

FOREWORD

The Treaty of Rome of July 18, 1998 establishing an International Criminal Court (ICC), is likely to go down in history as the date when international criminal law came of age.

Since the signing of the Rome Treaty, three major works have been published. Two are experts' commentaries on the Statute's provisions edited by Professors Triffterer and Lee, while the third book is authored by Professor William Schabas.

Professor Leila Sadat's well-written and highly-documented book is, however, the first comprehensive authored text on the history of the ICC's Statute and a commentary on its text. But it is also more than that.

This book, whose contents and structure are described by the author in her Introduction, starts with three chapters that deal essentially with the historic evolution of international criminal justice. The author's description of this evolution argues for the values and policies of accountability which are needed in order to achieve justice and peace. Though the facts are not new, their presentation is articulate, precise and succinct. This part on its own could almost be a separate book on international criminal justice.

A discussion of the relationship between the ICC, the United Nations, and States follows. It is a premise to the notion of complementarity. Only then does the author go into her analysis of the different parts of the statute as they relate to jurisdiction, crimes and penalties, general principles of criminal law and responsibility, procedural aspects, and the court's processes. This chapter also includes the state cooperation regime and enforcement. Professor Sadat concludes with her assessment of the codification compromises made in the Rome Treaty, and a discussion of "what is in and what is out." She aptly ends with a chapter that takes us into the future, but more importantly, shows that the ICC is but only a window to the future.

This is not only a book about the ICC but also about international criminal law. In the first chapter, the author points out that the journey of international criminal law began in 1899, more than a century ago, but is not yet completed. Indeed, we have yet to complete the transformation from a culture of impunity to a culture of accountability. The author's description of the pursuit of international criminal justice through the

complementarity of international tribunals and national criminal justice systems is amply documented. The overall purpose, as she explains, is to develop a big enough net through which few perpetrators of international crimes will fall and evade accountability.

The first impulse for contemporary international criminal justice came after World War I, but its thrust was weak and short-lived. The aftermath of World War II took it to a new level, but it was still viewed as one-sided. Some called it “victors’ vengeance,” even though those who were prosecuted at the Nuremberg and Tokyo trials were war criminals. The question is not whether they were fairly tried, but whether the system as a whole is fair when it excludes violators on the victors’ side. She traces the history and details of establishing the ICC from WWI, through Nuremberg and Tokyo, the bleak years of the Cold War, and the final stretch in 1992 when the Security Council established the Commission of Experts [Security Council Resolution 780 (1992)] to Investigate Violations of International Humanitarian Law in the Former Yugoslavia. It was the first time since Nuremberg and Tokyo that an international criminal investigating body was established. The Commission’s compilation of evidence of criminality was a factor in bringing about the establishment of the International Criminal Tribunal for the Former Yugoslavia [ICTY] (1993). These events broke the psychological barrier that seemed to hold back the international community from its ability to pursue international criminal justice. Shortly thereafter, the Security Council established the International Criminal Tribunal for Rwanda [ICTR] (1994). As other atrocities in various parts of the world became known—Sierra Leone, East Timor, to name only a few—it became clear that the Security Council could not re-invent an *ad hoc* post-conflict justice formula every time a conflict occurred during which violations of international humanitarian law took place. The logic of a permanent International Criminal Court imposed itself. But legal logic and politics are not always compatible.

Between 1995 and 1998, an elaborate and complex draft ICC statute was developed by dedicated government delegates, while a consensus among governments and international civil society was being forged. Its purpose was to not only serve justice but also peace. Professor Sadat retraces this travailed historical evolution, which was fraught with difficulties. As she observes, on the one side stood the political opposition of some governments and, on the other, the complex task of codifying substantive and procedural international criminal law as well as devising modalities of cooperation and enforcement. This was a task of a scale never before undertaken. She describes the preparatory work done in 1995 by the General Assembly’s *ad hoc* Committee for the Establishment of an International Criminal Court, followed from 1996 to 98 by that of the General Assembly’s Preparatory Committee for the Establishment of an

International Criminal Court. It was not, however, until December of 1997 that the convening of a diplomatic conference became reasonably certain. This left only four months in 1998 for the work of the Preparatory Committee to be completed. It was a considerable challenge in view of the many political and technical difficulties that remained to be overcome. By the end of April, 1998—barely six weeks before the convening of the diplomatic conference—the draft statute which governments would have to consider in Rome for a short five weeks consisted of 116 articles contained in 173 pages, riddled with some 1300 parenthetical brackets for optional provisions and word choices. Some of these were so complex that only a few of the experts who had followed the preceding three years' work could understand it.

The negotiating process in Rome was extraordinary in many respects. The author captures so well the mood of the place and its people, as well as the difficulties that were faced in bringing about the conclusion of the Rome Treaty on July 17, 1998.

Some 5000 delegates attended the first week of the Diplomatic Conference. Most, in the opinion of inside observers, had not read the draft statute. After a week of speeches by delegation heads, it was clear that the work on the Statute had only begun. By the third week, the task appeared impossible, and many delegates already spoke of another diplomatic conference. But a few dedicated delegates worked assiduously—some on the political side of the issue, others, like the Drafting Committee—on the technical legal side. Their cumulative efforts brought about this unique result, but not without cost to the technical legal accuracy and precision of some of the provisions contained in the statute. For example, the definition of aggression was postponed for lack of political consensus. In addition, genocide was defined as in the 1948 convention without filling its gaps (i.e., non-inclusion of social and political groups), and crimes against humanity became a menu of what appear to be human rights violations and war crimes—other than grave breaches of the Geneva conventions—requiring much more specificity. Subsequently, as the author points out, the “elements of crimes,” as elaborated by the Preparatory Commission established by a resolution of the Diplomatic Conference, did not produce the expected precision and detail needed to fill the gaps and clarify any overlap in crimes.

Nevertheless, overlaps and gaps exist in three categories of crimes: genocide, crimes against humanity, and war crimes, which are now considered to cumulatively constitute the core crimes of international humanitarian law. But their legal contexts differ. “Grave breaches” of the Geneva Convention and Protocol I apply to conflicts of an international character, while the provisions of Common Article 3 of the Geneva Convention and Protocol II of the Geneva Conventions apply to conflicts of a non-interna-

tional character. Genocide and crimes against humanity apply in times of war as well as in times of peace, but many of the same acts fall under more than one, or all three, of these crimes. Nevertheless, as evidenced by the jurisprudence of the ICTY and ICTR, there is confusion as to whether these crimes can be charged alternatively or cumulatively, and whether there can be multiple conventions and consecutive sentences for more than one of these crimes when the underlying facts are the same. This situation reflects a lack of understanding of what the Romanist-Civilist legal systems consider to be *concoeurs d'infractions*. Regrettably, the ICC's Statute does not address this problem, even though it contains a provision prohibiting *ne bis in idem*.

The author's coverage of the "crimes within the jurisdiction of the Court" (Articles 5, 6, 7 and 8), and their "Elements" (Article 9) as elaborated by the U.N.'s Preparatory Commission, is incisive, critical and instructional.

The ICC's general principles of criminal responsibility or the general part (Part III of the ICC's Statute) is a comparative criminal law codification that leaves something to be desired. Admittedly, it is a difficult task, and the negotiators in Rome did their best in light of their expertise as diplomats, and considering the limited time they had at their disposal. Thus, they produced a text that is unsatisfactory—according to standards of comparative criminal law experts—and that left—in one aspect at least—a significant gap by not adopting a provision on the "material element" (because of inability to reach political consensus). Some commentators even question the validity of a provision on self-defense that may justify a certain type of self-defense in protection of property that would otherwise be deemed a war crime. Because the Diplomatic Conference gave no mandate to the Preparatory Commission to elaborate on the contents of the general part, as in the case of the "crimes," the opportunity to fill in some gaps was lost. The author reveals some of the weaknesses in the "general part."

The same is true with respect to the procedural part, which is also an exercise in comparative criminal procedure integration. The drafters freely mixed the adversary-accusatorial and inquisitorial models and processes. The "Rules of Procedure and Evidence" elaborated by the Preparatory Committee offer an additional level of detail. The result is an unparalleled mixture that produces what—to paraphrase Charles Dickens—became the best and the worst of all worlds. The procedural norms contain the best guarantees for the rights of the defense, but they also provide for a lengthy and cumbersome process that is likely to cause extensive delays and extraordinary costs to administer that type of justice.

Lastly, the "enforcement part" (Part IX of the ICC Statute), overly deferential to the sovereignty concerns of states, places the ICC in the posi-

tion of having to deal exclusively through national legal systems based on existing national laws and procedures. Thus, the ICC's enforcement will only be as good as the national system called upon to enforce its orders and to assist it in connection with the various modalities of cooperation that the Statute describes. Presumably, national implementing legislation is to address these issues, but I doubt that they will.

This book's unquestioned strength lies in its substantive international criminal law aspects as it relates to the history of international criminal justice, the evolution of the ICC's process, its negotiating history, the jurisdictional aspects, crimes and relations with state-parties and non-state parties.

For years to come, commentators and writers will offer their insights and views as to what actually happened in Rome or on the way to Rome. This is inevitable in view of the historical significance of the event and the absence of an authoritative legislative history. Professor Sadat was a close observer of each step of the ICC process from 1995-1998, during which time she also assumed an active leadership role in the community of scholars interested in the ICC. Prior to the Rome Conference, she was the editor of *13 bis Nouvelles Etudes Pénales, Observations on the Consolidated International Criminal Court Before the Final Session of the Preparatory Commission* (1997). She had also contributed her thoughts to the negotiating process by proposing a *Model Draft Statute* which was published in *13 Ter Nouvelle Etudes Pénales* (1998). Professor Sadat attended the Rome Conference as a delegate of the International Law Association (American Branch).

The author has been noted in the last few years for her scholarly work in connection with "crimes against humanity" prosecutions in France as an outgrowth of WWII events that occurred during that country's occupation and the collaboration of its Vichy regime with Nazi Germany. Recently she became a contributing author to the second edition of the U.S.'s first casebook on international criminal law along with Professors Paust, Gurulé, Zagaris, Williams, and myself.

Some thirty years ago, when I picked up the torch of the ICC from my predecessors in the Association Internationale de Droit Pénal, there were very few who believed in the realization of that goal, and even fewer who were willing to dedicate themselves to it. As the international community moved forward and the goal became achievable, more joined the ranks. Later, when the prospects became politically likely, there was a groundswell of support. Until 1994, there were no more than five major non-governmental organizations in the world with a commitment to the establishment of an ICC. By the time the diplomatic conference took place, there were more than three hundred such NGOs, and today there are close to 1000 of them supporting the ICC. The few scholars who, from the 1920s into the 1990s have consistently worked in support of the ICC, have been joined by hundreds of scholars from all over the world. In universities

across the globe numerous masters theses and doctoral dissertations are written about international criminal law and the ICC. Among these contemporary students, many will become tomorrow's scholars, and their future work in support of international criminal justice will be that much more significant because of their early interest in it.

Human nature being what it is, the few parents of the past will soon be relegated to the footnotes of history, while the more recent putative ones seek recognition, and the ones to come will necessarily seek to reshape what they have inherited.

The idea, which at one time could count only a few among its parents, now has thousands in the academic world and among activists in international civil society. That is the hallmark of an idea whose time has come. Now, one of our colleagues adds her important scholarly contribution to the work of others, and the torch passes on.

In the meantime, the ICC will enter into effect, probably at the end of 2002. Its beginning will be difficult as with every new institution. But, it will move forward and deal with its problems. In time, it will be one of the world's most important international institutions, and most observers will never know how arduous a task it was to bring it about and how long it took. Professor Sadat's book and other writings will then become important records of history. In the meantime, this book will serve an important contemporary need.

Chicago, September 29, 2001
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