

M. Cherif Bassiouni, *The Legislative History of the International Criminal Court*, International Publishers, Inc. Ardsley, New York, 2005, 1500 pp., \$ 350.

There have been several publications on the International Criminal Court (ICC) over the last years. They have covered a wide range of issues ranging from the establishment of the Court, its competence, its procedural and substantive law to the implementation of its Statute in the domestic law. The ICC being the first permanent tribunal created to prosecute crimes committed all over the world whose competence is not limited to a particular context, is bound to generate great interest from academics and legal practitioners. There have been several other international criminal tribunals, which however had a limited jurisdiction *ratione materiae* and *ratione temporae* such as the International Military Tribunal of Nuremberg (IMT), International Military Tribunal for the Far East (IMTFE), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The *raison d'être* of the ICC is to prevent impunity for certain international crimes, namely, genocide, crimes against humanity and war crimes, i.e., crimes that are so serious that they amount to offences against the whole of humanity and must therefore be prosecuted by all States.¹

For all these reasons the importance of a documentation of the legislative history of the ICC, published in three volumes cannot be overstated. This is all the more true if the editor of this history is Prof. *Cherif Bassiouni*, member of the Egyptian delegation to the Rome Diplomatic Conference, head of the drafting committee of the Rome Conference and one of the principal protagonists throughout the difficult negotiating process on the road to a permanent International Criminal Court. The volumes offer the reader an in-depth analysis of the negotiating history of the ICC, which is indispensable to understand and correctly interpret the ICC Statute. The volumes review the historical evolution of the ICC

and go as far back as 1268 when the norms and institutions that comprise international criminal justice developed. Volume 1 contains an introduction, analysis and integrated text of the ICC, volume 2 an article-by-article evolution of the ICC Statute providing an in-depth understanding of how the Statute developed in the course of the conference and, finally volume 3 the summary records of the 1998 Rome diplomatic conference.

The *first volume* is divided into 2 parts. The *first Part* sets the context of the book by illustrating the development of international criminal law and justice. *Chapter 1* of Part I provides a historic chronology of events on international criminal justice. It offers the reader a macro-historical perspective of relevant events on international criminal justice and their inter-relationship. It begins as far back as 1268 when Conradin von Hohenstaufen and Frederic of Baden were tried in the city of Naples for the sacking and plundering that followed the battle of Tagliacozzo near Rome. This volume looks at the various conflicts which took place from this time on and which had an effect in the development of international criminal justice enforcement mechanisms leading to the ICC. The analysis examines the connection of these conflicts to the concomitant normative developments of international criminal justice. Both the end of World War I (WWI) in 1919 and World War II (WWII) in 1945 marked new approaches in international criminal justice. On the one hand the 1919 *Treaty of Peace between the Allied and Associated Powers and Germany* (Treaty of Versailles)² in its art. 227 provided for the first time for the formal prosecution of a head of state, the Emperor of Germany, for what subsequently became known as "crimes against peace". On the other hand the *Agreement for the Prosecution and punishment of Major War Criminals of the European Axis* (London Charter)³ established the first modern international criminal tribunal. It provided in its art. 6 for individual and group responsibility, removed the defences of immunity under international and state law, rejected the defence of obedience to superior orders, and established the supremacy of international law over national law with respect to the crimes of "aggression", "crimes against peace", "crimes against humanity" and "war crimes". This chapter looks into issues as recent as 2004 and ends up with a conclusion that throughout the historic journey towards establishing a system of international criminal justice through various institutions, logic was more often than not defied, with *realpolitik* always present. The editor concludes that "... the struggle between the ideals and values of international criminal justice and the exigencies and impositions of *realpolitik* have been constant throughout history – though ebbing and flowing like the tides of an uncertain sea. Thus international criminal justice is still a work in progress".

¹ See Preamble of the ICC Statute: "... conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, Recognising that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes ..."

² Friedman, Leon, *The Law of War: A Documentary History*, 1972, p.417.

³ August 1945, 59 Stat. 1544, 82 U.N.T.S. 279, in: Charles I. Bevens (ed.), *Treaties and Other International Agreements of the United States of America 1776-1949*, November 1969, vol. 3, p. 1238.

Chapter 2 contains a historical perspective of international criminal justice. It includes an introduction to the issue at hand, which is having an institution, which would be capable of translating moral values, commonly shared by the international polity, into applied precepts that the international community affirmatively accepts. Section 1 in this chapter sets out to present the investigative and prosecutorial bodies existent from 1919-1994. Section 2 looks at the steps towards the establishment of a permanent international criminal court from 1937-1989. It begins with the slow period in which efforts to establish a permanent ICC failed. These efforts, which began by the League of Nations, were linked to a permanent international criminal court whose jurisdiction was limited only to enforcement of the 1937 Terrorism Convention⁴. They however failed due to the occurrences in the years that preceded WW II. Times only changed after 1989 with the end of the cold war. The issue of an ICC returned to the UN via an unexpected route in 1989 after a 26-year hiatus⁵. The preparation of the draft statute from 1995-1998 including the informal inter-sessional meetings is closely looked at in this chapter. Section 3 approaches the 1998 Rome Diplomatic Conference, from the setting up of the stage for the conference, its beginnings, and the negotiating process up to the final stage. Section 4 looks at the absence of a legal method. This absence, according to Bassiouni, could be justified among other issues by the fact that the delegates who negotiated the Draft Statute came from various legal systems and traditions and many of them were diplomats who lacked expertise in international and comparative criminal law or comparative criminal procedure. Section 5 looks at post-Rome period. It deals in the first place with the Preparatory Commissions (1998-2002), which were established in interim by the General Assembly to prepare the way for the Court to function as soon as the treaty entered into force⁶. It secondly deals with the Assembly of State Parties (2002-2004), which as established by art. 112 of the Rome Statute⁷ consist of representatives of the State Parties.⁸ The chapter concludes by a speech made by Prof. Bassiouni at the Rome Ceremony on July 18, which expressed the moral, ethical, and policy significance of this historical journey, whose new chapter had just began. "The world would never be the same after the establishment of the International Criminal Court ...

⁴ Convention for the Creation of an International Criminal Court opened for signature at Geneva, 16 Nov. 1937, League of Nations O.J. Spec. in Supp. No. 156 (1938). League of Nations Doc. C.547 (I).M.384 (I).1937.v (1938) (never entered into force).

⁵ See Revised Draft Statute for an International Criminal Court, U.N. GAOR, 9th Sess., Supp. No. 12, Annex, U.N. Doc. A/2645 (1954).

⁶ The Preparatory Commission was created through resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (U.N. Doc. A/CONF.183/10. See Appendix for UN documents related to the ICC).

⁷ Rome Statute for an International Criminal Court.

⁸ See ICC Statute, art. 112, paragraph 1.

today's opening of the Convention for signature marks both the end of a historical process that started after World War I as well as the beginning of a new phase in the history of international criminal justice ...but today I can say ... what Winston Churchill once said about heroes of another time, 'never have so many, owed so much, to so few.'"

Chapter 3 of the first volume focuses on the nature of the ICC, its functions and its mechanisms. This chapter is subdivided into 12 sections. Section 1 deals with the characteristics of the ICC as being an international mechanism designed to enhance accountability and to reduce impunity for existing international crimes. It further looks at its subjects and its prospective jurisdiction. Section 2 deals with the jurisdictional mechanisms while section 3 analysis the crimes, which fall within the jurisdiction of the ICC. Sections 4, 5 and 6 approach issues on the elements of criminal responsibility and penalties, applicable law and stages of the judicial proceedings respectively. Section 7 deals with the Victims' Rights in the ICC Statute, which contains one of the most important recognitions of the victim as a subject of international criminal law. Section 8 deals with cooperation and enforcement modalities, which are very vital for the success of the ICC. The organisation and operation of the ICC is handled in section 9 informing the reader about the setting up of the Court and its functioning. Sections 10, 11 and 12 deal with national implementing legislation, ratification, amendment, and reviewing of the Statute and the relationship of the ICC with the UN respectively. In his conclusion of Part I Bassiouni acknowledges that the Rome Statute is not absolutely perfect for it contains certain ambiguities, overlaps, inconsistencies, and gaps but it should be kept in mind that it is a complex multilateral treaty and would for some time be a work in progress like all other legal institutions of this kind.

Part II of this volume contains an article-by-article legislative history of the ICC Statute. It contains selected texts having the "L" symbol⁹ which were submitted by delegations during UN meetings between 1995 and 1998 however in limited numbers and are no longer available. Thus, this part permits the reader to have access to material, which could hardly be found anywhere else. This second part contains the integrated text of the Rome Statute, Elements of Crimes, and the Rules of Procedure and Evidence applicable at the ICC. Also available in this part are the Regulations of the Court, the bibliography, the Negotiated Relationship Agreement between the International Criminal Court and the UN¹⁰ and the Agreement on the Privileges and Immunities of the ICC. Furthermore, Bassiouni included footnotes referencing the recently promulgated Regulations of the court and decisions of the Assembly of State Parties. This integration of all relevant material on an article-by-article basis is unique in its kind and represents the most comprehensive work on the subject to date.

Having dealt in the first volume with the historical evolution of international criminal justice and with it the estab-

⁹ Documents emanating from the Office of Legal Affairs of the U.N. General Secretariat.

¹⁰ ICC-ASP/3/Res. 1, 4 October 2004.

lishment of the ICC, the author focuses in *volume 2* on the ICC Statute itself with an article-by-article evolution of the Statute from 1994-1998. This is a chronological legislative history of all relevant material from 1994-1998, concerning each article of the Statute. This volume contains all the preceding material relating to the articles in the ICC Statute in a reverse chronological order (Rome Statute of the International Criminal Court, Text of the Drafting Committee transmitted by the Committee of the Whole to the Plenary of the Diplomatic Conference, Text of the 1998 General Assembly Preparatory Committee submitted to the Diplomatic Conference, The "Zutphen Draft" submitted to the Plenary Committee at its final session of 1998, reports containing the decisions of the Preparatory Committee at its sessions held in 1997.¹¹ The legislative history presented in this volume consists of an article-by-article integration of different draft versions of the Statute. The author includes an Explanatory Note at the beginning of this volume, which explains the texts used in this volume. The volume consists of 13 parts although only 12 are included in the table of content. Parts I to XIII deal – on an article-by-article basis – with the contents of the ICC Statute. The integration of all relevant documents permits the reader to follow the historical evolution of each article.

The third and last volume consists of the relevant substantive parts of the summary records of the meetings of the Diplomatic Conference's meetings, as well as of meetings of the Committee of the Whole. In order to better understand and implement the ICC Statute it is important to have an idea of what its initial aim was. No later than when it comes to implementing the Statute does one realise that the wordings do not always deliver the message initially aimed at. In this case, an in-look into the records of the meetings is of great help to clarify ambiguities. The various interventions of the different delegations give the reader an idea of how the ICC Statute was established reconciling the various legal systems, proposals and opinions involved. This volume contains a list of all delegations to the Rome Diplomatic Conference, which permits all those interested in the work of the ICC to identify the persons, delegates or experts that drafted the Statute. The material on the Diplomatic Conference included in Volume 3 has not been integrated in Volume 2 because of the manner in which the official UN summary records were compiled by the Secretariat.¹² The Committee of the Whole discussed the draft statute by parts as opposed to the authors approach in volume 2, which is an article-by-article approach. The author divides volume 3 into 8 parts and each of the Texts reproduced herein have a referral to where they could also be

found in the U.N. volumes¹³, which unfortunately since October 2004 no longer get published. Nr. 1 consists of the General Assembly Resolutions and UN Background Paper relative to the Diplomatic Conference. Nr. 2 contains the list of delegations to the Rome Diplomatic Conference including the names of the individuals who participated and the country or organisation they represented. Nr. 3 consists of the officers of the conference and the various committees in which they worked. This permits the reader to understand how difficult it was with all these various legal systems and traditions to come out with a unique document. Nr. 4 contains the summary records of the plenary meetings with each one of the plenary meetings separately reported which permits an accurate apprehension of what took place. Nr. 5 contains the summary records of the meetings of the Committee of the Whole. It contains all 42 meetings, which took place between 16 June 1998 and 17 July 1998. Nr. 6 is made up of the reports of the Committees; the Credentials Committee, the Preparatory Committee on the Establishment of an International Criminal Court, the Committee of the Whole and the Drafting Committee. Nr. 7 contains the documents of the Committee of the Whole, the proposals, reports and other documents from this Committee. Finally Nr. 8 contains the Final Draft Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

In sum, the decision to publish this elucidative work on the legislative history of the ICC is praise-worthy for it provides the reader with all the information necessary to understand the negotiations leading to the ICC and its normative bases. The work is the most comprehensive legislative history to be published on the ICC to date. The separation into three volumes permits the reader to have quick access to whichever topic is of greater interest to him. Furthermore, Bassiouni avoids putting his personal views on the interpretation of the statutory provisions thus permitting the reader to build up his own mind on the issue. This book is indeed a valuable resource for academics, practitioners and students of international criminal justice. It will certainly serve as a guideline for those who would be called upon to interpret the Statute.

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¹¹ Texts also available in Bassiouni, M. Cherif, *The Statute of the International Criminal Court: A Documentary History*, Transnational Publishers, Inc., Ardsley, New York 1998.

¹² Volume 1, which contains the UN summary records, was written down in parts, whereas vol. 2 develops an article-by-article approach. Thus in order to avoid any misunderstandings, the author deemed it reasonable to separate these volumes.

¹³ The Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court consist of 3 volumes, referenced as A/CONF.183/13 (Volume I, II and III).