

THE ROME STATUTE OF THE ICC

GLOBAL DEVELOPMENTS & NATIONAL CONSEQUENCES

**Training Course organized by
T.M.C. Asser Institute, Science Alliance and
No Peace Without Justice**

“EVALUATING THE ICC REGIME: THE LIKELY IMPACT ON STATES AND INTERNATIONAL LAW”

Address by

**Mr. Hans Corell
Under-Secretary-General for Legal Affairs
The Legal Counsel of the United Nations**

Peace Palace – The Hague, The Netherlands

21 December 2000

Ladies and Gentlemen,

This training course is now drawing to its close. For three days, you have discussed various aspects of International Criminal Law and the establishment of the International Criminal Court (ICC). This closing session will focus on perspectives on the future ICC. I have been asked to focus on an evaluation of the ICC regime and to address you on the likely impact of this regime on States and on international law. I will do this in these three very distinct steps*.

Let me first make an attempt to evaluate the ICC regime.

As a point of departure I should like to take the Secretary-General's evaluation of the regime in his speech on Compidoglio on 18 July 1998, the day after the adoption of the Statute. He referred to the Court as a gift of hope for coming generations.

The efforts that bore fruit in Rome in the summer of 1998 had started almost at the same time as the establishment of the United Nations itself. Attempts have been made since the end of World War II to establish an international criminal court. This is not to say that the thought was new; there were also attempts made at earlier stages, and the Nuremberg and Tokyo tribunals testify to the fact that a need was felt to establish such an international court. The Convention Against Genocide was adopted already in 1948. This Convention contains a reference to an international criminal court.

However, the efforts during the first decades in the history of the United Nations showed little progress in the work towards the establishment of such a court. The reason was of course the then prevailing political situation, in particular the Cold War. However, the thought was there, and the question was really when the right moment would present itself.

* The views expressed are my own and do not necessarily reflect the opinion of the United Nations.

In my view, there were several factors that contributed to the events that culminated in Rome in the summer of 1998 when the ICC Statute was adopted. Interestingly, it was not the concern for violations of international humanitarian law and human rights law that brought the matter to the forefront on the agenda of the General Assembly of the United Nations in the late 1980s. The initiative came from Trinidad and Tobago, and was motivated by the concern that small States, notably in the Caribbean region, had difficulties in dealing with grave criminality, in particular crimes related to drugs.

At the same time, we experienced a tumultuous development in Europe with the coming down of the Berlin Wall and the demise of the former Soviet Union. The political climate changed, and the prospects for continued work for the establishment of an international criminal court were all of a sudden much more positive.

In 1989, the General Assembly requested the International Law Commission to address the question of establishing an international criminal court.¹ Three years later, the Assembly requested the Commission to elaborate a statute of such a court as a matter of priority.²

In the meantime, we experienced some very tragic events in the wake of the end of the Cold War. The Gulf War erupted in 1990, and the military action authorized by the Security Council against Iraq commenced in January 1991. At the same time, the situation on the Balkans deteriorated, and we witnessed the disintegration of the former Socialist Federal Republic of Yugoslavia. These events are all too well known.

In 1992, the Conference on Security and Cooperation in Europe (CSCE) took an initiative to clarify whether it was not possible to bring to justice those responsible for the atrocities committed in the former Yugoslavia.³ In 1993, the

initiative was taken over by the United Nations. On 22 February of that year, the Security Council decided to establish an International Criminal Tribunal for the former Yugoslavia.⁴ The Council adopted the Statute of the Tribunal on 25 May 1993.⁵ The judges were sworn in in November 1993, and the Tribunal commenced its work.

A few months later the tragic events in Rwanda evolved. Also here, the Security Council drew the conclusion that it was necessary to establish an international criminal tribunal. The statute of the International Tribunal for Rwanda was adopted on 8 November 1994 and the judges made their solemn declarations in May 1995.⁶

In parallel, the International Law Commission was at work. A constant topic on the agenda of the Sixth Committee of the United Nations General Assembly has been the inter-relationship between the Commission and the Committee. It has been pointed out that the Commission sometimes has difficulties in producing useful results, mainly depending on the fact that sufficient political guidance is not forthcoming from the Sixth Committee.

In the case of the International Criminal Court the situation was different. The Sixth Committee expressed a clear political will, and clear guidance was given to the Commission by the General Assembly. The Commission set up a working group, led by Professor James Crawford, and was able to produce, already in 1994, a draft statute for an international criminal court. This draft was discussed in the Sixth Committee during the 49th General Assembly. On 9 December 1994, the General assembly decided to establish an ad hoc committee to review major substantive issues.⁷

On 11 December 1995, the General Assembly decided to establish a preparatory committee to discuss further the major substantive and administrative issues and to prepare a widely acceptable consolidated text of a

convention for an international criminal court. This Committee, under the able Chairmanship of Adriaan Bos, the Legal Adviser of the Ministry of Foreign Affairs of The Netherlands, met during the years 1996 – 1998 and was able to transmit to the Rome Conference a draft Convention.⁸

On 15 December 1997, the General Assembly adopted a resolution, convening a Conference on the Establishment of an International Criminal Court. The Conference was to be held in Rome between 15 June and 17 July 1998.

Some 14 months before the beginning of the Conference, the planning started in the United Nations Secretariat. Further preparatory meetings were held among interested delegations in Courmayeur in Italy and in Zutphen in The Netherlands. In late spring 1998, informal consultations were held at the United Nations Headquarters, which led to a smooth opening of the Conference, for which Giovanni Conso, former Minister of Justice of Italy, was elected Chairman. Ambassador Philippe Kirsch, the Legal Adviser to the Ministry of Foreign Affairs of Canada, was elected Chairman of the Committee of the Whole. During five intensive weeks in Rome, the Conference – one of the most paper-intensive Conferences ever held under the auspices of the United Nations; there were close to 700 documents produced – managed to weld delegations together in producing the Rome Statute of the International Criminal Court.⁹

On 17 July 1998, the Statute was adopted by 120 votes in favour, 7 votes against and 21 abstentions. The adoption of the Rome Statute was a formidable effort by the delegations from 160 States that participated. The picture would not be complete, however, if I did not also mention the contribution by the Coalition of Non-governmental Organizations led by Bill Pace.

Let us now examine some of the aspects of the Rome Statute.

In order to better appreciate the impact of the creation of the International Criminal Court on States and international law, one has first to consider what was the picture of possible jurisdiction for international crimes before the advent of the Rome Statute.

The principle of the territoriality of penal law, namely that a State may, in principle, try only crimes committed in its own territory, has traditionally been among those most steadfastly held by States. The exceptions to this principle have always been very restrictive. These exceptions may be classified into forms of extraterritorial jurisdiction and forms of universal jurisdiction.

Extraterritorial jurisdiction may be based on the principle of active personality (this means crimes committed by the State's own nationals abroad). It can also be based on the protective jurisdiction principle (this means crimes committed against the State's own interests). There is also a third principle of extraterritorial jurisdiction, referred to as the passive personality principle (this means crimes committed against a State's own nationals abroad). This principle is occasionally also invoked.

Forms of universal jurisdiction include the universal jurisdiction stricto sensu, and the jurisdiction based on the principle aut dedere aut judicare. The universal jurisdiction stricto sensu was developed by customary international law for a crime such as "piracy". This kind of universal jurisdiction allows any State on the high seas or in any other place outside the jurisdiction of any State to seize a pirate ship or aircraft, arrest the persons, seize property on board and submit the case to its own tribunals which may decide on the penalties to be imposed.

A step further in the development of the concept of universal jurisdiction is the principle aut dedere aut judicare. Many international conventions are based on this concept, including the 1949 Geneva Conventions on humanitarian law

and many anti terrorist conventions. This principle not only grants the State in whose territory the alleged perpetrator of an international crime is to be found, the power to try such person. It also creates for such State the legal duty either to try the alleged perpetrator before its own courts or to extradite the person to another State which, having jurisdiction on the case, requests the extradition.

The creation of the International Criminal Court provides States with a further, third alternative, namely, to surrender the accused to an international criminal court for trial. I will revert to this in a moment.

A number of carefully balanced provisions contained in the Rome Statute introduced a note of innovation in international criminal law and constitute factors enhancing the acceptability of the Statute for States.

Perhaps the most important factor in fostering the acceptability of the International Criminal Court has been the fact that the court was not created as a replacement to the national jurisdictions emanating from the principles I have just mentioned, but rather as a complement to them. This complementarity principle became a key element in the negotiating process of the Rome Conference. The Court may determine that the case brought before it is inadmissible if the case is being investigated or prosecuted by a State that has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

Also important were the aspects related to the trigger mechanism or conditions under which the Court may exercise jurisdiction. While referrals to the Prosecutor by a State Party or by the Security Council were not the subject of much controversy during the negotiation process, the possibility that the Prosecutor may initiate an investigation proprio motu gave rise to protracted discussions. A carefully balanced system, which requires the Prosecutor to seek

the authorization of the Pre-Trial Chamber to initiate formal investigations, goes a long way into curtailing possible abuses or politically motivated prosecutions.

Furthermore, provisions contained in the Rome Statute relating to the qualifications and election of the Prosecutor, the disqualification in cases in which his or her impartiality may be doubted, and removal in cases of serious misconduct or serious breach of duty tend to insure the impartiality and independence of the Prosecutor's Office.

Another important aspect of the Rome Statute is the fact that, in accordance with its provisions, a State accepts the jurisdiction of the Court with respect to the crimes covered by the Statute solely on the basis of becoming a party to the Statute. There is no need for any further expression of consent. This simplification of the procedure for accepting the Court's jurisdiction constitutes a significant departure from more cumbersome solutions which were discussed during the negotiation process, such as opting in and opting out procedures. This simplified solution, on the other hand, was also a determining factor in excluding from the Court's jurisdiction the so-called "treaty crimes". Some States, while ready to adopt a system of "automatic" jurisdiction with regard to genocide, war crimes and crimes against humanity, did not feel that they could extend such a regime to drug trafficking activities or terrorist acts, for example.

The Court will be able to exercise its jurisdiction if one or more of the following States are parties to the Statute or have accepted the jurisdiction of the Court: (a) the State on the territory of which the act or omission occurred; (b) the State of which the person accused of the crime is a national. Since the two conditions mentioned are not conjunctive, it means that the Court might exercise jurisdiction over nationals of a State which is not party to the Statute, if the territorial State is a party to the Statute or otherwise consented to the Court's jurisdiction.

This possibility has fostered the opposition of some States to the Rome Statute. It is not however a violation of the principle res inter alios acta. States would normally have competence, under the principle of territoriality or under the principle of universal jurisdiction, to which I referred, as the case may be, over the crimes of genocide, crimes against humanity or war crimes. Consequently, it is within their sovereign prerogative to exercise that jurisdiction through their own courts or through an international court created with other like-minded States.

A further welcome development in the Statute is the fact that it includes among the war crimes falling under the Court's jurisdiction a number of serious violations of the laws and customs applicable in armed conflicts not of an international character. Although the list of these violations is more restrictive than the one concerning international armed conflicts, their inclusion under the Court's jurisdiction constitutes a significant achievement; many of the war crimes being committed in the world nowadays, occur in the context of a conflict not involving one State against another.

Since the inclusion of these violations gave rise to some resistance on the part of some States, the Statute clearly indicates that the concept of "armed conflict not of an international character" does not extend to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

A further precision contained in the Statute in connection with some of the violations occurring in armed conflicts not of an international armed character is that these violations do also fall within the court's jurisdiction if they occur in 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.

In addition, the Statute lays down a highly developed system of international criminal justice, with a set of legal principles emanating from the various legal systems of the world. Every individual will be entitled to the highest international standards and guarantees of due process and fair trial before a court composed of impartial and qualified judges in which, *inter alia*, there has to be a fair representation of female and male judges and judges with expertise on violence against women or children. Furthermore, a judge may be removed from office if he or she is found to have committed serious misconduct or a serious breach of his or her duties. The Statute further includes detailed provisions on technical matters such as investigation, prosecution, trial, cooperation and judicial assistance and enforcement.

Prior to the Millennium Assembly, which took place in September 2000, the Secretary-General wrote to Heads of State or Government on the need to speed up the processes of signature and ratification of the Rome Statute and encouraging them to consider taking the necessary action in order to become a party to the Statute as soon as possible. The replies received have been overwhelmingly supportive of the Statute. Some States communicated that they were deeply involved in the internal process of adapting their legislation or even their constitution to the provisions of the Statute. Subsequently, on 8 September 2000, 188 Heads of States or Governments adopted the Millennium Summit Declaration in which, *inter alia*, they “call upon all States to consider signing and ratifying the Rome Statute of the International Criminal Court”.

On 20 December 2000, 123 States had signed the Rome Statute. The number of ratifications stood at 25.

To sum up on the first element of my presentation – Evaluating the ICC regime: The Rome Statute is one of the most remarkable achievements in the field of international law in the 20th century.

Ladies and Gentlemen,

I have now come to the second element of my presentation, namely the likely impact of the ICC regime on States.

Here there are several aspects to consider. First, States act through representatives. It is therefore on those that we should focus. In my view, the existence of an international criminal court with the jurisdiction laid down in the Rome Statute will certainly affect the way in which representatives of States act. The Statute is designed to reach those that bear the ultimate responsibility for actions decided by State organs. Therefore, the decision makers at the highest level will have to consider carefully their actions before decisions are taken. Under normal circumstances they would be sufficiently monitored by the ordinary institutions at the national level. It is, therefore, only under extraordinary circumstances that the ICC would be engaged. The ability of national institutions to deal with issues that arise are an important factor in this context. I leave this issue with the reflection that those who act on behalf of States will in the future be aware that if certain limits are transgressed, they might be subject of investigation by the organs of the ICC.

In reality, today most conflicts are intra-State and sometimes within failed States, where persons who could be described in terms of warlords take action. The question is what the impact of the ICC would have in such circumstances. The purpose of the Court is of course to function as a preventive factor, just as the criminal justice system is meant to work at the national level. Hopefully, the mere existence of the ICC will make certain actors think twice before they engage in activities violating the standards that the Court is to uphold. The situations in Cambodia, the former Yugoslavia, Rwanda and Sierra Leone demonstrate, however, that if the ICC had been established, immediate action could have been taken, and persons that have continued to violate humanitarian

law would have been arrested and brought before the Court at a much earlier stage than is presently possible.

Against this background it may also be assumed that the Rome Statute could influence the attitude of States towards the implementation of international criminal law. It will be difficult for the authorities of a State to justify a delaying attitude towards signing and ratifying the Statute. The Rome Statute has become emblematic of the concerns of the international community to end impunity for egregious crimes which revolt the conscience of mankind and of the realization of its basic values. Becoming a party to the Statute will then symbolize the commitment of a State to fully endorse these aspirations of the international community.

The Rome Statute may also serve, in some cases, as an incentive for States to exercise the jurisdiction of their own courts for the crimes contemplated in the Statute.

On the other hand, in other cases, in which a State, due to internal tensions, outside political interference, weakness of its own judiciary or any other relevant reason, is unable or unwilling to exercise its own jurisdiction over a case or to make a difficult political choice concerning competing requests for extradition, the existence of a third alternative consisting in a neutral and impartial forum, perceived as such by all, will constitute an effective tool for the application of international criminal law and the attainment of international justice and even, in certain instances, as a contributor to international peace and security by defusing situations which otherwise might lead to unilateral actions on the part of some States.

Needless to say, one could speculate at length on the impact of ICC in this perspective. I simply draw the conclusion that in all civilized societies, there is a criminal justice system in place to apply a law that reflects broadly accepted

norms in the particular society. The purpose of the system is of course to bring to justice those that violate this law. There is no reason why the law should halt at the borders of States. What we have now witnessed is an attempt to establish at the international level the same system of prevention and punishment that is applied at the national level.

Against this background, it may be more interesting to focus on the more subtle impact of the ICC within States. First, I think that the Rome Statute will mean that attention is drawn to the criminal justice system at the national level. This will follow as a natural consequence upon the efforts undertaken in the process of ratifying the Statute. But I feel certain that it will not stop there. The necessary examination of the national system in the ratification process and the need to adopt the necessary implementation legislation, will by necessity entail a closer look at the national system. The natural question would be to see what improvements could be made; in particular, some elements may be influenced by the international contributions through the common efforts in Rome.

This means that attention will be drawn to elements of the Rome Statute that are imported from other legal systems. This could lead, at least in more general terms, to a harmonization of criminal law and criminal procedure in Member States of the Organization.

Another effect will be that, when the Court is operational, its case law will be studied at the national level and will also influence the national justice systems.

By tradition, the judiciary of a State is a very national institution. The same is probably true with respect to prosecutors. The police may be more open to international cooperation in the wake of the development of new forms of criminality, in particular, transnational crimes. However, with the coming into force of the Rome Statute, members of the judiciary and prosecutors will become

aware of the common denominators. Since the Rome Statute is a common effort by so many States, it is natural that it will be studied by those concerned at the national level and that they will seek guidance and inspiration in it. An increased awareness of the internationally agreed standards will also be the result, and a preparedness to accept international standards will certainly grow.

Of particular importance is that all persons in the field – judges, prosecutors, and police officers – will become potential candidates for posts under the ICC umbrella. Furthermore, there will be a need at the national level to be prepared to collaborate with the ICC. This will, no doubt, lead to an increased interest at the national level already at the university level. I am informed that, already now, there are courses in international criminal justice being taught.

In sum, I think that it is difficult to assess in more exact terms what the influence of the ICC will be at the national level. However, I think that one can say with enough certainty that the existence of the Rome Statute and the coming into operation of the ICC will lead to a tremendous cross-fertilization in the field of international criminal justice.

It is important to note in this context that in countries where there is a well-established criminal justice system, it has often taken centuries to develop it. We should therefore remember at this juncture that we are only at the beginning of this process at the international level. The attempts to establish international criminal justice towards the end of the 20th century are but a first step in a direction that I think is a necessary and natural development in the history of mankind. In the field of governance and environmental law we are often referring to the world as the global village. It is only natural that a criminal justice system, addressing the most serious crimes against humanity, extends to all who live in this village.

Ladies and Gentlemen,

I have come to the third and final element in my presentation, namely the likely impact of the ICC regime on international law.

As it appears from what I have said in the past, a new chapter has been written in international law. Needless to say, this chapter will be the subject of further studies in academia. A number of books and treatises have already been published on the topic, and the first courses are being organized, based on the contents of the Rome Statute.

At the national level, the existence of the penal system is a necessary complement to other law. The same will be the case at the international level. This means that the mere existence of the Rome Statute and the ICC will influence the way in which international law is applied. I should in this context like to point, in particular, to the role of the United Nations in the field of peace and security. The Security Council of the United Nations has demonstrated that it has both the political will and the legal competence to establish ad hoc criminal tribunals. However, to take such a decision represents a major threshold.

Therefore, a significant impact of the Rome Statute on international relations, once the Court enters into operation, will be the elimination of the need for creating additional ad hoc tribunals by the Security Council in cases in which the Council is acting under Chapter VII of the UN Charter, and decides, in accordance with article 13 (b) of the Statute, to refer a situation to the Court. (It is important to note, however, that the coming into force of the Rome Statute represents no restriction with respect to the existing power of the Security Council to establish ad hoc criminal tribunals.) The replacement of ad hoc tribunals by a pre-established jurisdictional organ will not only contribute to an improved perception of international justice but will also help develop a uniform case law of international criminal law.

Furthermore, the existence of the ICC, a standing court which is prepared to deal with cases almost instantaneously, will certainly add an interesting and effective element in the deliberations of the Council in matters which require its attention.

Also to be noted is article 16 of the Statute according to which the Security Council, acting under chapter VII of the Charter, may request from the Court a deferral of investigation or prosecution for a period of 12 months, which is renewable. This constitutes a compromise between those States which in the negotiation process were in favour of a total independence of the Court from the Council, and those advocating an international criminal court subordinated to the Security Council.

Needless to say, the impact will also be de lege ferenda. The moment there is a law established, there will be a discussion on how to apply and develop this law. As a matter of fact, the discussion has already started with respect to the crime of aggression, which is included, but not defined in the Rome Statute. The Preparatory Commission presently deals with this matter, and it will be interesting to see what progress can be made in this context.

It is also important to note that the so-called "treaty issues" were left behind in Rome. I recall in this context what I said at the outset of the reasons for the initiative by Trinidad and Tobago. The question whether certain crimes, codified in treaties, should be added to the penal code in the Rome Statute will certainly be addressed as soon as the meeting of the States parties to the Rome Statute becomes operational.

Ladies and Gentlemen,

What conclusions can be drawn from all this?

A new comprehensive regime of international criminal justice has been established. This regime will certainly affect the behaviour of States and those who act on their behalf. I think that we can rest assured that it will also affect the behaviour of potential warlords around the world. And those who have gone from potential to real should be aware that the transformation of an arrogant warlord into a war crime suspect locked up in the detention center of the International Criminal Court could be a matter of hours. But the existence of the Court will also have an influence in a more general sense on those who are engaged in politics, in the legal profession and in non-governmental organizations.

At the international law level, the effect will be considerable. A new topic for research and education presents itself. Consequently, there will be closer links between those who engage in the more limited field of international law and those who focus on the field of criminal law in general. This will lead to further contacts across borders and between disciplines.

But, above all, the coming into operation of the ICC will have an effect on the attitude among human beings in general. Its preventive effect will be noticed.

However, one has to be realistic. I certainly do not want to suggest that we are treading a rosy path. To establish international criminal justice will be an uphill road, and we must be prepared for disappointments; the seven votes against the Statute in Rome is already one of them. But we should not forget that it took a long time to build national justice systems. We therefore cannot expect dramatic changes. But we are heading in the right direction.

No one among us knows the destiny of mankind. But we have a responsibility towards coming generations. We know that the varnish of civilization is thin. Therefore, we must always be watchful. We should not forget what happened twice only in the last century – and that, among nations who consider themselves cultured and civilized.

We who are participating in this course on the ICC and our colleagues around the world who share our interest have a responsibility to advocate strong support for the Court in order to end the impunity that has caused so much sorrow and suffering among human beings for longer than we can remember.

I thank you for your attention!

¹ GA/RES/44/39 of 4 December 1989. See also GA/RES/45/41 and 46/54.

² GA/RES/47/33 of 25 November 1992 and GA/RES/48/31 of 9 December 1993.

³ Cf UN Doc. S/25307.

⁴ Res. 808 (1993).

⁵ Res. 827 (1993).

⁶ Res. 955 (1994).

⁷ GA/RES/49/53.

⁸ See GA/RES/52/160.

⁹ Doc. A/CONF.186/9*.