

THE INTERNATIONAL CRIMINAL COURT AND INTERNATIONAL LAW

Due to the encroachment of international law upon national sovereignty, there has in the past been a distinct reluctance towards creating international supervisory mechanisms. Instead, there has been a *'swelling of the normative network without any corresponding development in supervision'*². International rules have historically yielded to domestic law², and have been referred to as 'quasi', 'near' or 'soft' laws, due to the difficulty encountered in enforcing them⁸.

However, with the growing interdependence between nation states, whether economic, cultural, environmental, military or otherwise, we can no longer merely rely on the reciprocal entitlement principle⁸ or a nation's goodwill towards common values to assist in the enforcement of international law. The significant number of war crimes and crimes against humanity that have occurred since the end of World War II, including in Indonesia, East Pakistan, Burundi, Cambodia, Rwanda, Bosnia and Iraq, emphasise this point.

This report examines the Statute of Rome of the International Criminal Court (ICC) in relation to its ability to contribute to the enforcement of international law. This is achieved by comparisons with the shortcomings of existing international institutions burdened with the task of enforcement, including the International Criminal Tribunal for Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Court of Justice (ICJ), and the United Nations Security Council (UN SC). Following this analysis, the obstacles to the success of the court,

such as the opposition of the United States, some outstanding issues on impartiality, state co-operation, and constitutional incompatibilities will be discussed.

POSITIVE STEPS TOWARDS THE ENFORCEMENT OF INTERNATIONAL LAW

According to Kofi Annan, Secretary-General for the United Nations, the ICC *“promises, at last, to supply what has for so long been the missing link in the international legal system: a permanent court to judge the crimes of gravest concern to the international community as a whole – genocide, crimes against humanity and war crimes.”*⁴

Several ad hoc courts have existed prior to the ICC to prosecute these so-called ‘*crimes of gravest concern*’, crimes which are in theoretically under universal jurisdiction¹². The ICTY, created in 1993, and the ICTR created in 1994, have served to prosecute war criminals from former Yugoslavia and Rwanda respectively. Up until the creation of these courts, no war criminals had been formally tried for their crimes since the Nuremberg and Tokyo war crimes tribunals after WWII, in 1945 and 1946 respectively⁷. Thus, until the creation of the ICC, there was no permanent and international means of prosecuting the worst violations of international humanitarian and human rights law³.

The Statute of Rome for the ICC has tried to avoid many of the pitfalls of these earlier institutions, as well as learning from the difficulties encountered by the ICJ and the UN Security Council in the area of enforcement of international laws.

A) UNIVERSAL JURISDICTION

The International Court of Justice (ICJ) has encountered many problems in relation to its limited jurisdiction. Although it is a very different Court to the ICC, as it tries states as opposed to individuals for a wide range of disputes, the lessons learned have been incorporated into the Statute of Rome. The ICJ's famous '*Optional Clause*' and attached reservations contained in Article 36 of its charter, in effect allow states to voluntarily and conditionally accept its jurisdiction¹². This voluntary jurisdiction has resulted in less than a third of the member states of the United Nations having accepted the optional clause, and even several of the powerful states having withdrawn from it, including the United States²². The 'lofty ideals' of the Court were quickly replaced by 'political realities'²². The court's inability to enforce its jurisdiction seriously hampers its credibility within the international arena. It has led to inequitable jurisdiction, where one set of rules exists for one nation state, and a different set of rules, or even a complete absence of rules exists for another nation state. This is reflected in the ICJ's relatively poor track record in ensuring the enforcement of interim measures, and even several judgments, such as the Corfu Channel, Fisheries Jurisdiction, US Diplomatic and Consular Staff in Tehran, and Nicaragua cases¹².

This '*voluntary*' jurisdiction, where the acceptance of jurisdiction in international law has been subject to additional State consent⁴ is in direct contrast to the ICC. The ICC has the capacity for '*universal*' jurisdiction - it has the potential to exercise its jurisdiction in every corner of the earth²⁴. This universality is embedded in Article 13 (b) of the Statute of Rome, which proclaims that the Security Council, under Chapter VII of the UN Charter, can refer to the Prosecutor a situation in which one or more of the crimes contained in the Statute appear to have been committed. This principle applies even if the State in question is not a party to the Statute, such as the United States¹¹. Thus the Security Council is able to bypass the nationality and territorial principles that apply if a State were to refer a situation, or a prosecutor were to initiate his own investigation, giving the ICC hitherto unprecedented jurisdictional reach²⁴. This is a major advance for the credibility and enforcement of international law, as it is a step forward towards ensuring that only one set of international rules applies to every nation state.

Apart from the prohibition on reservations in relation to the ICC's jurisdiction, Part 13 of the Rome Statute states that no reservations in any regard can be made once the treaty has been ratified, though States may propose amendments at a Review Conference seven years after the treaty has entered into force. The UN Security Council in accordance with its voting procedures⁵ can amend the Constituent Instrument of the ad hoc ICTR and ICTY at any time.

A final point on jurisdiction.... The ICC's jurisdiction is not geographically limited to a particular state or states, as is the case with the ICTY and ICTR, which focus on former Yugoslavia and Rwanda respectively, and not restricted to a particular time

period, as is the case for the ICTR. Therefore it is less likely to be criticised as carrying out ‘victor’s justice’¹⁵.

B) COMPLEMENTARITY

The principle of ‘complementarity’, enshrined in Articles 1 & 17 of the Statute of Rome, is a basic principle of the ICC, and is designed to protect the jurisdictional sovereignty of the States Party to the Statute⁴. The ICC will only exercise its jurisdiction if national courts are unwilling or unable to investigate or prosecute alleged crimes⁴. For this reason, the ICC is often referred to as the ‘Court of last resort’⁶. In contrast, the jurisdiction of the ad hoc tribunals, ICTY and ICTR, is deemed as being concurrent with national courts⁵, and they have primacy over national courts (Articles 9 & 8 respectively)⁵. The Statute of Rome encourages States to modify their domestic laws (e.g. in the areas of extradition, human rights, criminal law etc) in line with its Statute²⁴, which is referred to as the ICC implementing legislation⁶. Again, this is designed to ensure that there is no conflict between international and national laws, with only one set of laws applying to all nations, while at the same time protecting every nation’s jurisdictional sovereignty by the principle of complementarity.

C) MULTILATERAL INITIATIVE

Between 15 June and 17 July 1998, 160 States participated in the United Nations Diplomatic Conference in Rome, which led to the adoption of the Rome Statute of the ICC⁴. On the 17th July 1998, 120 countries voted in favour, 21 abstained and only 7 voted against the adoption of the Statute¹⁸. By the 31 December 2000 deadline, 139 States had signed the Statute. Thus as opposed to being a largely unilateral initiative, such as the creation of the ICTY and ICTR by the UN Security Council pursuant to Chapter 7 of the UN Charter⁵, the Rome Statute was clearly the product of international agreement¹¹.

The structure and organisation of the ICC is also designed to give an equal voice to State Parties. Many decisions, including the election of prosecutors and judges, are determined in the Assembly of States Parties, the legislative body of the ICC, where in accordance with Article 112 (7), each State Party has one equal vote. In contrast, decisions regarding the ICTR, ICTY, and ICJ are in the end made by the UN SC, an archaic product of the world order at the conclusion of WWII. The UN SC does not reflect the political realities of today, and a limited few, the five permanent members, have the power to effectively veto any decisions. This explains the insignificant role of the UN SC in many previous threats to world peace, such as the 1962 Cuban Missile Crisis, the Vietnam War⁷ and the recent war on Iraq.

The ability of every single one of the State Parties to influence the future direction of the ICC, and their participation in the drafting of the Statute of Rome, augurs well for its acceptance within the international community.

D) IMPARTIALITY AND INDEPENDENCE

The ICJ has in the past been criticised for its lack of independence and impartiality. An organ of the UN, the permanent members of the UN Security Council have an automatic seat on the ICJ²⁰, which has led to the ICJ in the past being labelled as a ‘White Man’s Court’¹⁹. While the aim of the election procedures for judges to the ICJ is to produce a body of independent members, as opposed to state representatives²⁰, in practice there have been several studies highlighting the existence of quite distinct national bias of judges in the decisions of the ICJ since its inception²³.

The ICC is not an organ of the UN; in fact it is an independent organisation with an independent budget¹⁸. Also, the ICC Treaty has established very strict criteria for the selection of the prosecutor and the judges, requiring experts with high moral character, independence and reputation. They cannot participate in any activities that could hamper their independence, will be accountable to an assembly of member states, and can be removed by a simple vote¹⁶. The prosecutor and judges for the ICC are elected by the Assembly of State Parties¹⁸, where each State that has ratified the Statute of Rome has one vote. The President, Vice Presidents and 18 members elected by the Assembly of State Parties are monitored for an equitable geographic distribution and adequate representation of the principal legal systems of the world¹⁸, as well as a fair gender representation.

To further aid in ensuring impartiality of the ICC judges, very clear and detailed definitions of genocide, crimes against humanity and war crimes have been effected in Articles 6, 7 & 8 of the Statute²⁵. In accordance with Article 22 (2), in cases of

ambiguity the definitions are to be interpreted in favour of the accused⁴. This is designed to limit the scope for subjective international standards. The definition for the crime of aggression continues to be negotiated by the Preparatory Commission, and will only be included in the ICC Statute in its review 7 years after entry into force, assuming agreement is reached, highlighting the importance attached to universally agreed and accepted definitions of the crimes. The definitions of crimes contained within the Statutes of the ICTR and ICTY are much less detailed and comprehensive⁵.

It is generally agreed that it is in the national interest of law abiding countries to have international adjudication of justiciable disputes. Instead, it is the objectivity and impartiality of this adjudication that has in the past been of concern in the arena of international law²³.

E) DUE PROCESS PROVISIONS

Former US State Department Legal Advisor Monroe Leigh has said ‘The list of due process rights guaranteed by the Rome Statute are, if anything, more detailed and comprehensive than those in the American Bill of Rights I can think of no right guaranteed to military personnel by the US Constitution that is not also guaranteed in the Treaty of Rome’¹⁶. The detailed general trial procedures are outlined in Articles 62 to 76 of the Statute of Rome and the Rules of Procedure and Evidence⁵, such as the right to counsel, right to remain silent, right to have charges proved beyond reasonable doubt, etc.. The ICTR and ICTY have less detailed general trial

procedures in comparison to the ICC⁵. Ensuring that the rights of individuals are respected is essential for the international acceptance of a Court.

F) OBLIGATION TO CO-OPERATE

Part 9 of the Statute of Rome incorporates extensive provisions regarding international co-operation and judicial assistance between national authorities and the Court. The issue of co-operation, though part of the ICTR and ICTY in articles 28 and 29 respectively, has never previously been elaborated on⁵. A state can still refuse a request to co-operate with the Court if doing so would prejudice national security interests, however under Article 72 (5) of the Statute, it must take ‘all reasonable steps’ to resolve the matters of co-operation with the court⁴.

OBSTACLES TO THE SUCCESS OF THE ICC

Regardless of the various improvements made to the Statute of Rome over and above what currently exists amongst various other institutions of international law, there are still several obstacles that obstruct the success of the court.

A) THE OPPOSITION OF THE UNITED STATES

The single biggest obstacle to the success of the ICC is the fundamental opposition of the United States to the ICC. The US withdrew its signature to the Statute of Rome in May 2002¹⁴ due to largely unfounded fears that the ICC would be able to exercise its jurisdiction to conduct politically motivated investigations and prosecutions of US military and political officials and personnel¹⁴. Since the ‘unsigned’ of the ICC, the US has pushed hard to negotiate bilateral and multilateral agreements termed ‘Article 98’ or ‘impunity’ agreements with countries that have ratified or signed the Rome Statute¹⁴. Article 98 (2) states that *‘the court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements’*²¹. These ‘Article 98’ agreements effectively serve to promise the US that their nationals would not be extradited to the Court. Although by March this year, 22 countries had signed these non-surrender agreements, according to the EU Council, these agreements do not fall under Article 98, making their signing by States parties to the ICC illegal¹. Notwithstanding the doubt as to the legality of these ‘Article 98’ agreements, America’s ongoing efforts to

discourage other nations to ratify the Rome Statute¹, for example with threats to withhold military aid via the American Servicemembers' Protection Act (ASPA)¹, and the threat to veto any fresh or renewed UN peacekeeping¹⁰ will be an obstacle to the likely success of the court. Overall, the EU's joint support for the court has already weakened under US pressure, while also inflicting significant damage on the transatlantic relationship. In addition, in response to US lobbying, the Security Council, in Resolution 1422, has last year approved a limited, one-year exemption for US personnel participating in UN peacekeeping missions or UN authorised operations in response to US pressure¹⁴, codified in Article 16 of the Statute of Rome.

While American fears are largely unfounded, due to the principle of complementarity, these actions could have the effect of creating a two-tiered rule of law: one applying to US nationals and another applying to the world's citizens. As the ICC is also potentially the most important human rights institution of the last 50 years, the continued opposition of the US will damage its credibility as a champion of human rights and justice¹⁵.

B) IMPARTIALITY

Article 44 (4) of the Rome Statute on Staff sets forth the ability of the prosecutor to accept '*gratis personnel offered by States Parties, Intergovernmental Organisations and NGO's*'. Likewise, Article 116 on the matter of financing permits that in addition to the assessed contributions from State Parties, and funds provided by the UN, the ICC may accept '*voluntary contributions from Governments, international*

organizations (sic), individuals, corporations and other entities' ²¹. The potential effect of these two articles is far-reaching. They may hamper the judicial impartiality of the prosecutor or the ICC in general in favour of the agenda of a particular state, NGO or intergovernmental organisation. It has also been argued that pressure groups may use the Rome Statute to enforce international 'soft law' norms in order to further their social agenda, and export Western Social Policy to the rest of the world²⁴.

In order to ensure the future success of the ICC, it is essential that the application of Articles 44 and 116 be closely monitored for their effect on the impartiality of the Court. The credibility of the ICC, and thus its ability to generate international co-operation with its laws is potentially at risk.

C) OBLIGATION TO CO-OPERATE

Although part 9 of the Statute of Rome incorporates extensive provisions in relation to international co-operation and judicial assistance between national authorities and the Court, it must be remembered that the ICC has no police force or prison to enforce its judgements. Thus it is highly dependent on the co-operation of the State parties in this regard⁶. Apart from the United States, the other nations that have not signed or ratified the Statute of Rome tend to be undemocratic regimes. Unfortunately, nationals from these types of nations are also at a higher risk of committing the types of crimes identified in the Statute of Rome, and are generally less likely to be amenable to co-operation with a Western institution. Again, this is why the credibility of the court, especially in the non-western world, is vital to its success.

D) CONSTITUTIONAL INCOMPATIBILITY WITH THE ICC

As individual states work on their 'implementing legislation', debate has arisen as to whether or not the Rome Statute is compatible with individual countries' constitutions, especially in the area of prohibitions on the extradition of nationals, provisions on immunities and prohibitions on life imprisonment⁹.

Although the principle of complementarity addresses many of the concerns raised in relation to constitutional conflict¹³, it does not address all concerns, and some of the nation states may have to defer to international laws in relation to certain rights and obligations. This submission, albeit necessary for the effective functioning of the Court, will lead to some resistance to the ICC, due to its encroachment on national sovereignty. Unfortunately the harmonisation of laws is vital to the successful application of international law in general.

CONCLUSION

The Statute of Rome for the ICC has enacted many positive steps towards the enforcement of generally recognised customary international law. Its unprecedented jurisdictional reach, the principle of complementarity, its multilateral nature, its independence and impartiality and its stringent due process provisions, all serve to create an institution that is two-fold. On the one hand, it finally ensures that only one set of rules is enforceable on all nations of the world, a concept that has been thus far alien to the arena of international law, and thereby allowed nations to pursue politically motivated goals, instead of bringing perpetrators of crimes or delicts to justice. On the other hand, at the same time as ‘forcing’ its laws on all nations in the world, the ICC, a ‘court of last resort’⁶ attempts to give the first and foremost power back to the nations, via the principle of complementarity.

In essence, this new international institution does not differ from the application of laws in the national system. The people of a nation can be likened to the states of the international system. Their elected representatives make laws, and, although these laws are unlikely to suit and be accepted by every single person in the nation state, they are essential for the order of the national system. Some persons will resent this intrusion on their individual rights, just as some states resent the intrusion on their sovereign rights. However, without such laws, or if each individual person in a nation state were able to specify which laws they would like to accept and which laws they

denounce, as is the ability of nation states within the international arena by proclaiming reservations or escaping jurisdiction altogether, anarchy would prevail. In order to avoid anarchy, or a repeat of the international atrocities of the past century, it is essential to have a universal system of law applicable to all international nations and enforced by a central democratic power.

Nonetheless, despite the unprecedented step towards deterring future perpetrators of atrocious systematic crimes against humanity, it is impossible to predict whether or not the ICC will be a success or failure. It has been structured for success, however the opposition of the United States could prove to be a serious obstacle. The incompatibilities of the Rome Statute with some national constitutions, the dependence on states to co-operate with judgements, and the remaining potential for bias in judgements, could also prove to be obstructive.

However, overall, the creation of the ICC has proclaimed to the international community that no nation is above the law in the area of the crimes of '*gravest concern to the international community as a whole*'⁴. While this doesn't mean that all would-be criminals will be deterred, and all judgements will be free from bias or error, as is the case in the national system, it will act as a '*deterrent to the Hitlers, Pinochets and Milosevics of the future*'⁴. And as just one such deterrence could spare the lives of millions of the world's citizens, the ICC is an essential and long overdue institution in the arena of international law, warts and all.

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