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Research Note

Desperate Times Call For the Birth of the ICC

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Abstract: This paper dives into the historical background of the creation of the International Criminal Court, and then evaluates the political impact, if any, that the ICC has on U.S. domestic law. Because citizens look to a judiciary body to implement and interpret rulings, this paper also includes details from court cases that have been adjudicated at the ICC.

Widely recognized norms have significantly affected states and individuals in both beneficial and detrimental ways. A more detrimental attribute of these norms is how many human rights abuses have gone unpunished in light of the creation of an international criminal court. Even with bold international prohibitions against mass atrocities in place, it is evident that states fail to enforce these norms on a domestic level. The creation of the International Criminal Court (ICC) allows for the enforcement of domestic laws and laws banning genocide, war crimes, and crimes against humanity, which then focus on accountability mechanisms that aid in prosecuting individual actors or entities guilty of committing egregious crimes.

The young ICC has transnationally prosecuted human rights perpetrators like Laurent Gbagbo and Thomas Lubanga Dyilo, and it has adopted international treaties because they are 'self-executing.' Treaties like these augment the ICC because they are enforceable without formal incorporation of its standards into domestic law. Powerful political influence engrained within sovereign nations like the United States (U.S.) undermines the dire need of ending impunity for international criminals. Countries that have not signed onto the Rome Statute are misconceived that benefits of incorporating ICC policies into domestic laws have less tangible benefits than the concrete costs.[1] This paper, however, contends a degree of discretionary power is critical in most administrative contexts in foreign judiciaries, which then impels a position for soft law to bridge law and policy without becoming as rigid as prescriptive legislative provisions. Consequently, the ICC has dealt a reasonable compromise between competing demands of a rule-based government and flexible decision making that accord with basic notions of international justice.

This paper dives into the historical background of the creation of the ICC. After the adoption of the Rome Statute and the Geneva Convention, the paper mentions how judges are appointed with specifications to their length of terms, and how their appointment and powers are defined in the Rome Statute. The differences and similarities between the ICC and domestic courts in compliance of the Rome Statute are signified to convey characteristics of both types of institutions. Information on who/what can formally file a complaint before the ICC is provided, but then the paper progresses to evaluate political impact, if any, that the ICC has on domestic law. Because citizens look to a judiciary body to implement and interpret rulings, this paper also includes details from court cases that have been adjudicated at the ICC.

Part One

History

A peace conference was held in The Hague in 1899, which involved twenty-six countries declaring independent sovereignty.[2] After one hundred years had passed since the 1899 conference, representatives of 160 countries met in Rome to negotiate a treaty that would establish a permanent ICC.[3] The delegates struggled to define the parameters of an institution whose purpose was to respond to the atrocities that had occurred throughout the twentieth century. After five weeks of grueling negotiations, the Diplomatic Conference adopted a statute for the court with twenty-one countries abstaining.[4] It soon became a global phenomenon that the establishment of an international criminal justice system is to prevent and to punish pathological breaches of the international criminal justice system even if multiple obstacles hindered its full adoption among varying states.

Stemming from World War II (WWII) atrocities of the mass genocide of Jewish citizens in Germany rose the first major precedents exhumed from international criminal trials. The International Military Tribunal (IMT) was an integral component at Nuremberg when the four Allied powers in WWII signed an international agreement known as the London Accord, which criminally prosecuted "War criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups in both capacities."[5] In the Nuremberg trials, IMT stated that heads of state and those individuals acting under orders could be criminally liable under international law. The IMT affirmed the primacy of international law over national law in which representatives stated that the "Very essence of the Charter [of the IMT] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State."[6] The IMT established that individuals may be liable for initiating war itself and the wrongfulness of aggression in which war as well as the offenses against the laws of war were criminalized.[7] However, the IMT's judgment was not binding on either municipal or international courts.

After the Cold War ended in the 1990s, the International Criminal Tribunal for the former Yugoslavia's (ICTY) statute suggested that a permanent court was needed alongside the support of a rule-based government. Shortly thereafter, the creation of the International Criminal Tribunal for Rwanda (ICTR) undermined the establishment of an international institution that

could combat serious violations of international humanitarian law since enforcement was not binding, but both the ICTY and the ICTR served to mitigate the atrocities stemming from renegade regimes.[8] Nonetheless, the difficulties of ad hoc tribunals in delivering timely justice were imminent and required further legitimization.

The Genocide Convention was formulated and adopted for the establishment of a permanent international criminal court. The newly established International Law Commission (ILC) received an invitation from the U.N. General Assembly to "Study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.[9] The ILC subsequently voted at its second session in 1950 to support the desirability and feasibility of creating an ICC.[10]

The Committee on International Criminal Jurisdiction met in Geneva, Switzerland on August 1951. The committee decided that a multilateral convention would be the best initiation for the ICC's establishment of jurisprudence, which was ultimately adopted at Rome.[11] The ILC provisionally adopted a Draft Code of Crimes in 1991 and in its forty-fourth session in 1992, created a 'working group' on an international criminal court.[12] The group produced an extensive report outlining the ICC's authority and jurisdiction. With the exception of the Court's jurisdiction, which expanded in the 1994 Draft Statute, these proposals were substantially adopted in the 1994 Draft Statute issued by the ILC, and many of them became a significant component to the Rome Statute as well.

Structure and Relative Autonomy (power) of the Court

ICC ethos like the principle of complementarity embodied in the Rome Statute contend that the court must defer to state sovereignty and should only act when states have failed to administer justice.[13] ICC jurisdiction extends to the most heinous international crimes and has developed safeguard proceedings that protect state prerogatives. In examining the structure of the ICC, it is vital to consider the implications of the Rome Statute of the ICC. On July 17, 1998, almost one hundred years after the First Peace Conference in The Hague was held, the ICC Statute was signed in Rome; however, it did not enter into full force until July 1, 2002.[14] The Rome Statute is a treaty that extends the ICC's jurisdiction over domestic legal enforcement and "three core crimes of genocide, crimes against humanity, and a carefully negotiated (and thereby limited) list of the most serious war crimes."[15] It was established that a two-thirds majority of Member States is required to define and to establish ICC jurisdiction over the crime of aggression.[16]

Articles 5 through 8 include the prohibition of crimes within the jurisdiction of the ICC. The U.N. General Assembly adopted the Genocide Convention's text in 1948 for the purpose of satisfying rule-based governmental structures based in and around The Hague.[17] The text conveyed a new international consensus condemning and defining genocide as a form of mistreatment "committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such" (UN General Assembly). As well-intentioned these provisions are, many scholars perceive the principle of complementarity as creating barriers for national

criminal proceedings to advance to the ICC.

Judges

The ICC consists of eighteen full-time judges divided into separate chambers dealing with trials, pre-trial matters, and appeals whose number and status may be adjusted later according to the caseload.[18] The Rome Statute establishes an Assembly of States Parties as the overseer of the other organs of the ICC, members of the States Parties decide the financial budget to fund the ICC's creation and development, and they also decide the number of ICC judges that preside over the cases brought forth.[19]

The Assembly of States Parties then elect the judges and a ballot election requires a two-thirds majority of present States Parties to vote. The judges who pass these necessary hurdles in order to preside over cases in the ICC serve a single nine-year term.[20] A president responsible for the overall administration of the ICC and two vice presidents are then elected by these selected judges, five of whom are assigned to the Appeals Division (including the President). The Trial and Pre-Trial Divisions are comprised of six judges each; they are expected to refrain from any activity that will affect their deliverance of a fair judgment.[21] The other organs of the ICC's composite are the Offices of the Prosecutor and Registrar.[22] The provisions concerning the composition and administration of the court, as well as the removal from office are specified in Part IV of the Rome Statute in Articles 34 through 46.[23] Judges can be removed from office for serious misconduct or for a serious breach of his/her duties under the Rome Statute, which is proclaimed in Article 41.[24] It requires a two-thirds vote of the Assembly of States Parties and a recommendation of a two-thirds majority vote of the other judges to remove an ICC judge.[25]

Separation of Powers

The ICC was created to complement the criminal jurisdiction of states. The ICC acts as a jurisdictional 'safety net' when domestic remedies are exhausted and no alternative forum is presented to prosecute those liable for international crimes.[26] The Rome Statute limits ICC jurisdiction to those cases where a Member State with jurisdiction has not investigated or prosecuted an alleged crime.[27] Even though the ICC abides by the complementarity principle of the Rome Statute, any state with jurisdiction can assert a more superior right to deal with a case by prosecuting; however, there is the exception in which a case in a particular state has not been prosecuted, and then it is therefore handed over to the ICC.[28]

The powers of judges in the ICC are limited in that they do not have judicial review powers. Judges are expected to rigorously apply the law as it is written in the Rome Statute. Powerful non-party nationals are often unwilling to surrender a portion of their sovereignty to the ICC. The domestic institutions have a centralized authority with a monopolized enforcement mechanism to punish criminals; conversely, there is no international authority that enforces laws and provisions on a global scale. Because of these characteristics of international treaties, it becomes viable how difficult it is for soft law and policy to strengthen governmental entities. In contrast to international law's lack of a real enforcement body, highly developed domestic systems are considered to be 'fully legalized' due to "[their]…obligations with some dome degree

of precision that are in turn delegated to a third party to implement, interpret and apply the rule" (2000: 401-419). Rules have merit only when there is some realistic application of them to situations that take place in communities, which is better examined through the scope of each States' enforcement mechanism. Subsequently, domestic law is more binding to States and individuals than self-executing treaties.[29] For international law to have the authority of enforceability, domestic courts must incorporate international obligations into national legislation so that international cooperation over transnational borders can serve to maintain social control.

Access

A country that has signed the Rome Statute and/or the United Nations Security Council can refer a situation to the prosecutor of the ICC in which crimes within the ICC's jurisdiction have been committed. The ICC prosecutor him/herself may initiate an investigation proprio motu (on their own authority) if they have determined that a violation of the Rome Statute exists on the basis of information presented in court. The ICC prosecutor may inquire international organizations, states, and non-governmental organizations for additional information; however, the investigations initiated by the prosecutor are subject to authorization approval by the Pre-Trial division. Authorization is granted if the investigational elements of the alleged crime are appropriate and if three judges vote in consensus that there is a reasonable basis to proceed and that the alleged crime falls within the ICC's jurisdiction.[30] Victims of atrocious crimes are to be represented in this ignition of investigations/prosecution process by allowing individuals to submit their views and information to the prosecutor and/or judges presiding in the Pre-Trial Chamber.[31]

Part II

When the probability of detrimental loss occurring is extremely low, it is expected that individuals will take advantage of the opportunity presented in front of them. In applying this to Member States of the ICC, delegates of the countries that have ratified the ICC have weighed the costs versus the benefits of surrendering their national sovereignties and can now be held accountable for atrocious human rights violations that take place in their respective jurisdictions. The decision-making model that is referred to in this case is known as prospect theory. This theory contends that people weigh outcomes that are merely probable in comparison with outcomes that are more certain to occur; value is assigned to gains and losses rather than to final assets.[32] Risk and loss aversion is typically highlighted to assess potential gains in a rational deliberation. By weighing the loss of their complete national sovereignty (costs), these Member States, unlike the U.S., have recognized that there must be accountability mechanisms in place to restore international justice (gains).

However, the principle of complementarity mentioned earlier allows for cases to be addressed in domestic settings first and to use the ICC as a court of last resort to ensure that individuals guilty of committing human rights atrocities enlisted in the Rome Statute have been prosecuted. This principle constrains the ICC from playing an active role in judicial review and policy-making in

an effort to prevent political backlash. On the other hand, prospect theory is what empowers the ICC politically as Member States relinquish their limited jurisdictional powers to an ICC. Therefore, Part II reinforces the notion that the ICC negotiates between the competing demands of various Member States and the binding powers illustrated in the Rome Statute that embodies the principle of complementarity.

The establishment of the ICC raises hopes that the lines between international law and world order are being blurred and that normative structures being created by international law might influence or even restrain the Hobbesian order established by the politics of states in which states' relations are guided by interests.[33] It was deliberated that the ICC would be different from the ICJ (International Court of Justice), which can only decide disputes between states.[34] The ICC's political impact is exemplified in the applicability of domestic laws to serve as a check in ensuring that the laws do not hamper the rights of an individual or the duties of a state as a sovereign entity. It is arguable that the ICC does not do more than what each state is expected to do; therefore, the ICC is an extension of national criminal jurisdiction and it is noted that this is the reason behind why the ICC does not infringe on national sovereignty.[35] Paradoxically, ratifying the Rome Statute was an exercise of national authority, so the ICC owes its existence to the state sovereignty that it seeks to complement.

The ICC has jurisdiction over nationals of non-party states when a crime is committed in a Member State's jurisdiction.[36] The ICC has also impacted domestic power through its use of extradition powers that domestic institutions are unable to implement transnationally. Member States demonstrate their acceptance that the ICC may exercise some of their sovereign powers in that instance. This does not, however, mean that non-party states of the ICC have had their control limited or undermined in any way. Although most scholars have the preconceived notion that the principle of complementarity limits the power of the ICC, complementarity can be used as a tool to extend state sovereignty through international measures. Robert Jennings, an expert in international legal studies, contended that what "…Is most urgently needed is not a surrender of sovereignty but a transformation and augmentation of it into new directions by harnessing it, through proper legal devices, to the making of collective decisions, and the taking of effective collective action, over international political problems."[37] States can now use the ICC to their advantage by establishing legitimacy and implementing the ICC's jurisdictional powers in areas outside of domestic courts' supremacy.

The Prosecutor v. Thomas Lubanga Dyilo and The Prosecutor v. Thomas Lubanga Dyilo are landmark cases for the ICC's assertion of international justice. Lubanga, commander-in-chief of the Forces Patriotiques pour la Liberation du Congo (FPLC), was arrested and brought to The Hague on March 20, 2006. He was accused of enlisting children under the age of fifteen, conscripting them, and using children to participate actively in hostile operations.[38] The trial proceeded January 26, 2009, and he was found guilty of all of the crimes he was accused of on March 14, 2012. On July 10 of the same year, judges in the Trial Chamber sentenced Thomas Lubanga Dyilo to fourteen years of imprisonment in the Detention Centre in The Hague. The Lubanga case proves the progression of the ICC in enforcing domestic policies that the

Democratic Republic of the Congo was unable to enforce. Since this was the first case conducted in the ICC, judges will look to the Lubanga case as precedent in guiding them in future decisions.

Laurent Gbagbo, Ivorian national and former President of Cote d'IVoire, was accused of four charges of crimes against humanity at the ICC: murder, rape, and other inhuman acts, all of which are prohibited under international/domestic institutions.[39] The Pre-Trial Chamber issued the warrant of arrest in November the same year; however, the last milestone in prosecuting Gbagbo was issued on June 3, 2013 when ICC judges delayed the decision on whether or not they should officially send the case to trial, emphasizing the need for more substantive evidence from the prosecutor.[40] Following the ICC's failed attempts to bring President Omar al-Bashir of Sudan and Libya's Muammar Gadaffi to justice for the alleged crimes they committed, this case demonstrates how the ICC is playing its part to convey that even those at the highest levels of political power are unable to escape justice when they commit grave crimes.

Several countries, namely the U.S., are resistant in compromising their political interests with ICC supervisory that may hold them accountable for several violations of war crimes and crimes against humanity. Because the U.S. was the major strategic and financial contributor of the ICYT and ICTR, it is a perplexing matter to discuss why the U.S. objects to abiding by the Rome Statute when the U.S. clearly demurred the events that initiated the Nuremberg trials.[41] Nonetheless, the U.S. issued mainly five justifications as to why it refused to sign onto the conditions binding them to the conditions of an International Criminal Court. Because there is ICC jurisdiction to prosecute Member States citizens in nationals of non-parties, the ICC essentially binds non-signatory nations like the U.S. to its discretion. If an individual or an official from the U.S. is accused of violating a domestic law or an international provision in the Rome Statute, the U.S. is concerned that the ICC could be used by hostile countries as a vehicle for challenging U.S. foreign policies to bring unsupported charges against American citizens. The accused U.S. citizens may have greater exposure to such charges than citizen of other nations; the U.S. realizes that due to the prominent role it plays in the realm of world affairs, the ICC is subject to politicized prosecution.[42]

Other objections of signing onto the statute is that the ICC prosecutor has unchecked discretion to initiate cases, which one could argue condemns the prosecutor to be unaccountable. U.S. delegates have also realized that the Rome Statute gives the ICC authority to define and punish the crime of "aggression." The definition serves as a prerogative of the Security Council of the United Nations under the U.N. Charter and can interpret the term 'aggression' in a discretionary fashion to achieve its aims.

Finally, one difference manifested between the ICC's statute and the U.S. Constitution is the lack of due process guarantees in the Rome Statute. The ICC will not offer foreigners like Americans due process rights they consider truly viable, such as the right to a jury trial[43]; therefore, Americans prosecuted in the ICC will presume that they have suffered unfair treatment in a court of international law like the ICC. Complementarity also proves deficient in providing American service-members any absolute protection against being brought to trial before the ICC.

Sustaining legitimacy is consistent with how soft law constructs rely on states' political ideals, but the ICC must also avoid losing the ability to inspire the protection of human rights in treaties among nation-states.

Recently developed administrations such as the ICC and judges' imperative use of discretion connects soft law constructs like the Rome Statute to domestic law/policy to preserve global sanctities. In the cases against Gbagbo and Lubanga, it is portrayed how the ICC has difficulties in achieving its aim when it has to satisfy Member States while remaining impartial. Critics of ICC mechanisms often reflect a realist view that contends how the ICC was a cheap and deceitful way of demonstrating a façade that international crimes are being dealt with effectively. For example, Professor Kevin Ward claims that "Such trials are anticlimactic, as evil is banal, and [f]lashy show trials of certain individuals…allow the rest of us to pretend that we are not ourselves in some way responsible."[44] Though this contention means that trials at the ICC allow people to feel emotionally satisfied under the pretext that violations against humanity are being dealt with, it must be noted that a force of consensual solidarity among countries in international relations makes every nation-state equally responsible for crimes committed in their presence.

Creating an effective, but limited ICC per the Rome Statute has enabled necessary confrontations and adjudications to persist in The Hague. Throughout this paper, it was discussed how judges are appointed, their length of terms, and how their authority is defined in the ICC's statute. Analyzing the comparisons and similarities between the ICC and countries party to the Rome Statute are designed to reveal flaws and strengths of each adjudicative venue. Part one of this paper informs readers of who is able to bring forth a complaint before the ICC. The second part of this paper evaluates that the ICC has played a critical role in affecting domestic law. Through case law, it is demonstrated that desperate measures truly do call for the birth of an ICC in galvanizing international efforts to secure human rights in both internal and external legal institutions.

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