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The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations

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The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations

*by Jerry Fowler**

Late in the evening of July 17, 1998, a treaty to create a permanent International Criminal Court (ICC) came up for a final vote before a UN Diplomatic Conference in Rome, that had begun on June 15, 1998. By a vote of 120-7, with 21 abstentions, the participants approved the treaty, which will create a tribunal for the most serious crimes of international concern: genocide, crimes against humanity, and war crimes. Amidst cheers and hugs, there was a widespread feeling that something historic just occurred. For U.S. human rights activists, however, the joy at this important step towards ending impunity was leavened by disappointment that the United States joined countries such as China and Iraq in opposing the treaty.

The treaty will not come into force until 60 countries ratify it, a process that will take a number of years. Even after the Court is established, jurisdictional constraints described below will limit its effectiveness in its early years. Nonetheless, over time the Court offers real promise for ending the cycle of impunity for the worst human rights atrocities and increasing deterrence of these horrible crimes. Coming at the end of a century that witnessed the Holocaust, and with the images of ethnic cleansing in Bosnia and genocide in Rwanda still fresh, the importance to humanity of this promise is immense.

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Structure of the Court

The Court will be a permanent tribunal with headquarters in The Hague (Article 3(1)). It will deal only with crimes committed after the Rome Treaty comes into force (Article 24). Because the Court will be established pursuant to a multilateral treaty, it will not be an organ of the United Nations, although the two organizations will have formal relations (Article 2). Moreover, the Security Council will have a significant role in the Court's operation by virtue of its authority to initiate or defer investigations (Article 13(b); Article 16).

Initially, the Court will consist of 18 judges, elected to nonrenewable nine year terms by a two-thirds majority vote of the Assembly of States Parties, which will be composed of nations that have ratified the treaty (Article 36(6), (9)). At least nine of the judges must have established competence in criminal law and procedure, while at least five must have established competence in relevant areas of international law, such as international humanitarian law and the law of human rights (Article 36(5)). In selecting judges, the States Parties must take into account the need for representation of the principal legal systems of the world, equitable geographic representation, and a fair representation of male and female judges (Article 36(8)). The judges will be distributed among three divisions: pre-trial, trial, and appeals (Article 39).

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Human Rights in Sudan in the Wake of the New Constitution

*by Ghazi Suleiman and Curtis Francis Doebbler**

Prelude to Contemporary Times

Various international organizations have accused the Sudanese government of repeatedly breaching basic human rights. Claims against Sudan include violations of the rights to life, health care, free movement, and the enjoyment of one's property, as well as prohibitions against torture and slavery. These allegations have appeared consistently since 1990, one year after the current government came to power.

The current Sudanese government complains that the international human rights community misunderstands and targets it as a result of its preference for Islamic laws. Indeed, many allegations of human rights abuses first arose when former president Jafer Numeri attempted

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An absolute majority of the Assembly of States Parties will elect the prosecutor and one or more deputy prosecutors to nonrenewable nine year terms (Article 42(4)). These individuals must have extensive practical experience in the "prosecution or trial" of criminal cases (Article 42(3)). As discussed in greater detail below, the prosecutor will act on referrals by States Parties or the Security Council and may also initiate investigations on her own motion *(propio motu)*, subject to various safeguards and controls.

A fundamental principle of the Rome Treaty is that the ICC "shall be complementary to national criminal jurisdictions" (Article 1). This means that the Court must defer to national systems unless they are unwilling or unable genuinely to investigate or prosecute a crime that otherwise would be under the Court's jurisdiction (Article 17). Although the Court can always consider on its own motion whether it should defer to national proceedings, the statute also allows the complementarity principle to be invoked by interested states and by individuals who have been accused of crimes (Article 18; Article 19). The standard for finding "unwillingness" to investigate or prosecute is quite high. For example, national proceedings must have been "undertaken . . . for the purpose of shielding the person concerned from criminal responsibility" (Article 17(2)(a)). Likewise, a finding of "inability" requires that there has been "a total or substantial collapse or unavailability of [the] national judicial system" (Article 17(3)). The principle of complementarity underscores that the Court is not intended to replace functioning judicial systems, but to provide an alternative to impunity where independent and effective judicial systems are not available.

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Crimes Within the Court's Jurisdiction

The conference participants had to decide which crimes to include in the Court's jurisdiction and how to define those crimes. The Court will have jurisdiction over genocide, crimes against humanity, and war crimes. The treaty also provides that the Court will have jurisdiction over the crime of aggression, once the treaty is amended to define the crime and specify the conditions under which the Court will exercise that jurisdiction. There was universal agreement that genocide should be included, as well as agreement that its definition should be drawn from the 1948 Genocide Convention. Other crimes under consideration generated more controversy.

Crimes Against Humanity. A tremendous achievement of the Rome Conference was the codification of crimes against humanity (Article 7) in a multilateral treaty for the first time since the Nuremberg Charter. The Court will have jurisdiction over those crimes whether committed by state or nonstate actors. There was a determined effort by a small number of states to limit the Court's jurisdiction to crimes against humanity committed during armed conflict. Customary international law, however, does not mandate that nexus, and the reality is that crimes against humanity are committed in peacetime. The final text thus gives the Court jurisdiction over crimes against humanity whether committed in peacetime or in armed conflict.

The most contentious issue surrounding crimes against humanity was whether the Court's jurisdiction would extend to "widespread *or* systematic attack[s] directed against any civilian population." Some countries argued that the Court should have jurisdiction only over attacks that are "widespread *and* systematic." Human rights groups responded that requiring attacks to be both "widespread and systematic" would unnecessarily limit the Court to those cases where there is evidence of a plan or policy. They contended that widespread commission of acts such as murder and extermination should be enough to support the Court's jurisdiction.

A compromise left the basic standard as "widespread *or* systematic" (Article 7(1)) (emphasis added), but defined "attack directed against any civilian population" as "a course of conduct . . . pursuant to or in furtherance of a State or organizational policy to commit such an attack" (Article 7(2)(a)). Unfortunately, the requirement that an attack be pursuant to a policy effectively means that the crime must be "systematic." The treaty also includes a requirement that individuals act "with knowledge of the attack," suggesting that individual perpetrators must be aware of the policy in order to be found guilty. These requirements retreat from widely accepted standards of international law and will significantly restrict the Court's jurisdiction over this category of crime.

An important result of the Rome Conference was the explicit inclusion of crimes of sexual assault as crimes against humanity and war crimes. Among the acts that can constitute crimes against humanity and war crimes are "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" (Articles 7(1)(g) (crimes against humanity); 8(2)(b)(xxii) (war crime in international armed conflict); 8(2)(e)(vi) (war crime in internal armed conflict)). The treaty does not vary from the substance of existing international law in this respect. The explicit enumeration of these acts as crimes within the Court's jurisdiction, however, is a critical affirmation that rape and other crimes of sexual assault are, under appropriate circumstances, "the most serious crimes of concern to the international community as a whole."

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War Crimes. The Rome Treaty gives the Court jurisdiction over war crimes committed in both international and internal armed conflicts (Article 8(2)). The inclusion of internal armed conflict in the Court's jurisdiction was vital, as most armed conflict in the world today

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occurs within national borders. Unfortunately, compromises resulted in the deletion from the Court's jurisdiction of some crimes that otherwise are serious violations of the laws and customs applicable to internal armed conflict, such as the intentional starvation of civilians as a method of warfare.

There was a vigorous effort in the final week of the conference by a few countries to further restrict the scope of crimes in internal armed conflict or to impose an impossibly high threshold before the Court would be able to exercise its jurisdiction. Fortunately, that effort failed. The Rome Treaty's provisions on crimes committed in internal armed conflict should go a long way toward ending any argument as to whether such crimes are covered by international law.

An important result of the Rome Conference was the explicit inclusion of crimes of sexual assault as crimes against humanity and war crimes.

The treaty includes a threshold specifying that "[t]he 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" (Article 8(1)) (emphasis added). This language was a compromise between those who wanted the Court to have jurisdiction "only" when war crimes are part of a plan or part of a large scale commission and those who wanted no jurisdictional threshold at all. The "in particular" threshold presumptively limits the Court's jurisdiction but gives the Court leeway to act if circumstances mandate, even without evidence of either a plan or the large-scale commission of war crimes.

A major disappointment of the treaty is a provision that allows superior orders to be offered as a defense to war crimes. If Nuremberg stood for anything, it was that "I was only following orders" is not an excuse for war crimes. The statutes for the Yugoslav and Rwandan Tribunals likewise specified that superior orders could not relieve an individual of criminal responsibility. Under the Rome Treaty, however, a defendant will be able to avoid criminal responsibility by showing that he was under a legal obligation to obey the order, that he did not know that the order was unlawful, and that the order was not manifestly unlawful (Article 33). The Rome Treaty also departs from the Nuremberg Charter and the Tribunals' statutes by making it more difficult to establish the criminal responsibility of the civilian superiors of those who commit war crimes or other crimes within the Court's jurisdiction (Article 28).

Aggression. The Nuremberg Charter included "crimes against the peace," along with war crimes and crimes against humanity, and many felt that it would be a step backward to establish a permanent tribunal without including the crime of aggression in the Court's jurisdiction. There were, nonetheless, deep disagreements about defining the crime and determining what role, if any, the Security Council should have in determining whether aggression has occurred. In the end, the Court's subject matter jurisdiction included aggression (Article 5(1)(d)).

The Court cannot, however, exercise jurisdiction over aggression until the treaty is amended to define the crime and establish the conditions under which the Court shall exercise jurisdiction (Article 5(2)). As a practical matter, such an amendment might never happen. No amendments will be considered until seven years after the treaty's entry into force, and, even then, amendments will require a two-thirds vote of the Assembly of States Parties *and* ratification by seven-eighths of the States Parties to receive approval (Article 121(3), (4)).

Drug Trafficking and Terrorism. The inclusion of drug trafficking and terrorism enjoyed significant support, though less than aggression. In a resolution attached to the Final Act, the conference participants recommended that a review conference consider adding these crimes to the Court's subject matter jurisdiction. As a practical matter, the Court's onerous amendment provisions render it unlikely that these crimes will ever fall within the Court's aegis.

"Triggering" the Court's Jurisdiction

A central political issue resolved in the final week of the conference was how Court proceedings can be "triggered." There was widespread agreement that States Parties should be able to refer situations to the Court. But there was vigorous debate about whether the Security Council should be able to refer situations and whether the prosecutor should be able to initiate investigations on her own motion.

Security Council. The Rome Treaty permits the Security Council to refer situations to the Court while acting under Chapter VII of the UN Charter (Article 13(b)). One of the most vocal opponents of Security Council referral powers was India, which argued that the Security Council should have no role at all in the Court's operation. In explaining its vote against the final treaty, India asserted that "the Statute gives to the Security Council a role in terms that violate international law." The Security Council also will have the power to defer investigations or prosecutions for renewable twelve month periods (Article 16).

In light of these powers, it is surprising that opponents of the ICC in the U.S. Congress, such as Senator Jesse Helms (R-NC) and Senator Rod Grams (R-MN), criticize the Rome Treaty as an attempt to do an "end run" around the Security Council. Senator Grams has asserted that the treaty is "a great victory for the critics of the Security Council." In fact, the most vociferous critics of the Security Council, such as India, Iraq, and Libya, refused to support the treaty, while three of the five permanent members of the Security Council voted for it.

The Prosecutor. The Rome Treaty also permits the prosecutor to initiate an investigation on her own motion, *propio motu*, subject to rigorous safeguards (Article 13(c); Article 15). Supporters of an independent and effective Court felt that a prosecutor with *propio motu* powers was an essential complement to Security Council and State Party referrals. Although such referrals are important, they will not be sufficient if the Court is to be effective in punishing and deterring international crimes. The Security Council is a political body that is often paralyzed by the veto power of its five permanent members. States, in turn, are often reluctant to file complaints involving another state's nationals, especially if doing so might interfere with diplomatic or economic relations or might invite retaliatory complaints. As a consequence, an independent prosecutor is essential if cases are to be brought in situations of heinous criminal conduct where there is little political will to proceed.

The Rome Treaty tightly circumscribes the prosecutor's *propio motu* authority. Before the prosecutor can proceed, he/she must convince a panel of judges that "there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court" (Article 15(4)). The prosecutor also must defer to investigations by national authorities, unless a panel of judges decides that those authorities are

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either unwilling or unable genuinely to investigate or prosecute (Article 17; Article 18). Additionally, the Court and prosecutor must defer proceedings for a renewable 12 month period if requested to do so by the Security Council (Article 16). Finally, as explained below, the prosecutor is limited to initiating investigations in cases involving either conduct on the territory of states that have accepted the Court's jurisdiction or acts committed by the nationals of such states (Article 12).

The United States opposed giving the prosecutor *propio motu* powers on the grounds that, in Ambassador David Scheffer's words, "it will encourage overwhelming the Court with complaints and risk diversion of its resources, as well as embroil the Court in controversy, political decision-making, and confusion." Although the Ambassador expresses a valid concern, one needs to question whether it warrants opposing the entire treaty. Systems and procedures can be developed for the fair and efficient handling of unsolicited information. Even if the prosecutor does receive a large volume of complaints, the reality is that the Court's narrow subject matter jurisdiction will provide an effective screen that will filter out the overwhelming majority of those complaints. Moreover, the preconditions to exercise of the Court's jurisdiction, described below, will also act as a screening mechanism. As for the danger of "political decision-making," the surest way to avoid that is precisely the mechanism embodied in the treaty: an independent prosecutor subject to judicial oversight applying crimes that are strictly defined and widely accepted.

Preconditions to the Exercise of the Court's Jurisdiction

Under the Rome Treaty, the Security Council can refer a situation involving the territory or nationals of any state that is a party to the UN Charter, just as it already has the authority to establish *ad hoc* tribunals without obtaining any consent or agreement from interested states. By contrast, State Party referrals and *propio motu* investigations by the prosecutor will be sharply limited. When those triggers are used, the Court will be able to move forward only if the situations involve conduct that occurred on the territory of a state that has accepted the Court's jurisdiction or was committed by the national of such a state (Article 12(2)). A state accepts the Court's jurisdiction either by ratifying the treaty, although it can opt out of war crimes jurisdiction for seven years (Article 124), or by filing an *ad hoc* declaration that accepts the Court's authority (Article 12(1), (3)).

Many, if not most, of the nations on whose territories the crimes subject to the Court's jurisdiction are likely to be committed or whose nationals are likely to be responsible for such crimes, will not be among early signatories to the Rome Treaty. The preconditions of territory and nationality, therefore, mean that for many years the ICC will primarily be a Security Council court. The hope among human rights groups and other supporters of the Court is that it eventually will obtain universal acceptance, allowing it to serve future generations as an independent and effective judicial institution.

There was widespread support at the conference for including on the list of countries whose consent will provide a basis for the Court's jurisdiction, the state that has custody over a suspect and the state of the victim's nationality. Pressure by the U.S. and other major powers, however, defeated this initiative, producing the narrower result. Including the custodial state as a basis for the Court's exercise of jurisdiction would have significantly extended the Court's reach. As the treaty stands now, the Court will be powerless to prosecute an individual who is accused of genocide and who is in the custody of a signatory states, absent some other basis for jurisdiction.

Including the state of the victim's nationality also would have extended the Court's reach. In particular, it would have provided increased protection to soldiers from ratifying countries who go on peacekeeping missions in the territory of non-ratifying countries. The Court would have been able to exercise its jurisdiction over war crimes committed against such peacekeepers, even if the territorial state or the state of the perpetrator's nationality had not accepted that jurisdiction. The irony is that those nations most intent on restricting the scope of the Court's jurisdiction were also those who professed greatest concern for the relationship of the Court to soldiers on international peacekeeping missions.

Human rights groups argued that the principle of "universal jurisdiction" should apply to the Court. Universal jurisdiction is a widely accepted principle of international law that any state can prosecute the perpetrators of genocide, crimes against humanity, and war crimes, without any connection of territory or nationality. As a practical matter, the Court's ability to address the crimes within its jurisdiction would have been greatly enhanced if it were given universal jurisdiction. Needless to say, the final treaty, with its strict preconditions to the exercise of jurisdiction, reflected a substantial retreat from universal jurisdiction. This was perhaps the greatest disappointment of the entire conference.

U.S. Reaction

The primary reason that the United States gave for opposing the Rome Treaty was that the Court would be able to exercise jurisdiction over conduct that occurs on the territory of a state that has accepted the Court's jurisdiction. The U.S. insisted that the Court only be able to exercise jurisdiction if the state of the suspect's nationality has accepted jurisdiction. Ambassador Scheffer denounced the territorial basis for the Court's jurisdiction as "a form of jurisdiction over non-party states." It was, he said, "contrary to the most fundamental principles of treaty law." Despite these harsh words, there is nothing remarkable about a state deciding how to adjudicate crimes that occur on its territory, especially when those crimes are among the most serious imaginable. Indeed, the territorial basis for jurisdiction is stronger even than nationality. It is remarkable that the U.S. government would claim that sovereign states are so limited in their jurisdiction over their own territory.

The U.S. added finesse to its position by referring to "jurisdiction over non-party states." It maintained, accurately, that a treaty cannot bind states that are not signatories. The Rome Treaty, however, does not accord the Court jurisdiction over any "state." Rather, the Court will have jurisdiction over individuals. Nor does the treaty bind states that are not parties. Such states have no obligation, for example, to surrender suspects, cooperate with investigations, or do anything else.

Conclusion

As is clear from this discussion, there were many compromises made by the countries at the Rome Conference in order to arrive at a treaty that enjoyed broad support. The result falls short of what human rights groups hoped for, just as it goes further in some areas than many states originally desired. But the Rome Treaty provides a framework of international justice for future generations. The cost in human lives and suffering exacted by the cycle of impunity has been too high not to give this framework a chance to work.

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