2003

Establishing the International Criminal Court

Nancy Amoury Combs

William & Mary Law School, ncombs@wm.edu

Repository Citation

Combs, Nancy Amoury, "Establishing the International Criminal Court" (2003). *Faculty Publications*. 340.
<https://scholarship.law.wm.edu/facpubs/340>

Copyright c 2003 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

Conference scene / Le tour des conférences

Establishing the International Criminal Court

NANCY AMOURY COMBS*

The conclusion of the Rome Statute in July 1998 was a tremendous and unlikely achievement. After five weeks of grueling, often disheartening negotiations, the treaty establishing the first permanent international criminal court ("ICC") was adopted in an emotional vote of 120 to 7, with 21 countries abstaining. Spontaneous cheers, applause, and euphoria greeted the vote. Four short years later, the requisite sixty states had ratified the treaty, and the ICC opened its doors in July 2002.

With the applause now only an echo, the more mundane task of constructing – piece by piece – the real-world institution that will bring perpetrators of international crimes to justice is in full swing and was the subject of an intense, three-day conference, held 18-20 December 2002, at The Hague, the location of the ICC. While scholars and academics exclaim over the ICC's revolutionary theoretical features, the Conference, entitled *Establishing the International Criminal Court*,¹ focused more on the nuts and bolts of creating an efficient, viable international criminal justice institution in the midst of shrinking budgets, inconstant political support, and intense United States opposition. The Conference's advertised list of speakers read like a Who's Who of international criminal law and human rights: Roger Clark, John Dugard, Philippe Kirsch, Roy Lee, William Pace, Michael Scharf, Otto Triffterer, Sergio Vieira de Mello, Sharon Williams, and Michail Wladimiroff, among others well-known in the field. A few of the "big names" were unable to appear, among the more notable, Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), and Carla del Ponte, Prosecutor for the ICTY and the International Criminal Tribunal for Rwanda (ICTR), but the speakers who replaced them – Fausto Pocar, ICTY Judge, and Michael Johnson, ICTY Chief of Prosecutions, respectively – were up to the task.

* Legal Adviser, Iran-United States Claims Tribunal.

¹ The Conference was presented by the International Criminal Law Network in cooperation with the International Association of Prosecutors, the European Network of Forensic Science Institutes, and the International Criminal Defense Attorney Association.

The optimism and drama of Rome made occasional appearances. Philippe Kirsch, who chaired the Committee of the Whole at the Rome Conference, for instance, confidently asserted that in a few decades the ICC will be as natural to the international community as the United Nations now is. And Michael Johnson dramatically predicted that if the human race is going to survive, it will be as a result of the ICC enterprise.² But on the whole, the presentations were rather cautious in both their appraisals and their forecasts, and they emphasized the challenges that threaten the new court.

Perhaps the most well-known challenge comes from the United States, which has exhibited near pathological hostility to the ICC. It has threatened to obstruct the transfer of witnesses, documents, or any other type of information that would help with an ICC prosecution,³ and it has enacted laws that bar the use of United States funds to assist the ICC and that authorize the United States President to use all means necessary and appropriate to free American soldiers arrested by the ICC.⁴ Anticipating the Rome Statute's entry into force in July 2002 and failing to obtain ICC immunity for its peacekeeping nationals, the United States vetoed a U.N. Security Council resolution continuing the Bosnian peacekeeping mission⁵ and thereby pressured the Security Council into adopting Resolution 1422. The resolution asks the ICC to refrain from investigating or prosecuting American or other non-party peacekeepers for at least one year and expresses the Security Council's intent to renew the request yearly for an indefinite period.⁶ In addition, the United States has pressured Rome Statute states parties to enter into agreements with the United States, pursuant to Article 98(2) of the Rome Statute, pledging that they will not transfer American peacekeepers to the court.⁷ Many of the Conference

² Johnson went on to note that the 20th century had been history's most violent, and he maintained that if the human race continues on this path, it will no longer exist. Accordingly, "the ICC, in its importance, has no equal."

³ 22 U.S.C. §§ 7423, 7425 (2002); Bruce Zagaris, *U.S. Enacts Anti-ICC Law and Signs First Article 98 Agreement with Romania*, 18 No. 7 INT'L ENFORCEMENT L. REPORTER 299 (2002).

⁴ 22 U.S.C. §§ 7401, 7427 (2002).

⁵ See Serge Schmemmann, *U.S. Vetoes Bosnia Mission, Then Allows 3-Day Reprieve*, N.Y. TIMES, July 1, 2002.

⁶ S.C. Res. 1422, U.N. Doc. S/RES/1422 (2002).

⁷ Christopher Marquis, *U.S. is Seeking Pledges to Shield its Peacekeepers from Tribunal*, N.Y. TIMES, Aug. 7, 2002; Zagaris, *supra* note 3.

speakers decried these heavy-handed American tactics, but no one suggested that such political solutions were not necessary, if distasteful, accommodations to a powerful and vocal foe.

Indeed, the political necessity of these measures was underscored by the Conference's Simulation Exercise on the last day of the Conference.⁸ The exercise, developed and directed by Professor Roy Lee of Columbia Law School, assigned Conference participants to one of four groups – prosecutors, defense attorneys, victims' representatives, or judges – and required them to present arguments on the applicability and legality of Security Council Resolution 1422 and an article 98(2) agreement in a fictitious case involving thinly disguised United States peacekeepers transferred to the ICC to stand trial for war crimes and crimes against humanity. As a purely legal matter, the exercise was a compelling one. The participants assigned to be prosecutors made all the appropriate legal arguments: they challenged Resolution 1422 as *ultra vires*, arguing, in self-righteous tone, that article 16 of the Rome Statute envisages occasional deferrals on a case-by-case basis, not a blanket and indefinite proscription on the prosecution of American peacekeepers. They argued that the Security Council has no competence to modify a multi-lateral treaty. And they contended that countries that enter into article 98(2) agreements act inconsistently with their Rome Statute obligations. Despite the textual plausibility of the legal arguments, the exercise had an aura of fantasy about it, given the real world in which the ICC must operate: that is, there is greater likelihood that elephants will soon learn to fly than that an ICC Prosecutor will soon provoke an international confrontation by indicting American peacekeepers and challenging the Security Council's Chapter VII powers. Indeed, the only scenario less likely is that the ICC judges would rule in favor of the prosecution in such a case.

Political considerations thus pervaded the Conference presentations and highlighted the fact that, although courts are often idealistically considered above politics, every feature of the ICC's establishment and initial operation will be influenced, if not controlled, by realpolitik. John Dugard, Professor of Public International Law at the University of Leiden, for instance, discussed the nominees for the 18 ICC judgeships and lamented the fact that most states had nominated candidates who bear a close affiliation to the State,⁹ thus suggesting that states parties do not

⁸ Conference attendees had the choice of participating in the Simulation Exercise or attending presentations relating to the forensics of international crimes.

⁹ Dugard noted that some candidates are diplomats, and many have a history of support for governmental policies.

want the ICC to be too very independent of their interests. Otto Triffterer, Professor of Austrian and International Criminal Law and Procedure at the University of Salzburg, and Sharon Williams, *ad litem* ICTY judge, both made extensive comments on the gender and geographical balance required of the ICC bench.¹⁰ The United States has complained about the selection criteria, maintaining that judicial standards in many states are too low¹¹ and that judges from non-democratic, repressive, even terrorist, regimes could be elected to sit in judgment of American nationals.¹² Both Williams and Triffterer, though apparently supportive of the ICC's gender and geographical requirements, acknowledged that they made for an exceptionally complex, nearly incomprehensible, judicial ballot. Whatever the complications they engender, Sureta Chana, ICTY Trial Attorney, reminded us of the values they advance when she admonished that the ICC's legitimacy will be severely undermined unless "it appears to represent the whole world." To maintain credibility and support, Chana asserted, the ICC must "avoid any danger of being accused of being a voice of the developed world, sitting in judgment on the developing world."

Geographical and gender balance along with American threats are the sexy issues that get most of the press, but the gravest challenge to the ICC, in my view, is the more mundane financial one: specifically, will the ICC be able to resolve a politically acceptable number of cases at a politically acceptable cost? The experience of the ICTY and ICTR is instructive, if worrisome. The ICTY has spent nine years and nearly \$600 million¹³ to dispose of seventeen cases, and the ICTR has spent seven years and nearly \$500 million¹⁴ to dispose of nine cases. Even the Tribunals' most ardent supporters condemn the lengthy pre-trial detention many defendants suffer; at the Conference, ICTY Judge Fausto Pocar stated that defend-

¹⁰ Article 36(8)(a) of the Rome Statute requires states parties to consider when electing judges the need for "equitable geographical representation," "a fair representation of female and male judges," and "representation of the principle legal systems of the world." Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9.

¹¹ See Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 389-90 (2002).

¹² Patricia McNerney, *The International Criminal Court: Issues for Consideration by the United States Senate*, 64 L. & CONTEMP. PROBS. 181, 186 (2001).

¹³ *ICTY Key Figures*, available at <http://www.un.org/icty/glance/keyfig-e.htm>.

¹⁴ See Mary Kimani, *Carla Del Ponte Seeks Support from UK Parliamentarians to Investigate RPA Crimes*, RWANDA INFORMATION, 9 Jan. 2003, available at <http://www.rwanda.net/english/News/news112002/news11292002b.htm>.

ants not infrequently spend two years in pre-trial detention, a detention period that, he opined, “would be unacceptable in any country.”

Defenders of the Tribunals can point to a host of factors contributing to the high cost and long length of proceedings. Tribunal trials are held far from the locations of the crimes making it time-consuming and expensive for the parties to investigate the cases and locate witnesses and evidence. Many witnesses fear coming forward, and others dispersed following the crimes making them difficult to find.¹⁵ And evidence that might otherwise be easy to locate, is often concealed by governmental authorities, anxious to obscure the regime’s wrongdoing. Indeed, the productivity of the ICTY, in particular, suffered for years because the states of the former Yugoslavia refused to transfer indictees or evidence, and the international community declined to press the issue. Once the evidence has been gathered, trials take considerable time as a result of the size and complexity of the cases. The elements of the crimes within the Tribunals’, and the ICC’s, jurisdiction – genocide, crimes against humanity, and various war crimes – are complex and time-consuming to prove. To prosecute a grave breach of the Geneva Conventions, for instance, the prosecution must prove that the offense took place in the context of an international armed conflict.¹⁶ To prosecute a crime against humanity, the prosecution must prove that the act in question was “committed as part of a widespread or systematic attack directed against a [...] civilian population.”¹⁷ Establishing these and other elements often requires days of witness and expert testimony and the introduction of dozens if not hundreds of exhibits.

Good reasons thus exist for the high cost and long length of Tribunal proceedings. Further, the Tribunals themselves have made great efforts to expedite proceedings. Judge Pocar noted that the ICTY’s Rules of Procedure and Evidence have been amended 24 times now, with most of the amendments intended to accelerate proceedings. The Tribunals’ rules now authorize judges to exercise greater authority over the pre-trial stage, among other things, to “ensure that the proceed-

¹⁵ See Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, 55th Sess., Agenda Item 53, U.N. Doc. A/55/435-S/2000/927 (2000) para. 78 (noting that in the Bagilishema case, 15 defense witnesses were called from twelve different countries).

¹⁶ See *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Case No. IT-94-1-AR72, Oct. 2, 1995, paras. 79-84.

¹⁷ Rome Statute, *supra* note 10, at art. 7.

ings are not unduly delayed.”¹⁸ Tribunal judges conduct status conferences to monitor the progress of trial preparation, and they set the number of witnesses that each side may call and determine the time available to both parties for presenting their evidence.¹⁹ The Tribunals now make more efficient use of courtroom space, by conducting more than one trial in each courtroom.²⁰ They also better utilize judicial resources, by, among other things, permitting certain proceedings to be held before one judge rather than a three-judge panel²¹ and other tasks to be performed by senior legal officers, rather than judges.²² These steps have improved matters, but the statistics remain dismal, at best. According to Judge Pocar, after two years of pre-trial detention, the average Tribunal defendant can look forward to a year-long trial. And the international community can look forward to a \$200 million bill for a year’s worth of proceedings at the ICTY and ICTR.

That is a bill the international community appears no longer willing to pay. The U.N. Security Council, with the United States leading the charge, has lately pres-

¹⁸ ICTY Rules of Procedure and Evidence, IT/32/REV.24, July 11-12, 2002, rule 65*ter* (B) [hereinafter ICTY RPE].

¹⁹ ICTY RPE, *supra* note 18, at rule 73*bis*(C), (E) and Rule 73*ter*(C), (E); *see also* ICTR Rules of Procedure and Evidence, 6 July 2002, Rule 73*bis*(C), (D) and Rule 73*ter* (C), (D), *available at* <http://www.ictr.org> [hereinafter ICTR RPE].

²⁰ *See* Statement by the President of the ICTR to the United Nations General Assembly, Oct. 28, 2002, *available at* <http://www.ictr.org/wwwroot/ENGLISH/speeches/pillay281002ga.htm> [hereinafter President Pillay’s Statement to the UN General Assembly]; Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 57th Sess., Item 45 of the Provisional Agenda, U.N. Doc. A/57/150 (2002) at para. 60.

²¹ For instance, the Tribunals amended Rule 62 of their RPE to provide that the initial appearance of the defendant could be conducted before a single judge rather than the full Trial Chamber. *Compare* ICTY RPE, Revision 16, as amended July 2, 1999, Rule 62, *available at* http://www.un.org/icty/basic/rpe/IT32_rev16.htm#Rule 62, *with* ICTY RPE, Revision 17, as amended Nov. 17, 1999, Rule 62, *available at* http://www.un.org/icty/basic/rpe/IT32_rev17.htm#Rule 62. Certain motions have also been assigned to single judges rather than a full Chamber. Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, para. 15, 57th Sess., U.N. Doc. A/57/163-S/2002/733 (2002) [hereinafter ICTR 2002 Annual Report].

²² *Compare* ICTY RPE, Revision 19, as amended Dec. 1 & 13, 2000, *available at* [http://www.un.org/icty/basic/rpe/IT32_rev19.htm#Rule 65*ter*](http://www.un.org/icty/basic/rpe/IT32_rev19.htm#Rule 65ter), *with* ICTY RPE, Revision 21, as amended July 26, 2001.

sured the Tribunals to formulate a completion strategy; that is, to set a date for finishing their work and closing their doors.²³ Disgruntled with the financial outlays required, the Security Council has pressured the Tribunals to finish sooner rather than later, and the Tribunals appear to be doing just that. The Tribunals' Prosecutor has drastically reduced the number of investigations she is going to conduct; in the ICTR, for instance, she has reduced the number of suspects to be investigated from 136 to 14.²⁴ In similar vein, the Prosecutor has withdrawn the indictments of suspects considered not sufficiently high-level.²⁵ Most importantly, the Tribunals have formulated plans to refer many of their cases to domestic courts. The ICTY intends to send to the courts of Bosnia and Herzegovina about 50 of the approximately 100 defendants expected to be indicted by 2004, in addition to 10 other defendants who are already in ICTY custody. The ICTY has proposed establishing within the State Court of Bosnia and Herzegovina a Chamber with special jurisdiction to try serious violations of international humanitarian law, and with a limited number of key posts reserved for international judges.²⁶ Similarly,

²³ See *The U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice?*, Hearing Before the Committee on International Relations, United States House of Representatives, (Feb. 28, 2002) (testimony of Pierre Prosper) ("We have and are urging both Tribunals to begin to aggressively focus on the end-game and conclude their work by 2007-2008 ...").

²⁴ ICTR 2002 Annual Report, *supra* note 21, at para. 9.

²⁵ ICTY Press Release, *Indictment Against Zoran Marinic Withdrawn*, JL/PI.S./695-e, Oct. 4, 2002 (noting that Marinic was "a low-level indictee" whose prosecution no longer corresponded to the Prosecutor's strategy). The Prosecutor actually began targeting high-level offenders a few years ago, and recent pressure to complete the Tribunal's mandate has only accelerated that trend. See ICTY Bulletin, No. 21, July 27, 1998, at 4; see also Sean Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the former Yugoslavia*, 93 AM. J. INT'L L. 57, 59, 74-75 (1999).

²⁶ ICTY Press Release, Address by his Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council, JDH/PI.S./690-e, July 26, 2002, available at <http://www.un.org/icty/pressreal/p690-e.htm>. In establishing this special chamber, the ICTY would be seeking to ameliorate some of the "significant structural difficulties" that currently plague the courts of Bosnia and Herzegovina. These have been described as the

excessive compartmentalisation of the judicial systems of the Federation and the Republika Srpska, the lack of cooperation between the two entities, the political influence brought to bear on judges and prosecutors, the often 'mono-ethnic' composition of the local courts, the difficulty of protecting the victims and witnesses effectively, the court personnel's lack of training, and the backlog of cases at the courts.

Id.

the ICTR has identified 40 suspects whom the Prosecutor intends to refer to national courts; 25 are expected to end up in the courts of Rwanda,²⁷ which are already overwhelmed by their efforts to try more than 130,000 genocide suspects.

These events bode ominously for the ICC. The *ad hoc* Tribunals' problems with cost and efficiency are not unique to those bodies but rather are, to a greater or lesser degree, endemic to international institutions prosecuting international crimes. Indeed, the ICC, with its worldwide geographical jurisdiction and indefinite prospective temporal jurisdiction, is apt to face all the problems currently plaguing the *ad hoc* tribunals and more besides. Sam Muller, the ICC's Advance Team Coordinator, warned that, while the international community might expect the ICC one day to be simultaneously prosecuting crimes resulting from three distinct situations, the international community is not likely to bestow on it \$300 million per year and 3000 staff-members; that is, the ICTY's budget and staff times three. Muller made numerous recommendations; he stated that the ICC must have a sophisticated Case Document Management System, and it must have flexible procedures that, for instance, will allow the court to travel to the witnesses when it would cost too much for the witnesses to travel to the court. Michael Johnson echoed the former suggestion,²⁸ and in addition advocated brief, targeted indictments. These recommendations are sound, but they are reminiscent of the improvements made to ICTY and ICTR procedures: helpful but not anywhere near enough. Recognizing these limitations, both men opined that the only sure way to limit the ICC's cost to that which will be politically palatable is to limit, severely, the number of cases the court hears. Muller asserted, for instance, that the ICC will be able to hear no more than six cases per situation, with the remainder to be diverted to domestic courts.

That sounds pragmatic, but what about those remaining cases? First off, to which domestic courts will they go? Complementarity forms a cornerstone of the Rome Statute and envisages the ICC prosecuting cases only when domestic courts are unable or unwilling to hear the cases themselves. Consequently, if the ICC is prosecuting its six cases, that presumably means that no able, willing states have stepped up to bat. It thus remains unclear which states will prosecute the other cases deemed sufficiently serious, unless one supposes that the ICC's interest in a situation will motivate other states not directly involved to commence prosecu-

²⁷ President Pillay's Statement to the UN General Assembly, *supra* note 20.

²⁸ Michael Johnson noted that the ICTY has four-million pages of material and the ICTR one-million pages. As he put it: "When we are not able to know what we have and deliver it quickly, we become dysfunctional."

tions. Secondly, the ICC's limited capacity to hear cases will focus attention on the rather unseemly disparity between the ICC's state-of-the-art procedural protections and the less stringent due-process standards in place in many, particularly developing, countries. The ICC will presumably choose to prosecute those considered most responsible for the atrocities but by doing so will perversely bestow the greatest due-process protections – and probably the most lenient punishment – on the most culpable defendants, while relegating their less culpable subordinates to more arbitrary, harsher domestic courts. The problem is not new. Those most responsible for the Rwandan genocide are prosecuted in the ICTR, which provides them with extensive due-process protections and limits their punishment to terms of imprisonment. Less culpable Rwandans, by contrast, are subject to capital punishment and spend years in appalling, overcrowded Rwandan jails looking forward only to a summary criminal trial lacking even the most basic procedural guarantees, like the right to legal representation. Although the problem is not new, it will gain more exposure with the ICC's involvement, and it brings into sharp relief a schizophrenic feature of the international community's current approach to criminal justice: the firmly held conviction that international criminal courts must adhere to the highest fair-trial standards coexists with the political reality that such standards cost far too much for everyday use. Thus, they are bestowed on only a few, and perhaps the least deserving, while the international community washes its hands of the rest, dispatching them to inadequate domestic courts in the name of complementarity, state sovereignty, or the like.

The Conference speakers were, by and large, realistic and blunt about the ICC's prospects. The ICC has a long road to travel before it can be considered a credible, sustainable international body capable of dispensing respected international criminal justice. But at least the road exists. Fifteen years ago, the "idea of the establishment of an international war crimes tribunal seemed noble yet unrealistic."²⁹ The landscape has changed dramatically, almost all for the good, but the ICC's ability to meet the challenges outlined above will determine in the next fifteen years, or less, whether the road leads to international accountability or is instead a dead end.

²⁹ Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 *FORDHAM INT'L L.J.* 440, 440 (1999).