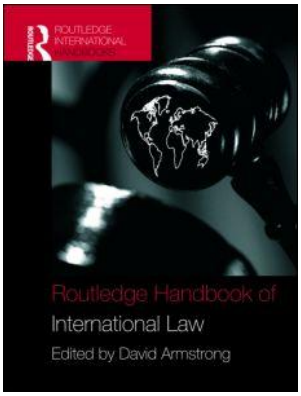

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16

The International Criminal Court

Beth Simmons and Allison Danner

This chapter describes the history and structure of the International Criminal Court (ICC), a permanent court, created in 1998, dedicated to prosecuting individuals for violations of war crimes and genocide. With limited exceptions, the ICC will only hear cases in which either the state where the crime occurred or the state whose national is accused of committing the crime has ratified the ICC treaty. Simmons and Danner argue that the most puzzling question about the ICC is why states created the Court and why any state – particularly those whose leaders may be at risk for prosecution – would join the institution. Based on empirical analysis of the states that joined the ICC in its first 5 years, they advance a tentative hypothesis, developed more extensively elsewhere. They argue that the ICC serves a mechanism by which leaders may make a costly commitment both to the international community and their domestic supporters and opponents to ramp down the level of violence in a civil war setting, thus setting the stage for peaceful resolutions to domestic conflicts. Their evidence suggests that governments in power in countries with weak accountability mechanisms that have recently experienced a civil war are much more likely to ratify the ICC statutes than countries with civil wars that do have relatively strong accountability mechanisms in place. They also find that ICC ratification is associated with interruptions in civil war violence and a somewhat higher tendency for these states to sign peace agreements to address domestic war.

The International Criminal Court (ICC) is one of the newest, most ambitious, and most controversial of international organizations. The Court is designed to prosecute a small number of exceptionally serious crimes at the international level. Its ultimate justification lies in the hope that it will prevent future occurrences of mass atrocity. Whether the Court can accomplish this lofty goal, however, is far from certain. Although on paper the ICC has serious enforcement powers – it can, for example, send convicted individuals to jail for the rest of their lives – the ICC depends on state cooperation for its principal tasks. It relies on states to provide logistical support for its investigations, to arrest its defendants, and to provide its funding. This dependence on state cooperation provides a political reality check on the Court's function and constitutes one of the ICC's greatest weaknesses. The Court opened its doors in 2002 and has investigated a modest number of cases since that time. Given the difficulty of building cases involving international crimes, a slow start was to be expected. For many observers, the most startling fact about the ICC is that it came into being at all.

History of the ICC

The ICC traces its roots to the international military tribunals at Nuremberg and Tokyo set up in the waning days of the Second World War. These tribunals, established by the Allies to try defeated members of the Axis powers, each conducted one "mega trial" and then was closed (Bass 2000). In 1947, the United Nations General Assembly instructed its Committee on Codification of International Law to prepare a draft code for an international criminal court. In the heat of the cold war, however, neither the United States nor the Soviet Union found an international court to be in its interest, and the movement died a quiet death.

In 1989, Trinidad and Tobago introduced a suggestion in the United Nations General Assembly for the establishment of a specialized international court to combat transnational drug trafficking. The General Assembly, in turn, requested that the International Law Commission (the successor of the Committee on Codification of International Law) draft a proposed statute (Bassiouni, et al. 1999). This draft became the negotiating text for the ICC treaty.

The quest for a permanent international criminal court also gained steam from the creation of two temporary tribunals by the United Nations Security Council in the early 1990s. These tribunals, the International Criminal Tribunals for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), were set up in The Hague and in Arusha, Tanzania, respectively, to prosecute international crimes associated with the brutal wars that occurred in the Yugoslavia and Rwanda in the 1990s. The ICTY and ICTR, which are still in existence as of 2007, have proved expensive and slow. The jurisdiction of each court is limited to crimes committed in those countries. But they have also demonstrated that international criminal justice can be accomplished outside of the Second World War context. The ICTY and ICTR have made dramatic strides in the development of a body of international criminal law and procedure that existed only in skeletal form after Nuremberg and Tokyo. As of October 2007 the ICTY had sentenced 52 individuals and a further 53 others were in custody in the ICTY's jail and facing ongoing proceedings.[1] As of this date, the ICTR had completed proceedings against 27 individuals, six cases were on appeal, and 35 others were ongoing.[2] The qualified success of the ICTY and ICTR gave new impetus to the negotiations over the ICC. The establishment of the ICTY and ICTR was relatively uncontroversial. This was due, in part, to the fact that no members of the Security Council (with the exception of Rwanda, which voted against the ICTR) had any concern that their nationals would face prosecution in these courts. Indeed, one of the most persistent criticisms lodged against international criminal justice has been that its punishments fall solely on individuals from militarily defeated and regionally weak countries. Supporters of the ICC intended for this court to be quite a different animal. In their vision, nationals of all countries would potentially be subject to the strictures of international criminal justice. Whether this goal would be reflected in the court's jurisdiction was the principal bone of contention during the ICC treaty negotiations.

Negotiating the ICC Treaty

The final text of the ICC Treaty was hammered out in a conference held in the summer of 1998 in Rome, Italy.[3] Based on the place of its location, the ICC treaty is widely known as the "Rome Statute." Negotiators worked from the draft text that had been prepared by the International Law Commission. This text was deferential of state sovereignty and set up an enforcement scheme that has been described as "jurisdiction à la carte" (Williams 1999: 337). Like the jurisdictional scheme of the International

Court of Justice, it essentially required state consent for prosecutions on a state-by-state basis, even for states that had ratified the treaty. It also provided that the Court would not have jurisdiction over crimes arising out of any situation being considered by the Security Council under its Chapter VII authority (Williams 1999). These two considerations – the relationship of the Court to the Security Council and the prerequisites for all cases not referred by the Security Council – were the central jurisdictional questions in the negotiation of the ICC treaty.

Unsurprisingly, the permanent members of the Security Council (P-5) wanted a strong role for the Security Council. These countries advocated that the Security Council be able to refer cases to the Court and block the Court's investigation or prosecution of cases under its consideration. Essentially, the Security Council members, and particularly the United States, wanted the ICC to function as a type of permanent ad hoc criminal tribunal in the model of the ICTY and ICTR.

The drive for a strong court was led by the "Like-Minded Group" (LMG), an influential group of states composed of approximately 60 members. Led by Canada, it also included most members of the European Union (but not France), Australia, Brazil, and South Africa. The LMG shared a "commitment to an independent and effective Court" (Kirsch and Robinson 2002: 70). It generally accepted a role for the Security Council in referring cases to the Court but argued that the Court should have jurisdiction over other cases on the basis of universal jurisdiction. In this context, universal jurisdiction meant that the Court would have jurisdiction over any individual who committed a crime within the jurisdiction of the Court anywhere in the world, as long as a state party to the ICC treaty had custody over the individual. The LMG was supported to a significant degree by the hundreds of NGOs that were working at Rome during the negotiations and who are widely seen as having an influential role in the ultimate outcome of the treaty (Lee 1999: 14). The remaining states took various positions between those of the P-5 and the LMG.

Beyond the jurisdictional scheme of the court, other major debates centered on whether to have a prosecutor with the independent authority to bring cases, whether to criminalize crimes committed in civil wars, how to define crimes against humanity, and whether to include the crime of aggression within the court's jurisdiction. The United States' objective with regard to the jurisdictional scheme was simple and inflexible: No U.S. national should be vulnerable to prosecution by the ICC. When it became clear that most states wanted the Court to have jurisdiction over cases even if some members of the Security Council objected, the permanent members of the Council put forth a proposal that would have allowed states to opt out of the Court's jurisdiction over their nationals for crimes against humanity and war crimes (but not genocide) for a renewable ten-year period. This proposal did not garner significant support. The treaty's key points remained highly contentious until the last hours of the Rome Conference. The final text was presented to the delegates in the waning hours of the conference as a package deal not subject to renegotiation. The treaty was ultimately adopted by a vote of 120 states in favor, 7 against, and 21 abstentions. Among those voting against the treaty were the United States, China, and Israel (Lee 1999).

Jurisdiction and structure of the ICC

Prosecutions at the ICC are limited to cases involving three crimes, as defined in the Rome Statute: genocide, crimes against humanity, and war crimes.[4] So-called "treaty crimes," including drug trafficking and terrorism, were not included in the final treaty. Furthermore, the Court has jurisdiction only over crimes that occur after July 1, 2002, the date of entry into force of the Rome

Statute.[5] Unless the Security Council has referred the relevant situation to the Court, the ICC will not have jurisdiction unless either the state where the crime occurred or the state whose national is accused of committing the crime has ratified the Rome Statute.[6]

Three sets of entities have the ability to trigger investigations and prosecutions in the ICC. The first is States Parties to the treaty. Any state that has ratified the Rome Statute may refer a "situation" to the ICC's Prosecutor if "one or more crimes within the jurisdiction of the Court appear to have been committed."[7] The United Nations Security Council may also refer a situation to the Prosecutor under its Chapter VII powers, which are implicated by threats to or breaches of the peace and aggression.[8] Finally, the Prosecutor may trigger the jurisdiction of the ICC by commencing an investigation on the basis of information he has received; the source of the information is irrelevant.[9] The Court's prosecutor is elected by the Assembly of States Parties (ASP), the representative body composed of one member from each state. He serves for one, nonrenewable nine-year term.[10] The International Criminal Court has eighteen judges, who will each serve one, non-renewable nine-year term, although the terms of the first judges elected are of staggered lengths.[11] They are elected by supermajority vote of the ASP.[12] Any State Party to the statute has the authority to nominate a judge to the Court. The judges must be of different nationalities and must either be experts in criminal law or international law. They are also required to "possess the qualifications required in their respective states for appointment to the highest judicial offices."[13]

The most important innovation of the ICC lies in the "complementarity" regime. The complementarity system established by the Rome Statute reveals states' unwillingness to vest the Court with unfettered discretion over international crimes. The ICTY and ICTR, and the Nuremberg and Tokyo tribunals before them, had "primary jurisdiction," meaning that prosecutions at these international courts took precedence over domestic prosecutions. The scheme is reversed with the Rome Statute. Under the ICC, states with domestic jurisdiction over any possible crime first have the option of adjudicating the case in their domestic courts before the ICC can address it.[14] In technical terms, a case is not "admissible" in the ICC if a state is itself investigating or prosecuting it.[15] The admissibility procedures attempt to balance states' desire to control the Court's docket with concerns that states would exploit the complementarity regime as a way of precluding the Court from hearing a case that the state itself had no intention of pursuing. The Prosecutor can challenge the state's assertion that the case is inadmissible in the ICC because of an ongoing domestic investigation or prosecution. The Court's judges may find a case admissible in the face of a domestic investigation or prosecution if the Court determines that "the state is unwilling or unable genuinely to carry out the investigation or prosecution,"[16] or the state's decision to investigate but decline to bring charges "resulted from the unwillingness or inability of the state genuinely to prosecute."[17] The ability of the ICC to override a domestic prosecution, notwithstanding the complementarity principle, is one of the reasons cited by U.S. officials for the country's refusal to join the Court.

Membership and first cases

To many observers' surprise, many states have already joined the ICC. As of October, 2007, the Court had 104 members. There are more members from Africa than from any other continent, and Asia has the fewest. As of this writing, twenty-nine members are from Africa, twelve from Asia, sixteen from Eastern Europe, twenty-two from Latin America and the Caribbean, and twenty-five from Western Europe and "other," which includes Canada, Australia, and New Zealand.[18] There are many notable omissions

from the list of members. Non-members include China, the United States, Russia, Israel, Iran, Iraq, India, and Pakistan.

As of October 2007, the Court is investigating four "situations" involving four countries. All four of the situations arise from central Africa, a point of some controversy among court observers. The situations involve crimes committed in the Democratic Republic of the Congo, Uganda, the Central African Republic, and Darfur (Sudan).[19] The first three situations all resulted from "self-referrals," meaning that these countries themselves asked the Court to prosecute the cases. This is a surprising development, because the possibility that courts would refer situations occurring in their own countries was seen as highly unlikely during the treaty negotiations. Self-referrals are less surprising when one realizes that all these cases involve crimes allegedly committed by groups rebelling against governmental authority.[20] The Security Council referred the situation involving Darfur to the ICC. This development, like many in the history of the ICC, was also a surprise. Most observers had assumed that the United States would veto any Security Council resolution referring a situation to the ICC. With regard to Darfur, however, the United States ultimately chose to abstain in the vote over the referral.

With the exception of the situation in the Central African Republic, the ICC's prosecutor has issued arrest warrants against at least one individual in all of the situations under investigation. Symptomatic of the Court's weakness, however, only one person – of the seven for whom arrest warrants have been issued – has been arrested. The ICC's complex institutional apparatus, therefore, has thus far produced only one case that has moved beyond the preliminary phases. While early weaknesses also marked the beginnings of the ICTY and ICTR, this lack of progress provides fodder for those who accuse the ICC of being ineffectual. Supporters counter that the Court needs more time, and that the Court's success can only be measured over the long term.

Research on the probable effects of the ICC

Thus far, few social scientists have given this innovative institution close scrutiny.[21] Those who have are often skeptical of its ability to deter international crime and encourage peace and stability. Jack Snyder and Leslie Vinjamuri argue that institutions bent on doling out universal justice are likely to cause more harm than good.[22] Michael Gilligan offers a formal model that shows this is not necessarily true, however, and shows formally that an institution such as the ICC might be able to deter some atrocities "on the margins" (2006). International lawyers are characteristically (though not uniformly) more optimistic. On the one hand, those such as David Scheffer or Payam Akhavan who have had close involvement with such tribunals are likely to attribute deterrent properties to them (Akhavan 2001; Scheffer 2002). By contrast, more removed legal scholars such as Julian Ku and Jide Nzelibe argue that international criminal tribunals are hardly likely to deter crimes by government opponents, whose calculations are overwhelmingly more likely to be influenced by harsh local sanctions than by lighter and less likely international ones (Ku and Nzelibe 2006).

Optimists are likely to view international criminal tribunals as important influences on domestic values and cultural orientations toward violence (Kiss 2000); pessimists (more plentiful among international relations scholars and increasingly vocal in the legal academy (Goldsmith 2003) remain largely unconvinced of such tribunals' transformative potential (Bloxham 2006). New research is beginning to examine the empirical patterns of support for and opposition to the Court in an effort to infer motives for joining, and from those, forecasts about its probable operation. Beth Simmons and Allison Danner have

modeled the ICC as a mechanism by which leaders may make a costly commitment both to the international community and their domestic supporters and opponents to ramp down the level of violence in a civil war setting, thus setting the stage for peaceful resolutions to domestic conflicts (Simmons and Danner 2007). Their evidence suggests that governments in power in countries with weak accountability mechanisms that have recently experienced a civil war are much more likely to ratify the ICC statutes than countries with civil wars that do have relatively strong accountability mechanisms in place. Simmons and Danner also find that ICC ratification is associated with interruptions in civil war violence and a somewhat higher tendency for these states to sign peace agreements to address domestic war.

Research by Judith Kelley shows that many states have maintained their commitments to cooperate with the Court despite potentially costly pressure by the United States not to do so. Kelley argues that these states often cite a normative commitment to the principles of justice and the rule of law (2007). Although it is too early to project too much based on these findings, their research suggests that the motives many states have for submitting to the ICC may closely parallel those hoped for by its early supporters.

Conclusion

The International Criminal Court represents a significant innovation in international criminal law. For the first time, a significant number of states have been willing to acknowledge the authority under limited circumstances of the international community to prosecute nationals who have committed some of the most egregious war crimes and crimes against humanity. It is not an institution that supersedes national sovereignty in this respect; it is clearly designed to complement it. The effort to enhance the international regime for criminal justice has been quite controversial, but now over one hundred states have formally committed themselves to cooperate with and become legally bound by the ICC's statutes. Scholars are divided on the probable effects of the institution on peace and justice, although some early research suggests the potential for positive consequences. Given that the Court is still in its infancy, it is easier to establish the Court's innovative ambitions than to confirm the scope and nature of its influence.

Notes

1 "Key figures of ICTY cases." Available at http://www.un.org/icty/glance-e/index.htm.
2 "ICTR status of cases." Available at http://69.94.11.53/default.htm.
3 For a more extensive description of the Rome negotiations, see Danner 2006.
4 Rome Statute, art. 5. The Rome Statute also gives the Court jurisdiction over the crime of aggression. The delegates at Rome, however, could not agree on a definition of aggression. Aggression will come within the jurisdiction of the Court once the Assembly of states parties amends the Rome Statute to include a definition of aggression. Rome Statute, art. 5(2). According to the terms of the Rome Statute, the earliest such an amendment can occur is in 2009, 7 years after the entry into force of the Treaty. Rome Statute, art. 121(1).
5 Rome Statute, art. 11(1). If a state ratifies the Rome Statute after July 1, 2002, the ICC will only have jurisdiction over crimes committed after the entry into force of the Treaty for that state. Rome Statute, art. 11(2).
6 Rome Statute, art. 12(2). A state may also accept the jurisdiction of the Court on an ad hoc basis with regard to that particular situation. Rome Statute, art. 12(3).
7 Rome Statute, art. 14.
8 Rome Statute, art. 13(b).
9 Rome Statute, art. 15(1).
10 Rome Statute, art. 42. The ASP elected an Argentian, Louis Moreno-Ocampo, to serve as the ICC's first prosecutor.
11 The ICC's first group of judges was elected in February 2003. The following judges were elected (country of origin in parentheses): Rene Blattman (Bolivia), Maureen Harding Clark (Ireland), Fatoumata Dembele Diarra (Mali), Adrian Fulford (United Kingdom),

Karl T. Hudson-Phillips (Trinidad and Tobago), Claude Jorda (France), Hans-Peter Kaul (Germany), Philippe Kirsch (Canada), Erkki Kourula (Finland), Akua Kuenyehia (Ghana), Elizabeth Odio Benito (Costa Rica), Gheorgios M. Pikis (Cyprus), Navanethem Pillay (South Africa), Mauro Politi (Italy), Tuiloma Neroni Slade (Samoa), Sanghyun Song (Republic of Korea), Sylvia H. de Figueiredo Steiner (Brazil), and Anita Usacka (Latvia). The full listings are available at http://www.un.org/law/icc/elections/results/judges_results.htm. There have since been additional elections.

12 Rome Statute, art. 36(6).
13 Rome Statute, art. 36.
14 See Rome Statute, Preamble (emphasizing that the ICC "shall be complementary to national criminal jurisdictions").
15 See Rome Statute, art. 17. One commentator has labeled Article 17, which sets out the admissibility procedures, as "one of the most sensitive provisions of the Rome Statute." (See Holmes 2001: 335.)
16 Rome Statute, art. 17(1)(a).
17 Rome Statute, art. 17(1)(b).
18 States parties to the Rome Statute, http://www.icc-cpi.int/statesparties.html.
19 International Criminal Court, Situations and Cases. Available at http://www.icc-cpi.int/cases.html.
20 A state that refers a situation to the Court, however, cannot limit the subject of the referral to particular individuals, so these countries run the risk that the prosecutor may choose to prosecute individuals affiliated with these states' governments.
21 Exceptions include Fehl 2004.
22 Snyder and Vinjamuri 2003–04. For a contrary view, arguing that the ICC in fact sets parameters in which political settlements can take place, see Méndez 2001.