

Building Criminal Accountability at the Global Level: the ICC and its discontents

With the negotiation of the 1998 Rome Statute of the International Criminal Court (ICC), we all believed we had entered a new age: an age of unheralded peace and security, of justice, of an end to impunity; an age of accountability. At the time we believed the statute to be the biggest advance for peace and security through the rule of law since the United Nations Charter of 1945.

The Rome Statute promised the missing function to the long-promised form of individual criminal accountability. Not merely augmenting state responsibility, the statute left state responsibility for

dead. Thumbing its nose at the political bodies of the UN system, the statute established an entirely independent line of judicial authority. It promised beacon-like authority for taming power through

law, blending politics with justice. It spoke to all of us as individuals over or beyond our nationality; it spoke to us as global citizens, albeit through serious sanction and not liberation.

Yet just 14 years into its existence, the International Criminal Court faces a crisis of confidence. Several states have announced an intention to withdraw, and a regional organisation is considering setting up a counterpart. What has happened to the institution? What has developed in the relationship between power and law? This article seeks to provide an answer within the context of a vision of 'global law for the global community'.

Introduction

When the Rome Statute was completed in 1998, bringing the ICC into existence four years later, it represented the culmination of work, spanning a century, towards strengthening the rule of international law, by introducing individual accountability for certain criminal actions of international significance. That effort marked a number of seminal historical moments of the 20th century.

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- At the end of the First World War, the Treaty of Versailles envisaged a tribunal to try the German kaiser for 'a supreme offence against international morality and the sanctity of treaties'. No such crime existed and, largely as a result, no agreement was reached and no trial undertaken.
- In the late 1940s, however, the Nuremberg and Tokyo tribunals ensured that Axis leaders were individually tried, with many convicted, for war crimes, crimes against humanity and crimes against peace. Again, no such crimes existed in positivist law during the war, although it can be argued that they were part of customary law, and the constitutional documents of the tribunals were based on that opinion.
- The young United Nations intended for the transition of the world from one-off tribunals to a permanent international criminal court. A draft statute existed by the early 1950s, but the onset of the Cold War halted progress.
- With the Cold War terminating in the late 1980s, the subject of a permanent court was reinstated on the agenda of the UN General Assembly at the initiative of Trinidad and Tobago. With support from Canada and the European Union, negotiations for a treaty establishing such a court succeeded within a short space of time (1995–98). With the requisite number of 60 ratifications, the Rome Statute came into force, and the ICC into existence, on 1 July 2002. The development signified, potentially, a new era in international relations.

Membership

The court's membership has grown rapidly, with 124 states parties to the Rome Statute in 2016. It has coexisted with other, ad hoc tribunals (in the former Yugoslavia, Rwanda) and hybrid arrangements between the UN and nation states (Cambodia, Sierra Leone), and regional organisations (such as a Senegal-African Union body for the trial of a former leader of Chad). Unlike these

others, the ICC is a permanent institution with potentially global reach.

The current membership of the court, while satisfying in many ways, masks two shortcomings: the power factor and a regional skew. The power factor, while unsurprising, is vividly portrayed in the case of the ICC. Whether they are states or individuals, it is the larger or more powerful that resist the strengthening of the law, and the weaker or smaller that promote it. It is no accident that most of the major powers (the United States, Russia, China, India) are not parties. Russia signed the statute in 2000 but has not ratified the agreement and in November 2016 notified the secretary

standpoint of many states parties, this is the height of hypocrisy.

A skew in regional membership of the court is also noticeable. Of the 124 parties, the majority come from Europe, Africa, Latin America and the Pacific. Only eight parties are from Asia (including Japan, South Korea, Philippines, Bangladesh and Afghanistan); major countries, such as India and Pakistan, North Korea and Indonesia, remain aloof. Only one party is from the Middle East (Jordan), while four states (Egypt, Oman, Syria and Yemen) have signed but not ratified. Iran and Israel have not ratified, despite having signed on the same day in December 2000.

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general of the Federation's intention to no longer be a party to the Rome Statute. China and India have not signed. France and the United Kingdom, however, have ratified and are thus parties.

The United States has vacillated over the court, having signed the statute in 2000 and then voided its signature in 2002. For some years it maintained bilateral agreements with many countries in which the latter agreed not to hand over US nationals to the court. For a few years it persuaded the UN Security Council to pass resolutions to similar effect, and its congress maintained sanctions against states that refused bilateral agreements. After some years, however, this policy has softened, in so far as the US sees the court as a potentially useful instrument, or at least awkward to avoid or deny in some circumstances, such as Sudan.

The refusal of three of the permanent members of the Security Council to become parties to the Rome Statute stands in stark relief to the exercise of their power to have the council refer nationals, including heads of state, of those states which are parties to the statute. From the

The fact that major powers are the last to adhere to the rule of international law is well known. The regional skew is less explicable. To some extent it is correlated with crisis areas (such as Kashmir, the Middle East and North Africa). But this is not total: South Korea joined the court despite the tensions on the peninsula. There is, moreover, the argument that ratification, at least as part of a truce arrangement, would strengthen the rule of law and help prevent the recurrence of tension.

Jurisdiction

The court's jurisdiction is clearly defined in the statute, which lays down the principle of complementarity, specifies the origin of advancing complaints and the opening of investigations, and identifies the crimes within its jurisdiction.

Complementarity

The ICC stands as a court of last instance, the presumption being that a state party's domestic criminal jurisdiction is sufficiently robust to handle its own cases. But, under the principle

of complementarity, the ICC accepts jurisdiction if a state party is unable or unwilling to ensure that criminal justice will apply through its own domestic jurisdiction in a specific case.

Exercise of jurisdiction

Under the statute there are four possibilities for enabling the court to exercise jurisdiction:

- self-referral: a state party can request the court to open an investigation over alleged crimes within its own territory, on the grounds that it lacks the capacity to do so within its own domestic jurisdiction;
- other state referral: a state party may request the court to open an

aggression is a crime that commits a state or individuals to conflict itself (*ius ad bellum*). The court has exercised jurisdiction over the first three since July 2000 but, for reasons explained below, aggression is not yet justiciable.

The crime of aggression is also different in another important sense. While the other crimes might be committed against a leader, in most cases they are committed by local military commanders, usually of rebel forces. In the case of aggression, the crime belongs to the most senior leader: political leaders in the form of heads of state or government (including cabinet ministers, such as the minister of defence), or the military leader of a country (the

produced a draft legal definition of aggression.

In 2010 the review conference of the Assembly of the States Parties to the ICC achieved a remarkable diplomatic breakthrough in which both conditions, a definition and the conditions of jurisdictional competence, were agreed. The Kampala amendment, now ratified by 32 states parties, requires a final decision by the states parties, meeting as an assembly after January 2017, to proceed. If and when that occurs, the crime of aggression becomes subject to the court's jurisdiction, effective one year after the assembly's decision, for those parties ratifying the amendment.

The introduction of aggression as an individual leadership crime in international law will have a revolutionary effect on international relations. A president or prime minister of a state party, a defence minister, or a commander of a nation's armed forces will be individually liable under international criminal law, if their country's armed forces commit aggression as defined in the Kampala amendment. This is where power meets law, perhaps more vividly than in any other example. The relationship between the political responsibility of the UN Security Council to determine whether aggression has been committed under article 39 of the UN Charter, and the judicial responsibility of the ICC to determine whether aggression has been committed under an amended Rome Statute, is highly sensitive. The compromise solution at Kampala accords the Security Council some discretion vis-à-vis the court. It can require the court to defer any investigation for a 12-month period, though such deferral is not indefinite. But the court's independence on substance is largely retained: a decision by the prosecutor whether to proceed is not conditional on any prior political decision by the Security Council.

Record of the court, 2002–16

The record of the court's dealings to date is shown in Table 1.

It is clear that the court has a full load, at least for its limited capacity. In short:

In the case of aggression, the crime belongs to the most senior leader: political leaders in the form of heads of state or government ... or the military leader of a country

investigation over alleged crimes by another state (not necessarily a party) if its own nationals have been victims of the alleged crimes;

- UN Security Council referral: the Security Council may refer a situation to the court if it judges this to be in the interests of international peace and security;
- *proprio motu*: the prosecutor is empowered to open an investigation, either on his or her own initiative or in response to allegations advanced by private groups.

The crimes

The statute accords jurisdiction to the court over 'the most serious crimes of concern to the international community as a whole'. It confines that jurisdiction to four crimes: genocide, war crimes, crimes against humanity, and aggression.

The first three crimes differ from the fourth: with respect to these the law governs crimes committed in the course of conflict (*ius in bello*). In contrast,

commander of the armed forces). Partly because of the sensitivities, the crime of aggression did not become justiciable in July 2002 with the other three. The decision was taken in 1998 to include aggression as a leadership crime, but to defer justiciability until two conditions were met: reaching a legal definition of the crime, and setting out the conditions under which the court would exercise jurisdiction.¹

Defining the crime of aggression has been a challenging exercise. As early as 1933 the USSR took an initiative with the Convention for the Definition of Aggression. But the convulsions of the 1930s and '40s, and a divided world, blocked any constructive progress. In 1974, however, the UN General Assembly adopted a seminal resolution defining aggression, which served as the basis for political, and to some extent legal, work.² But for the purposes of criminal law, a precise and exhaustive definition was required. In the early 2000s a working group on the definition of aggression

- Nine trials have run their course: four defendants have been found guilty (with one appealing and three under consideration for victim reparations); one has been acquitted; one case has been withdrawn; one has been vacated; and two charges were not confirmed.
- Five trials are currently under way.
- Ten cases are under investigation (including the only one involving alleged genocide).
- Ten more cases are under preliminary examination.

African tensions

The ICC has come under increasing criticism from some African states. A number of states parties have recently commenced the process of withdrawal:

- on 12 October 2016 the Burundi Parliament decided to withdraw, notifying the UN secretary general on the 26th;
- on 19 October South Africa submitted its instrument of withdrawal, which takes effect one year later;
- on 25 October Gambia announced an intention to withdraw;
- Namibia has stated an intention to withdraw, its cabinet having made such a decision.

African criticism of the court

The African criticism focuses on alleged bias in selection of investigations and prosecutions, a sensitivity heightened when sitting heads of state or government are involved. The president of Sudan has been issued with an arrest warrant, and the president and prime minister of Kenya have been under investigation. The opposition to the court has taken the form of non-cooperation over the Sudan case and a recent movement to withdraw from the court, spearheaded by Kenya.

In the case of Sudan, the investigation derived from a referral by the UN Security Council in 2005.³ An arrest warrant was issued within months against the president and other officials. The council's resolution, adopted under chapter VII of the UN charter, called on all UN member states to fully cooperate with the ICC. Despite this, the African

Table 1: Summary of ICC cases, by stage*

Stage	Genocide	War Crimes	Crimes Against Humanity	Total
Preliminary	0	4	4	10
Under investigation	1	7	9	10
Pre-trial	0	0	0	0
Trial	0	3	3	5
Appeals	0	1	1	1
Reparations	0	3	1	3
Closed	0	3	4	5
Total	1	21	22	34

* Note: The totals are not necessarily equivalent to the sum of the subsets, since more than one crime may be involved in a case, and because at the preliminary investigation the crime may not be publicly announced.

Table 2: Source of authority for ICC investigations

Self-referral	Other state referral	UN Security Council referral	Proprio motu
Situations under investigation			
Uganda		Sudan	Côte d'Ivoire
Democratic Republic of the Congo		Libya	Kenya
Mali			Georgia
Central African Republic I			
Central African Republic II			
Preliminary examinations			
Gabon	Comoros (Israel)		Afghanistan
Palestine			Burundi
Ukraine			Colombia
			Guinea
			UK (Iraq)
			Nigeria

Union responded with a resolution calling on states parties not to cooperate. The president has visited many African countries, including states parties, without being arrested. Under the UN Charter (article 103), decisions made by the United Nations take precedence over those by regional organisations. The African Union decisions are, in fact, invalid and in violation of the charter and the binding Security Council resolution.

The case of Kenya involved an investigation of two political leaders for alleged crimes committed in the wake of the 2007 election. The prosecutor opened the investigation with the support of the then president and prime minister. The two leaders under investigation were installed subsequently as president and prime minister, with resulting

opposition to the investigation from the new government and serious witness intimidation. The cases against the leaders were dropped, although charges against other individuals are retained.

Reflections on the criticism

Much of the criticism derives from concerns over who has the power to advance allegations and initiate investigation. Table 2 shows the source of the cases under investigation or preliminary examination.

As is shown, only two cases have been referred by the Security Council. Eight cases have been self-referred, and nine have been opened by the prosecutor, of which five are in Africa and four elsewhere. The evidence suggests that there is, in fact, no bias against Africa.

If the self-referrals are removed, the geographic spread appears different. And of the nine cases initiated by the prosecutor, five are from Africa, two are from Europe, one from Asia and one from Latin America.

The political fact remains, however, that there is a heavy concentration on Africa in the court's dealings:

- all five trials currently under way involve African conflicts;
- of the ten cases under investigation, eight are African, one is Arab and one is European;
- of the ten cases under preliminary examination, four are African, three are European (of which one involves a permanent Security Council

the General Assembly adopted a set of principles of international law which asserted that 'the fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law'.⁵ The same principle was incorporated more recently in the draft Code of Crimes against the Peace and Security of Mankind.⁶

African defence of the court

Notwithstanding these criticisms, there is a robust defence of the court, including from African states. At the African Union's 27th summit in July 2016, influential

parties to the statute include Sri Lanka, the United States, Russia, China, Iran and Saudi Arabia.

Challenges facing the court

Apart from the African crisis, two challenges confront the court: one logistical, one political. The logistical problem concerns the limited enforcement power of the court. The political challenge is the trade-off between 'peace' and 'justice' in any post-conflict situation.

Enforcement

Perhaps the biggest weakness of the Rome Statute is the lack of enforcement power. The statute does not allow trial *in absentia*, and so a suspect must be physically present for any trial to proceed. The prosecutor's office has no intelligence capacity, nor any physical capacity to apprehend, arrest and transfer. This leads to lengthy delays in bringing those charged before the court and can diminish the court's standing. At present, 11 suspects remain at large. Some way must be found of rectifying this.

The trade-off between peace and justice

This raises the difficult relationship between peace and justice. While it is a natural instinct for all involved, not least but not only the victims of atrocity crimes, to see justice dispensed, the process can have a chilling effect on the cementing of a peace arrangement. Suspects still clinging to power or to marginalised territory, or under malign protection, will only agree to a peace arrangement if it accords them a passage to impunity. The most prominent example of this dilemma is the case of former Liberian leader Charles Taylor. The apprehending of Taylor for alleged crimes during the conflict in Liberia and Sierra Leone was delayed for a period lest it impede the peace and reconciliation process. Ultimately, however, Taylor was arrested, and tried, convicted and sentenced in the special court for Sierra Leone.

Conclusions: the future

The International Criminal Court is a symbol not of the global community but of one that is emergent. Its rationale and its principles are predicated on the peace and the human rights provisions

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member, the UK), two involve the Middle East (Palestine, and a complaint against Israel) and one is Asian.

The withdrawing countries oppose in particular the arraignment of sitting heads of state. States parties not cooperating in the arrest of the Sudan president justify this on the grounds that he enjoys immunity through office. This is, however, not a valid understanding of contemporary law. It is inconsistent with the Nuremburg Charter of 1945, which states that: 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'.⁷⁴ In the first session of the UN General Assembly in 1946, all UN member states became party to the London agreement containing the Nuremburg Charter. In the same resolution the assembly declared the London agreement and the jurisprudence of the Nuremburg trial to be reflective of customary international law. In 1950

countries (Senegal, Nigeria, Côte d'Ivoire, Tunisia and Botswana) opposed a proposal for 'mass withdrawal'.

Relevance of other conflicts

The 'African crisis' raises the question of whether the court has failed to explore potential crimes sufficiently in other regions. Where there is intense and continuing conflict, there will usually be war crimes committed. In Asia, Sri Lanka is not a party to the statute, but if a party's nationals have been victims, the way is open for a complaint. The Philippines is a party, and the question has to be asked why there has been no exploration by the court, whether of war crimes in the south of the country or of crimes against humanity under the current 'war on drugs' policy of the new government. In the Pacific there may be reason for complaints of crimes against humanity by Australia (on Manus Island) and by Fiji (repression of political leaders, citizens and the media).

Other countries where potential crimes could be alleged but which are not

of the United Nations Charter, a 'statist' constitutional document coined in the mid-20th century. Yet by bringing the individual within the reach of criminal law, it extends those provisions, bringing accountability from the level of the state to that of the individual. As described in the preamble to the statute, the states parties are conscious that 'all peoples are united by common bonds, their cultures pieced together in a shared heritage'. And the parties harbour a concern that 'this delicate mosaic' might be shattered at any time; hence the need for a permanent court, one that makes no distinction among the 7.3 billion humans on the planet today, including those holding the highest positions of power.

It has not been, is not and will not be an easy path. So long as military power remains caged in national jurisdictional capability, the strengthening of the rule of law will prove difficult. Those who preside over the committal of the gravest

crimes will disclaim personal liability through general political oversight, shrug off the notion of individual legal accountability, and take refuge in their military capacity to remain unreachable. It took years for Radovan Karadžić to be apprehended. Omar Al Bashir may never be brought before the court, at least during his leadership tenure. Leaders of the US and China will remain unreachable for decades.

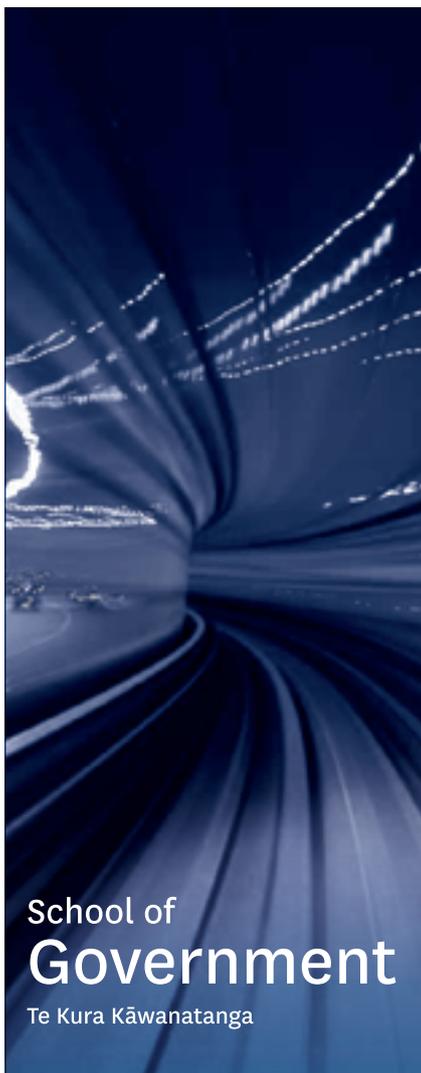
Until some form of enforcement capacity is bestowed on the court, or created in support of the court, through, perhaps, a separate enforcement agency (Interpol is a voluntary organisation), this will not change. Such a development will not occur in the immediately foreseeable future, but the same rationality and foresight that produced the court in the first place will, at some stage, result in an enforcement capacity that equates with the court's jurisdictional competence, a freedom and protection from political

bias or interference, and an objective application of due process and dispensing of justice that results in the existence of global law which attracts the genuine support of the world's citizenry.

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.

—Judge Robert Jackson,
Nuremberg Tribunal hearing, 1948

- 1 Rome Statute, article 5(2)
- 2 UN General Assembly resolution, Doc Res/28/3314.
- 3 Security Council resolution 1593 (2005).
- 4 Charter of Nuremberg, article 7.
- 5 'Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal', principle III.
- 6 International Law Commission, draft Code of Crimes against the Peace and Security of Mankind, International Law Commission, 48th session, May–July 1996, UN General Assembly official records, 51st session, supp. no.10, UN Doc A/51/10.



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