimes from the list adopted in Rome is regrettable.⁴ To mention but a few examples, there are no provisions on unjustifiable delay in the repatriation of prisoners of war or civilians or on the launching of indiscriminate attacks affecting the civilian population or civilian objects. The provision on the use of particularly cruel weapons was kept to a minimum as it proved difficult to reach a consensus, largely because of the desire expressed by some States to see nuclear weapons included on the list of prohibited weapons and the resistance of others to such a move. Accordingly, nuclear, biological and blinding laser weapons, as well as anti-personnel mines, were omitted. The ICRC favoured the inclusion of a generic clause stating the long-standing rule regarding the prohibition of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, or which are inherently indiscriminate. It is hoped that the list of prohibited weapons will be extended at the first Review Conference.

³For the complete list of war crimes see Article 8 of the Statute (Annex 1).

⁴See Article 8, para. 2 (b) (xx) in Annex 1.

- (b) As regards war crimes committed during non-international armed conflicts, the Statute sadly fails to include a ban on intentionally starving the civilian population, using certain weapons or wilfully causing widespread, long-term and severe damage to the natural environment. We believe that a greater effort should be made to complete the list of war crimes during the Review Conference due to take place seven years after the Statute comes into force. This should be possible, as the number of States party to 1977 Protocols I and II additional to the Geneva Conventions (to date 151 and 143 respectively) has continued to grow and these States should have less difficulty in accepting a more comprehensive list of war crimes.⁵
- (c) The question as to whether the Court should have jurisdiction only over war crimes committed on a large scale or also over single criminal acts was the subject of protracted negotiations. The Statute at present provides that the Court shall have jurisdiction in respect of war crimes “in particular” when committed as part of a plan or policy or on a large scale. In other words, a threshold was introduced, but not an exclusive one. The Court still has the authority to investigate individual criminal acts — a commendable solution.
- (d) The most serious disappointment lies in a provision relating specifically to war crimes. Article 124 of the Statute provides that on becoming party to the Statute a State may declare that it does not accept the jurisdiction of the Court for a period of seven years after the entry into force of the Statute with respect to war crimes alleged to have been committed by its nationals or on its territory. This, in fact, creates a regime for war crimes which is different from that relating to other crimes within the jurisdiction of the Court, and appears to send out the message that war crimes are not as serious as the other core crimes mentioned in the Statute. However, international law already recognizes the obligation of States to prosecute war criminals, irrespective of their nationality or the place where the crime was committed. States should be encouraged not to make the above declaration and the provision should ultimately be removed by the Review Conference.

⁵ The effect of the exclusion of some war crimes from the list, or the departure from texts agreed upon in the 1977 Protocols, may, however, be limited. Article 10 of the Statute provides specifically that “[n]othing in this Part [which includes the definition of war crimes] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

Automatic jurisdiction over the four core crimes

After intense debate, States finally agreed to accept the principle that when a State becomes party to the Statute it accepts the jurisdiction of the Court over the four core crimes: genocide, crimes against humanity, war crimes and acts of aggression. Thus the Court may exercise its jurisdiction if the State on whose territory the act or omission in question occurred, or the State of which the person being investigated or prosecuted is a national, is bound by the Statute or has accepted the jurisdiction of the Court. If, in view of the above conditions, the consent of a State which is not a party to the Statute is necessary, that State may make a declaration to the effect that it accepts the jurisdiction of the Court with respect to a particular crime.

No consent is required from a State when the Security Council refers a situation to the Prosecutor under Chapter VII of the Charter of the United Nations. The Security Council may also require that no investigation or prosecution commence or proceed for a renewable period of 12 months. This can only be done once a resolution to that effect is adopted under Chapter VII of the Charter.

It is regrettable that the proposal to give the Court automatic jurisdiction if the custodial State is bound by the Statute was not accepted. In practice, custodial States can play an important role in the prosecution of war criminals. This may be illustrated by the following imaginary scenario. A person who is suspected of having committed a war crime during an internal armed conflict on the territory of State X, and who is a national of that same country, has fled to State Y. State X is not party to the Statute and refuses to accept the ICC's jurisdiction over the suspect. In the absence of automatic jurisdiction, the Court would not be able to take action and prosecution would be possible only if the Security Council referred the situation to the Prosecutor or if State Y were willing and able to bring the suspect before its own courts.⁶ Once again, only broad acceptance of the Statute by States would break the deadlock.

The issue of jurisdiction was certainly among the most difficult and important questions to be resolved. Although the outcome is positive it will not have any clear, practical impact until a large number of States

⁶This would imply that the domestic legislation of State Y allows for the prosecution of a foreign national for crimes committed in a foreign country before its own courts. To date, only a limited number of States has adopted such legislation.

has ratified the treaty, thus allowing the Court to exercise its jurisdiction whenever necessary.

An independent Prosecutor

Agreement was reached in Rome to give the Prosecutor the power to initiate *proprio motu* (on his/her own initiative) an investigation with respect to the four core crimes. Once the Prosecutor decides that there is a reasonable basis for proceeding with an investigation, he or she must submit a request to the Pre-Trial Chamber for authorization. If the Pre-Trial Chamber authorizes an investigation the Prosecutor has to notify all States Parties and States concerned. Within one month of receipt of notification a State may inform the Prosecutor that it is investigating or prosecuting the case at the national level and that the Prosecutor should therefore defer the proceedings to the State's authority. The Prosecutor may, however, decide to seek a ruling of the Court on a question of jurisdiction or admissibility.

The solution found in Rome with regard to the power of the Prosecutor to initiate proceedings reflects a compromise between States that feared having an overburdened and "politicized" Prosecutor and those that hoped an independent Prosecutor would guarantee a non-political and efficient Court. Only time will tell whether or not the supervisory role played by the Pre-Trial Chamber will permit speedy investigations.

The ICRC's role after Rome

Now that the Statute of the International Criminal Court has been adopted, a vast amount of work remains to be done before the Court will be fully established and operational, as some issues remain to be resolved. One of the tasks still to be accomplished is the drafting of an Annex to the Statute outlining the elements of the various crimes, to assist the Court in the interpretation and application of Articles 6, 7 and 8 relating to genocide, crimes against humanity and war crimes.⁷ ICRC jurists will take an active part in this process, in particular with respect to the elements of war crimes.

⁷ A proposal containing the elements of these crimes will be prepared by a Preparatory Commission comprising representatives of States having signed the Final Act of the Conference and of other specially invited States. A draft text is to be finalized before June 2000.

Clearly, for the Court to be truly effective a large number of States must ratify the Statute, and the ICRC will no doubt play an important role in encouraging governments to do so. National Red Cross and Red Crescent Societies have also been invited to promote ratification of the Statute by their respective governments.

Furthermore, in the light of the principle of complementarity between the ICC and national criminal courts, efforts must be intensified to develop national legislation implementing the universal obligation to prosecute suspected war criminals wherever they may be. Despite the establishment of the ICC, States will continue to have a duty to exercise their criminal jurisdiction over persons alleged to have committed international crimes, as the Court has jurisdiction only when a suspected criminal has not been tried in a national court. This is likely to encourage States to put in place national implementation measures. In this context, the ICRC Advisory Service will continue to offer its technical assistance to States in adopting legislation necessary for the investigation and prosecution of suspected war criminals.

Concluding remarks

It is to be hoped that the new Court will make a significant contribution to improving respect for international humanitarian law and hence will help reduce the number of victims. States are invited to become party to the Statute of the International Criminal Court and to take all necessary steps to ensure that the Court will have a successful start and will function effectively.

Statute of the International Criminal Court

Adopted by the United Nations Diplomatic Conference
of Plenipotentiaries on the Establishment
of an International Criminal Court on 17 July 1998

(extract)

Article 8 — War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, “war crimes” means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;

- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
3. Nothing in paragraphs 2 (c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

(The text adopted on 17 July 1998 may be slightly amended.)

International criminal court: A reality at last

On 17 July, after years of relentless effort and five weeks of intense and sometimes arduous negotiations, the Statute of the permanent International Criminal Court was finally adopted.

The ICRC welcomes this historic event. It sincerely hopes that the Statute will allow the Court to take effective action against criminals who defy the international community and whose impunity is an invitation to crime.

It should be emphasized, however, that the Statute's substantial rules can be further improved. It is regrettable, for instance, that States becoming party to it will have the possibility to opt out, for a period of seven years, from the Court's jurisdiction over war crimes. Furthermore, war criminals who have committed crimes on the territory of States that do not adhere to the Statute or who are nationals of those States cannot be prosecuted by the Court.

It is therefore essential that a very large number of States sign and ratify this treaty, and that the Court be provided with adequate funding and high-quality staff.

The road ahead of us is still long, and war criminals must be swiftly and relentlessly prosecuted so as to ensure that the law does have a deterrent effect for the benefit of all potential victims of massacres, looting, rape and torture.

International Committee of the Red Cross
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