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Title

Irrational Utopianism: A response to critics of the admissibility regime of the International Criminal Court

A careful analysis of the International Criminal Court (ICC) reveals a judicial institution in its infancy struggling to overcome geopolitical barriers. Even today, almost 17 years after the Court's inauguration, only 123 States Parties have signed the Rome Statute. One cannot draw parallels with national systems to reach conclusions about the Court's effectiveness. There is no global monopoly on the legitimate use of force, regardless of assertions from proponents of American Exceptionalism. As Sir Alexandre Cockburn remarked in *R v Queen*, "(international law) must have received the assent of the nations who are to be bound by it."[1] To say that the admissibility regime of the 1998 Rome Statute diminishes the Court's legitimacy would be an oversimplification of both geopolitics and international legal norms.

It must be noted that the notion of the existence of 'international criminal law' can be traced far beyond the brief history of the ICC. The main differentiator is that the ICC is permanent, where prior prosecutions relied on national reconciliation efforts or ad hoc tribunals. Equally worthy of attention is the ICC's current status as a "court of last resort", only to be utilized if other jurisdictions lack capacity. Much like national jurisdictions that derive their legitimacy (in part) from the consent of those they govern, the ICC gains its legitimacy through the consent of States. If the ICC is to gain compulsory jurisdiction, it must first build trust amongst the international community.

The main rallying cry for ICC critics is the selectivity of the cases appearing before the Court. A quick glance at the statistics leads many to conclude that the Court is "racist". It is true that the majority of prosecutions relate to crimes committed in central Africa, but the picture these statistics paint is misleading. The majority of these prosecutions were not referred to the Court by the UN Security Council (UNSC), but by the countries themselves. It is submitted that the more accurate barometer for the ICC's contribution to international criminal law is not the amount of prosecutions, but the state practice and opinion juris observed since the Court's inception.

[1] Sir Alexander Cockburn, 12th Baronet, C.J., *The Queen v. Keyn*; "The Franconia" (1876), 2 L. R. Ex. D. 202.

Jurisdiction and the ICC

Before considering the issue of admissibility directly, a brief discussion on jurisdiction is warranted. There are three different ways through which the ICC can obtain jurisdiction.

States Parties: Article 12 stipulates that a State Party to the statute thereby accepts the jurisdiction of the Court. This will apply when the act in question occurs on the territory of a member State (12(2)a), or if the accused is a national of the State (12(2)b). The key point here is that a national of a non-member State could be prosecuted for crimes occurring outside their country of citizenship.

At first glance, this provision may not appear to be controversial, yet it is the cause of immense tension on the international stage. To put it into a modern context, the Palestinian bid to join the ICC is a prime example. The international legal status of the Palestinian Territories is the center of a major global crisis. While not widely recognised as an independent State, the Palestinian authorities are mounting an extensive campaign for recognition within international institutions, for example, by joining UNESCO.[2] More recently (and quite controversially) Palestine gained formal membership to the ICC.[3] Since joining, Palestine lodged a declaration accepting ICC jurisdiction dating back to June 13, 2014 to cover the 2014 conflict in Gaza.[4] As the conflict largely occurred on Palestinian territory, Israeli officials could find themselves under indictment despite Israel's refusal to recognise the ICC.

Acceptance: By lodging notification with the Registrar, a State which is not party to the Rome Statute can accept the Court's jurisdiction to hear a particular crime under Article 12(3). This provision is most applicable in relation to post-conflict reconciliatory efforts in fragile democracies. Upon the cessation of hostilities, the public perception of justice is critical to achieving peaceful reconciliation. Often times, little faith is placed in the national jurisdictions, requiring an ad hoc solution. Prior to the ICC, this often occurred in the form of ad hoc tribunals. Examples include the Nuremburg Tribunals, the International Criminal Tribunal for the Former Yugoslovia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). The mechanism has been used once in the ICC's brief history when the government of Ivory Coast accepted the ICC's jurisdiction to hear cases arising from disputed elections in 2010. In this case, acceptance came in the form of a letter to the Prosecutor signed by Alassane Ouattara, the newly elected leader.[5]

United Nations Security Council (UNSC) Referral: Perhaps the most controversial of the three methods of obtaining jurisdiction is the mechanism for UNSC referral under Article 13 (b). If the UNSC determines that a State is unable or unwilling to prosecute crimes committed on their territory or by their nationals, they can

[2] Nuadi, Nadeem. "Palestine: The Quest for Statehood." Al Jazeera English. 11 Dec. 2011.

[3] "ICC: Palestine Is Newest Member." ICC: Palestine Is Newest Member. 1 Apr. 2015.

[4] Ibid 6

[5] Ouattra, Alassan. "Letter Recognising the Jurisdiction of the ICC." International Criminal Court, 18 Apr. 2003.

authorise the Prosecutor by Resolution to open an investigation. This can occur regardless of whether or not the State in question is party to the statute. A notable example of such a referral is the case of Sudan, who was referred via Resolution 1593 despite their vocal objections.[6] Investigations initiated through UNSC declarations are not as plentiful as they could be due to the veto powers held by the permanent members.

Investigations

Prior to any prosecutions, the Prosecutor must initiate an investigation and 'analyse the seriousness of the information received' in accordance with Article 15. The Rome Statute provides for three situations in which an investigation can be launched:

Referral by State Party: Article 14 allows for any State Party to refer a crime committed within the jurisdiction of the Court. In the majority of situations, the referral comes from within the State whose territory is affected. Referrals of this nature have been made by Uganda, Democratic Republic of Congo, Mali and the Central African Republic. A more complex approach came from the Union of Comoros, who requested that an investigation be opened into the Israeli Flotilla incident.[7] While Israel is not a State Party to the Rome Statute, Comoros – the country in which the vessel was registered – had ratified.[8] This gave the ICC jurisdiction, as it is a recognized principle of international law that ships are considered the territory of the country in which they are registered. The incident marked the first time the ICC declined to open an investigation following a referral; this due to a failure to meet threshold requirements.[9] While it hasn't occurred to date, the language of Article 14(1) leaves open the possibility of an unconnected State Party referring a foreign incident.

Referral by UNSC: Article 13(b) stipulates that the Prosecutor may open an investigation if the case is referred to it by the UNSC acting in accordance with Chapter 7 of the UN Charter. As previously discussed, this power was first utilized in relation to the conflict in Darfur. Since then, then UNSC has been unable or unwilling to issue referrals in all but one case.[10] Much of this has resulted from the multi-polar nature of the permanent members and their allies. There are few conflicts that occur in which government forces are unable to procure a protector on the council who would be willing to wield their veto power. While there were four

[6] Cryer, R 2006, 'Sudan, Resolution 1593 and International Criminal Justice' Leiden Journal of International Law, vol 19, no. 1, pp. 195-222.

[7] Araturk, Ramazan, and Sihat Gokdemir. "Referral from Comoros." International Criminal Court, 14 May 2013.

[8] Zgonic-Rozel, Misa. "Decision on Flotilla Raid Is Latest Turn in ICC's Consideration of Israeli-Palestinian Conflict." Chatham House. 11 Nov. 2014.

[9] Ibid 11

[10] "UN: Security Council Refers Libya to ICC." UN: Security Council Refers Libya to ICC. Human Rights Watch

abstentions from the vote that produced the Resolution authorizing the investigation into Sudan, all 15 members voted in favour of a referral in the case of Libya. It is true that the current framework results in unequally distributed prosecutions; it is unlikely that an investigation will be opened in the US policy of using drones in counterterrorism.[11] However, one cannot overlook the subtle fact that the Libya vote achieved full support. It signals that the international community is beginning to accept that traditional notions of sovereignty are outdated, and it is no longer an absolute right. There appears to be growing consensus that an international court should have jurisdiction without acceptance in some cases. For the next step to occur, legal protectionism on the international stage needs to be eliminated. Removing the permanent member veto would be a good place to start.

Prosecutor intitiates proprio motu: In cases where the Court has jurisdiction, but has not had a referral, the Prosecutor can open an investigation on his/her own accord. However, Article 15 requires consent to be granted from the Pre-Trial Chamber prior to the investigation being officially opened. The first attempt to open an investigation under Article 15 largely resulted in failure.[12] The incident in question stemmed from disputed elections, which saw rival leaders Mwai Kibaki and Railla Odinga both claim the presidency. While investigations were launched, the case began to unravel leading to charges being dropped.[13] The second instance of an Article 15 investigation occurred with respect to the Ivory Coast, who would eventually accept the Court's jurisdiction.[14]

Admissibility

As a 'court of last resort', admissibility in the ICC is restricted by the Rome Statute in ways not often observed in domestic systems. Articles 5-8 limit prosecution to war crimes, genocide, crimes against humanity and aggression. The issue of admissibility is dealt with in Article 17, which provides the State concerned with the opportunity to investigate and prosecute the individual(s) domestically. A case will only be admissible if:

- The State in question is unwilling or unable to genuinely prosecute (a 17(1)a)
- The individual has already been tried for the act in question (a 17(1)c)
- The case is of sufficient gravity (a 17(1)d)

Article 19(1) grants the Courts the ability to determine for themselves whether a

[11] "Global Policy Forum." US Opposition to the International Criminal Court.

[12] Charges against Uhuru Kenyatta and others were eventually dropped, see "ICC Drops Murder and Rape Charges against Kenyan President." BBC, 5 Dec. 2014.

[13] Ibid 15

[14] Ibid 8

case is admissible. This is common in international courts where similar powers are granted by Article 36(6) of the Statute of the International Court of Justice annexed to the charter of the United Nations. An individual being prosecuted, or a State possessing jurisdiction are both able to challenge a determination of admissibility under Article 19(2).

Admissible Crimes

As mentioned, the Court is limited in the crimes it can prosecute to war crimes, genocide, crimes against humanity, and aggression. Currently only three of these can result in prosecution as the crime of aggression has not yet been ratified. During negotiations for the Rome Statute, a compromise was struck by which aggression would be added as a crime, yet the issue of jurisdiction and the elements of the crimes were to be decided at a later date.[15] Aggression is uniquely difficult to define in a system which respects sovereignty but allows anticipatory self-defence.[16] What's perceived as aggressive by one State may be justified self-defence by ~~the~~ another. There is a clear lack of consensus, particularly with regards to the interpretation of Article 51 of the UN Charter.[17] The Bush Administration's advocacy for pre-emptive self-defence is even more controversial, though widely discredited.[18] Until a coherent and accepted definition of self-defence arises, prosecuting the crime of aggression will be difficult, if not impossible.

In June 2010, at the Review Conference for the Rome Statute, State Parties were able to agree upon a definition of aggression.

Article 8 (1): Defines the individual crime of aggression as the 'planning, preparation, initiation or execution by a person in a leadership position of an act of aggression.'

Article 8 (2): The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

From the wording of 'inconsistent with the (UN Charter)' one can infer that the crime of aggression as defined in Kampala leaves ample room for interpretation with regards to self-defence. Article 15(2) adds to the uncertainty by requiring a year to pass following the ratification of 30 States prior to the amendments entry into force.

[15] Gillett, Matthew. "The Anatomy of an International Crime: Aggression at the International Criminal Court." ICC Now. International Criminal Court. Web. 24 May 2015. https://www.iccnow.org/documents/SSRN-id2209687.pdf

[16] Sovereignty is one of the key principles of international law. However, Article 51 of the UNC does not expressly prohibit anticipatory self defense, a topic which has been subject to heated debate. See. 2 Hanse L. Rev. 231 (2006) Anticipatory Self-Defence: A Discussion of the International Law; Mulcahy, James; Mahony, Charles O.

[17] Tams, Christian J. "The Use of Force against Terrorists." The European Journal of International Law 20.2 (2009): 359 – 397.

[18] Mulcahey, James, and Charles O'Mahony. "Anticipatory Self Defence: A Discussion of the International Law." Hanse Law Review 2.2 (2006): 231-48.

At the time of writing, only 23 States had ratified the amendment.[19]

Recent proposals by member States to further amend the Rome Statute point to a likely increase in the Court's ability to admit crimes.[20] The suggestions mirror the commonly perceived 'threats' to international security. Trinidad and Tobago and Belize partnered to introduce an amendment which would make drug trafficking a prosecutable offence.[21] The Netherlands proposed the addition of terrorism. Other efforts focused on the use of conventional weaponry. State Parties united to propose two amendments stating that the use of weapons prohibited by the Biological Weapons Convention, Chemical Weapons Convention, Anti-Personnel Mine Ban Convention, and the Convention on Certain Conventional Weapons should be considered a war crime.[22]

Within Sub-Saharan Africa, where support for the ICC is at a record low, governments have worked to propose amendments that would in some ways limit the Court's powers. Perhaps the most aggressive proposals were from the Kenyan government, which included immunity for sitting heads of State and allowing the prosecution of ICC officials for crimes against the administration of justice.[23] These proposals failed to get full support within the African Union, which decided instead to propose simply that the State Party with jurisdiction should have the ability to request that the UNSC defer the matter.[24] What is important to note is that even the Kenyan Government, perhaps the most aggressive State advocate for reform, is only asking for just that – reform. Amongst the current State Parties, there is little appetite (at least publically) for withdrawing support for the institution all together.

Principle of Complementarity

The core principle of the ICC is that of complementarity; it is in place to supplement national systems, and assist them when they are unable to genuinely prosecute. In ~~the~~ an ideal world, in which the Rome Statute has achieved universal ratification and compliance, the ICC would have little work to do. The concept is fundamentally flawed, in that from the beginning, an astute observer would have accurately predicted a misapplication of justice. Countries with sufficient resources and whose economy and governing structure can withstand international pressure would not likely see a prosecution.[25] Conversely, weaker governments could expect the international community to intervene if genuine prosecutions don't occur. The result is the appearance of a colonial court, in which the Western powers and their

[19] "Chapter XVIII, Penal Matters 10.b: Amendments on the crime of aggression to the Rome Statute of the International Criminal Court". United Nations Treaty Collection. 2013-09-25.

[20] "Report of the Working Group on Amendments." International Criminal Court. 7 Dec. 2014.

[21] Ibid 23

[22] Ibid 23

[23] Ibid 25

[24] Ibid 25

[25] Baldwin, Clive. "Why the ICC Needed to Reopen the Iraq Abuse Case." Human Rights Watch, 19 May 2014.

counterparts with veto power at the UNSC could protect their interests. Such a situation would inevitably lead to resentment amongst those most affected.

Discontent within the ICC is reaching a boiling point. Not only have developing nations been subjected to harsher than standard treatment, developed countries have largely failed to meet their end of the bargain. Abuses committed by coalition forces in Iraq and Afghanistan have gone largely unpunished. Those who have been brought to justice are predominantly low ranking officials.[26] While the principle of complementarity allows for national solutions to reconciliation, it is also the biggest factor undermining the Court's legitimacy. This could be rectified by prosecuting the aforementioned officials, whether that be in national jurisdictions or international courts. While flawed, the principle of complementarity can contribute to the strengthening of the ICC.

The Case against Compulsory Jurisdiction

Lead Prosecutor for the ICC is anything but a cushy job. The first to take up the position was Luis Moreno Ocampo, who was both criticized for aggressive prosecution by some, and for failure to prosecute by others.[27] Both arguments have some merit. Without doubt, the failure to investigate crimes committed by world powers for rendition and torture committed during the 'War on Terror' led to inequitable prosecutions. At the same time, arrest warrants issued by the ICC for Joseph Kony, leader of the Lords Resistance Army (LRA), has been preventing a peaceful settlement.[28] Both camps are guilty of placing utopian ideals above rational thought.

Throughout the Court's history, two incidents illustrate this point perfectly. The first relates to the accidental targeting of a UN sponsored pharmaceutical plant in Sudan. It was fear of prosecution stemming from persistent efforts of the Sudanese government that led the US to withdraw support for the ICC.[29] Not only was the experience sufficient to shun jurisdiction within their own territory, it inspired an active political and diplomatic offensive to undermine the Court. It was Article 12 that caused the biggest stir. The prospect of a US soldier being prosecuted for war crimes committed in a foreign State constituted the "single most fundamental flaw in the Rome Treaty that makes it impossible for the United States to sign the present text" according to the U.S. Ambassador-at-Large for War Crimes Issues, David Scheffer.[30] In 1999, Republican Representative Bob Ney proposed legislation

[26] Ibid 28

[27] Hoile, David. Justice Denied: The Reality of the International Criminal Court. Africa Research Center, 2014.

[28] Lanz, David, The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace vs. Justice, The Fletcher School of Law and Diplomacy, (May 2007), pg.1

[29] Hearing Before the Subcomm. on International Operations of the Sen. Comm. on Foreign Relations of the United States Senate, July 23, 1998, 105th Cong., 2d Sess., S. Rep. No. 105 724, at 13 (Statement of David Scheffer).

[30] Ibid 32

entitled "Protection of United States Troops from Foreign Prosecution Act of 1999".[31] The bill aimed to prevent economic assistance from being sent to countries that signed the Rome Statute.

The second instance in question came much later in the Court's existence, and from a seemingly weaker force. Disputed elections in Kenya would eventually lead to the ICC issuing indictments for leaders on both sides of the conflict. One such individual was Uhuru Kenyatta, the nephew of the country's first President, and one of Africa's wealthiest individuals.[32] When attempts to avoid prosecution by unsigning the Rome Statute failed, Kenyatta turned to regional institutions and national politics to achieve his aim.[33] By portraying the ICC as an aggressive Western entity infringing on Kenya's sovereignty, Kenyatta quickly gained popular support, eventually winning the presidency in the next elections.[34] As the first sitting Head of State to be under indictment, Kenyatta made allies with other 'outcast' leaders within the African Union. The result has been hostility towards the Court, on the continent in which the majority of its prosecutions are founded.

It is clear that compulsory jurisdiction without a global monopoly on the legitimate use of force will never be a reality, barring exceptions made for a few pariah States. Attempts to force the issue have only resulted in a decrease in support for the already struggling institution. The only way to improve the standing of the Court is to build genuine confidence in its mission.

ICC Contributions to International Criminal Law

As discussed, though far from ideal, the admissibility regime of the ICC appears to be strengthening an immature institution. Admissibility is just one avenue through which the ICC can contribute to the development of international criminal law. To state simply that without compulsory jurisdiction, the ICC's contribution must be negative is erroneous. The ICC's greatest contribution and asset is its convening power. Prior to the ICC, international criminal law was developed almost solely through ad hoc tribunals and national courts. Through negotiations surrounding the Rome Statute, the ICC built a small foundation of universally accepted values. As time passes, this foundation will likely be strengthened with the addition of new crimes. The ICC has had a similar effect on the rules of procedure and the elements of crimes.

Perhaps the most unheralded aspect of the convening power has been the ability for the ICC to collectivise the private and NGO sectors to achieve results. By September 2010, the Office of the Prosecutor had received

[31] H.R. 2381 (106th): Protection of United States Troops From Foreign Prosecution Act of 1999

[32] "African Union Urges ICC to Defer Uhuru Kenyatta Case." BBC News. BBC, 12 Oct. 2013.

[33] Ibid 35

[34] Ibid 35

8,874 communications.[35] Approximately 4000 of these were "manifestly outside the jurisdiction of the Court."[36] However, many of the communications have offered critical pieces of information that have radically altered the way investigations are conducted. Human Rights Watch, a US based NGO, has established an 'E-Team' – a rapid response unit tasked with collecting evidence of crimes committed in the battlefield.[37] Article 15(2) allows the Prosecutor to 'seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate.' In Syria, groups such as Amnesty International[38] and Syrian Fight[39] are actively investigating both regime and opposition atrocities. If this trend continues, it may become quite difficult for regimes to deny atrocities or to hold show trials.

State Practice and Opinio Juris

It has been established that the current rate of prosecutions is minimal in most developed countries. However, prosecution is just one aspect of a successful legal regime. Ideally, laws are complied with leaving little need for prosecutions. The actions of the United States during the 'war on terror' provide an excellent example. As the wars progressed, lawyers were increasingly utilised in the field of battle.[40] Generals often remarked that the rules on targeting meant many operations failed to get the green light. Civilian casualties dropped as a result.[41] The battle for "hearts and minds" definitely played its part, but it became clear that coalition forces understood that their actions were being scrutinized by the international community. The lawyerfication of the 'war on terror' is unprecedented in modern conflict.[42] Few prosecutions may have followed, yet the reduction of future atrocities is far more noble cause than the prosecution of past crimes.

It's true that some States still abuse the interpretation of international laws to suit their preferred narrative. The 'torture memos' drafted by State Department Lawyers Bybee[43] and Yoo[44] come to mind. Russian President Vladimir Putin used notions of

[35] "Communications, Referrals and Preliminary Examinations." Communications, Referrals and Preliminary Examinations. International Criminal Court.

[36] Ibid 38

[37] "Syria: New Spate of Barrel Bomb Attacks." Human Rights Watch, 24 Feb. 2015. Web. 24 May 2015.

[38] "Syria." Amnesty International. Web. 24 May 2015. http://www.amnesty.org.uk/issues/Syria

[39] "Islamic State Execute Peshmerga." Documenting War Crimes in Syria. Syrian Fight.

[40] Goldsmith, Jack L. Power and Constraint: The Accountable Presidency after 9/11.

[41] Ibid 43

[42] Ibid 43

[43] Bybee, J. (2002). Memorandum for J. Rizzo... [Re:] Interrogation of al Qaeda Operative. United States, Department of Justice, Office of Legal Counsel

[44] Yoo, John C. (August 1, 2002). Response to Alberto Gonzales' Request for Views on Legality of Interrogation Techniques. United States, Department of Justice, Office of the Legal Counsel.

self-defence and self-determination (as well as outright denial) to justify intervening in the Ukrainian conflict. [45]What's important here is not *State practise*, but *opinio juris*. Putin never claimed the right to unilaterally annex Crimea, rather he opted for a sham referendum. He did not deny the crime exists, he denied that he committed it. Both the 'torture memos' and the annexation of Crimea were widely condemned by the international community. In a roundabout way, attempts to undermine the international criminal legal system served to strengthen it. An international institution that provides a venue for States to communicate on this matter has been critical in the advancement of these international norms.

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