

Keynote Address

Philippe Kirsch

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Kirsch, Philippe (1999) "Keynote Address," *Cornell International Law Journal*: Vol. 32: Iss. 3, Article 2.
Available at: <http://scholarship.law.cornell.edu/cilj/vol32/iss3/2>

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Keynote Address

Philippe Kirsch*

The establishment of the International Criminal Court (ICC) is the culmination of a series of international efforts to replace a culture of impunity with a culture of accountability. After World War II, the Nürnberg and Tokyo Tribunals raised expectations in many quarters about a new culture of accountability. But the realities of cold war paralysis quickly settled in. The notion that those violating the most serious laws of humanity must be prosecuted faded, and a culture of impunity re-emerged. For several decades, the world watched absolutely revolting events take place without any response.

It is only in the last decade that things have begun to change. The end of the Cold War has allowed the major powers to cooperate on more issues. Without setting aside their national interests, States have proven more willing to address humanitarian considerations as part of their policies in a number of broader areas, including the maintenance of international peace and security.

When one considers the current debate over the ICC against this backdrop, one may see in sharp contrast what an extraordinary development the ICC Statute represents. Views may differ on some aspects of the ICC, but beyond those differences I believe that everyone in this room, all States and organizations represented here, agree with the objectives behind its establishment. And I also believe that all in this room realize that the establishment of an ICC is a unique opportunity to achieve these objectives, an opportunity that will not repeat itself. If this is indeed the case, then we all share a collective responsibility to ensure the maintaining of momentum in favour of the ICC, and in favour of accountability.

I. Overview of the Statute

I will now offer a short review of the major provisions of the Rome Statute (the Statute). To understand the future role of the ICC, it is necessary to

* Ambassador of Canada to the Kingdom of Sweden. Mr. Kirsch, Q.C., chaired the Committee of the Whole of the Rome Conference, which adopted the Statute of the International Criminal Court in July 1998, and has been Chairman of the Preparatory Commission for the establishment of the Court since February 1999. Over the years he has represented Canada in many international organs and conferences, starting with the Sixth (Legal) Committee of the United Nations General Assembly, of which he was elected Chairman in 1982. From 1988 to 1992 he served as Ambassador and Deputy Permanent Representative of Canada to the United Nations. Recent positions include chairing the Drafting Committee for the 1993 Conference on the Protection of War Victims and the Drafting Committee of the 26th Conference of the Red Cross and the Red Crescent. He currently chairs a U.N. Committee that is working on a Convention for the suppression of nuclear terrorism, and is Agent for Canada in the Legality of Use of Force Case (Yugoslavia v. Canada) before the International Court of Justice.

understand how the Statute is intended to work. There are five key features to the Statute:

A. Crimes

The Rome Statute addresses the most serious crimes of concern to the international community: genocide, war crimes, crimes against humanity. The Statute also provides that a crime of aggression be defined in a manner consistent with the relevant provision of the Charter of the United Nations. The statutory definitions of genocide, war crimes, crimes against humanity are consistent with customary international law. However, the Statute recognizes important recent developments. For example, the Statute accepts crimes committed against particularly vulnerable groups – notably women and children. The Statute expands the traditional definition of war crimes to include crimes committed in internal conflicts. Furthermore, the Statute understands that crimes against humanity may occur in armed conflict or in peace time.

B. Complementarity

Complementarity is a key principle of the ICC Statute. The ICC may exercise jurisdiction where national systems are unable or unwilling to genuinely investigate or prosecute offenders. The ICC, not States, has the last say as to whether a case is admissible. However, it is the essence of the principle that if a national judicial system functions properly, there is no reason for the ICC to assume jurisdiction.

C. Automatic Jurisdiction

The Statute provides that State Parties automatically accept the jurisdiction of the ICC in cases concerning the enumerated crimes. There is, however, a transitional provision in the Statute that allows States Parties to withhold automatic consent to jurisdiction over war crimes for a period of seven years.

D. Acceptance of Jurisdiction

Before the ICC can exercise its jurisdiction, certain States have to accept it: the State of the nationality of the accused or the State of the territory in which the crime was committed. This is a compromise seeking to achieve a balance between those who wanted a broad inclusive test, quasi-universal jurisdiction, and those who wanted an even more restrictive test such as mandatory acceptance of the State of nationality in all cases. The test eventually adopted was selected because it reflects the bases for jurisdiction most firmly established in international law. Where the U.N. Security Council refers a case to the ICC, acceptance is automatic by virtue of the U.N. Charter.

E. Trigger Mechanisms

The Statute provides that proceedings may be initiated by a State Party, by the U.N. Security Council, or by the ICC Independent Prosecutor. The ability of the Prosecutor to initiate proceedings was subject to some controversy. As a result, the Prosecutor is subject to checks and balances to prevent frivolous prosecutions, such as the requirement of judicial approval.

II. Reflections on the Statute

The Statute is a human construction, reflecting the need to reconcile very different perspectives. The Statute presented by the Bureau of the Committee of the Whole for adoption – and indeed adopted by the Plenary with a strong majority – reflected a balanced effort to create a strong ICC, deriving its strength both from the provisions of its Statute and from the support of States for the new institution.

A number of States raised concerns about the ICC. The two goals – a strong Statute and strong support from the international community – could not be fully reconciled in this case.

Uncompromising insistence on the strongest possible provisions could only be made at the expense of support of a significant number of States which were concerned about an institution that was unknown – about fairness of its proceedings, political influences, undue infringement upon national jurisdiction. This could have undermined support to such an extent that the ICC's future would be jeopardized.

However, putting exclusive emphasis on those concerns would have meant an ICC that could be paralyzed. The Statute adopted in Rome contains sufficient safeguards to satisfy most legitimate concerns. A major concern of many States at the Conference was that, to accede to more restrictions to the exercise of the ICC's jurisdiction could have led to the establishment of an ICC so weak that, whatever support it theoretically enjoyed would be irrelevant: an ICC not worth having.

Whether the balance was right can only be known with time. The strong vote on the Statute adopted in Rome was a promising first sign.

III. Prospects for the Future

The goals of participants currently working on the ICC, in a variety of forms, continue to reflect the balance I just mentioned: the need to build a strong, fair, effective ICC, and the need to ensure that it enjoys as much support as possible.

A. Signature and Ratification

For those who support the ICC that has been created, the objective is to ensure that the achievement of the Rome Convention is not lost, that the ICC quickly becomes a living, vibrant institution, which carries out its mandate effectively.

The number of signatures that have been obtained so far (seventy-six) is significant, especially when seen in comparison with other treaties which also required significant legislative, if not constitutional changes, for most States. The number of signatures reflects a genuine commitment of States to pursue this process to completion. We know that a number of other signatures are forthcoming including signatures from States that did not necessarily vote in favor of the Rome Statute. Many more are expected to be achieved by the time of closing (December 2000).

The Statute, as just mentioned, has important legal implications at the domestic level that must be met before States are in a position to comply with their international obligations. The momentum created by many signatures is encouraging a speedy ratification process.

Ultimately, of course, it is the ratification of sixty States that will bring the Statute into force. Again, those who attach importance to the ICC will presumably work to ensure early entry into force. The work will not stop there, however, because even broader ratification is necessary to ensure that the ICC's jurisdiction is as universal as possible.

B. PrepCom

The other important part of our future work is the Preparatory Commission (PrepCom) which completed its first meeting in February 1999. The PrepCom's task is to develop necessary documents concerning the technical aspects of the ICC's operation. Once the Statute enters into force, these documents will be submitted to an Assembly of States Parties for consideration and adoption. Thus, the PrepCom's work is to set the stage.

The mandate of the PrepCom has been defined by the Rome Conference: to develop rules of procedure, financial regulations and rules, define in various ways the relationship between the ICC and the Host Country, the relationship between the ICC and the United Nations, elaborate Elements of Crimes, and to define the crime of aggression. The General Assembly has also asked the PrepCom, in connection to its mandate, to discuss ways to enhance the effectiveness and acceptance of the ICC.

An objective of the PrepCom, through its technical work, is to reassure States that are still hesitant about the ICC that it will indeed operate fairly, and not exercise its jurisdiction in an uncontrolled, capricious, political manner. Among the tools that are at our disposal are the Rules of Procedure and Evidence and Elements of Crimes.

Overall, the objective of the PrepCom will be a fair and effective implementation of the Rome Statute. Its mandate is not a revision of the Statute. That could only be done by a Review Conference. In other words, the PrepCom must respect the balance achieved at the Conference, but build on it to enhance support for the ICC.

With the February meeting, the PrepCom has begun with a promising start. Although it was the first meeting, delegations worked in a positive atmosphere and a willingness to reach agreement. Delegations dealt with Elements of Crimes, Rules of Procedure, and touched upon the crime of aggression.

The Elements of Crimes will be a document elaborating in further detail the crimes defined in the Statute. Constructive work has already begun in the first PrepCom, with the U.S. papers serving as a starting point for discussion. A broad degree of consensus has already been reached on the elements of the crime of genocide. It is interesting that delegations, even those who initially appeared to have divergent views, not only reached agreement on elements which are fully consistent with the Statute, but also appeared to be united in the view that the Elements must be consistent with the Statute.

Rules of Procedure and Evidence will articulate the procedures of the ICC with more precision. Again, it is promising that delegations were united in the view that the Rules must be consistent with the Statute. The first difficulty in this area is not political but the familiar tendency to favor one's own legal system. Further discussion will be needed to ensure that rules are developed which reflect the best aspects of all legal systems.

The PrepCom was also given a mandate to work toward a definition of the crime of aggression for submission to a Review Conference in the future. The February meeting revealed that strong interest in the crime of aggression remains. Many delegations considered aggression the most serious of the crimes in the ICC's jurisdiction, and desired to move ahead on the issue. However, there are deep divisions, even among the strongest supporters of the crime, as to how to proceed. The matter therefore promises to be difficult. A coordinator has been appointed and will continue to canvass views on the subject.

The February PrepCom did not deal with the other items within the mandate of the PrepCom, but a couple of delegates have been appointed to begin discussion of these issues in preparation of future PrepComs, including ways to enhance the effectiveness and acceptance of the ICC. The reason is that, although this issue may be the focus of considerable discussion in academic and other circles, it has not yet been dealt with in the PrepCom itself.

IV. The ICC and the International Environment

In closing, I would offer a few observations on the ICC in its international environment.

The creation of the ICC responds to a number of different objectives: punish criminals responsible for the most serious crimes in international law, deter the commission of such crimes, create greater international stability by restoring the rule of law in countries affected by conflicts and crimes, and the creation of a permanent institution which avoids start-up costs and the need for Security Council action.

It will be important to keep these objectives in mind in the coming months and years. We have to remain faithful to our stated objectives, and keep in mind the realities behind them.

To put this need in concrete terms, consider the realities on the ground today. It is reported that in World War I, five percent of casualties were

civilian. Today, eighty percent of casualties are civilian, and these are mostly women and children who are often deliberately targeted as a terror tactic. We sometimes hear doubts expressed that the ICC, as the two existing ad hoc Tribunals on former Yugoslavia and Rwanda, will not be able to deter the commission of crimes. There are two observations which must be kept in mind.

First, more time will be required to assess the impact of international criminal justice mechanisms. Other international bodies, including the Security Council, have existed for more than fifty years now, and have had a limited deterrent or stabilizing effect for most of their history. They have achieved some successes but have not necessarily been able to fulfill all expectations. Yet, they are recognized as useful instruments, despite questions about the modalities of their operations and their politics.

In comparison, the ad hoc tribunals, *a fortiori* the ICC, are in their infancy. Announcements by prophets of doom and gloom of the demise or ineffectiveness of the ICC before it is even born strike me as a little premature.

The ICC has to be given time to be seen as a natural part of the international scene, on the same footing as the Security Council or the International Court of Justice (ICJ), with a role that imposes itself as equally evident and necessary, a role that is played in cooperation with existing institutions.

Second, it must be understood that no one expects the ICC, on its own, to deter all crimes. The ICC must be part of a framework of measures to sustain a culture of accountability. These measures might include increased domestic prosecution of such crimes, greater use of universal jurisdiction, and greater international cooperation in suppressing international crimes.

The establishment and affirmation of a culture of accountability will take time. It has begun even beyond the two ad hoc tribunals. The situation of General Pinochet and the Khmer Rouge leaders are cases in point. This objective has momentum as never before. But it will not happen overnight. It will require sustained efforts from everyone sharing a commitment to justice. Whatever differences may exist on particular issues, all participants in this process must work with this long-term goal in mind, and to ensure that we do not stymie the ICC or prevent it from carrying out its historic mandate.