

Advancing Human Rights and Assessing the Future Potential of the ICC

Randy Moore

The issue of maintaining and advancing human rights in the world is one of great importance to most nations of the world. The human rights violations that occurred in the 1990s, most notably the Rwandan and Bosnian genocides, led to an intense examination of how to best prosecute and prevent such crimes from occurring again. Nations of the world took note of the extremity of the crimes of which had occurred in the 1990s and realized that an International Criminal Court (ICC) needed to be established in order to best maintain peace and order within the international community. The idea of having an international court to prosecute criminals who committed heinous international crimes first came up following the Nuremberg Trials in 1948.¹ However, it was not until the genocides in Rwanda and former Yugoslavia that the international community, in particular the UN Security Council, took serious steps towards creating the ICC.² The court finally came into being in 2002 after a period of four years where it was intensely debated and worked on in order to make it fit to serve its purpose.

This creation of the ICC did not, however, go over well with every nation. The prominent nations who chose not to join the ICC,

China, Israel, Russia and the United States, have all made it clear that they have issues with the court and the way in which it is structured and functions.³ The United States in particular has been very vocal in its opposition to the ICC under the Bush Administration.⁴⁵ This opposition, it can be argued, has been a serious impediment towards the advancing of human rights and accountability in the world, as the absence of the US in an international body, such as the ICC, has the potential to lead to its downfall, as evidenced by the League of Nations.

This essay will examine the ICC's potential for advancing human rights and accountability in the world while focusing on, among other things, the United States' refusal to sign onto the Rome Statute and join the Court. This essay will start by looking at the Rome Statute and examine both the offences that it deals with as well as the powers that it gives the Court to enable the prosecution of said offences. The essay will then examine the four court cases that the ICC has brought to trial so far since its inception in 2002. These include situations in Uganda, the Democratic Republic of Congo, the Central African Republic, and Darfur. It will be determined just how well the court has done its job by looking at how the aforementioned cases have been dealt with and how many prosecutions have been successful with respect to these cases. It will then be determined why the United States did not sign onto the Rome Statute and what problems this has and will continue to pose for both the ICC and the international community. Finally, it will be determined what contributions the ICC has made, is making and will make in the future. By the end of the essay, a thorough examination of the ICC will be given and it is hoped that the answer of whether the ICC has potential to advance human rights and accountability in the world, and how much potential, will be reached.

The Rome Statute

The Rome Statute was the document that declared the creation of the ICC. It was adopted in July 17, 1998 with "120 votes in favor, 7 against and 21 abstentions."⁶ It became a legally binding document and officially established the ICC on July 1, 2002.⁷ In order to ensure that the Court is not wasting its time on the many minor and less serious offences that states commit, which would lead to the Court taking up thousands of cases, the Rome Statute specifically stated the four crimes that are in the jurisdiction of the Court. In Article 5(1) of the Rome Statute, it says that Court will only deal with the "most serious crimes of concern to the international community" and lists the most serious crimes as genocide;

crimes against humanity; war crimes; and crimes of aggression.⁸ For all crimes listed, with the exception of crimes of aggression, there are set definitions of each with examples of what actions must have occurred in order for a crime to be legally recognized. As per the aforementioned crimes of aggression, the Statute explicitly states that the ICC will not prosecute or handle crimes of aggression until all state parties who ratified the Statute agree on the definition of the crime and the methods of which the court will prosecute offenders.⁹

Two offences that are notably missing from the list and which have been brought up by other states are that of terrorism and drug trafficking.¹⁰ Terrorism is now seriously being considered to be added at the 2009 review conference, especially with the aftermath of the September 11th attacks.¹¹ Drug trafficking will also be considered for addition in 2009; however, it has been deemed as having too broad a scope for the ICC to focus on as it would take up too much of the Court's resources and time.¹² While this argument should be taken into consideration, it should also be noted that drug trafficking leads into and funds many other international crimes and a well planned crackdown on the international drug trade could prove beneficial towards shutting down and preventing other international crimes.

The Rome Statute also gives special powers to the ICC that enable it to take action against nations who commit those crimes. These special powers include having jurisdiction over individuals rather than states, the ability to investigate a criminal situation which has been brought to the prosecutor's attention by a state party, the ability to follow up on a state party's investigation of the situation within its jurisdiction when the state party claims that they are pursuing said investigation, the ability to punish persons who commit crimes in accordance with the Statute, and the ability to try any person who commits those crimes listed, regardless of immunities or special procedural rules that a person may have.¹³ The three main powers, however, are the powers of referral, deferral and the ability to determine what constitutes a crime of aggression.¹⁴

However, for the most part these are "complementary powers" which rely on the consent of states. This can lead to many procedural problems and has led to some scholars to note that "the ICC depends upon the compliance of states at virtually every stage of its legal procedure."¹⁵ The ICC can only take action against crimes that are committed after the Statute has entered into force.¹⁶ The ICC's jurisdiction and power are also limited because they only have jurisdiction "over violations within its subject jurisdiction in cases where the perpetrator is a

national of a state party or when the crime was committed on the territory of a state party” unless the case has been referred to the prosecutor by the UN Security Council (UNSC).¹⁷ The ICC is limited by its ability to only deal with cases that cannot be handled by the state party’s national judicial system.¹⁸ The ICC is not binding, as it was not based on a UN Chapter VII decision, which means that states that did not sign and ratify the Rome Statute are not bound by it.¹⁹ This is yet another limitation on the powers of the ICC and its ability to prosecute crimes on an international scale. If a state is not a party of the Rome Statute and the ICC wants to investigate the events that are occurring within that state, the only way this is allowed is with the authorization of the UNSC.²⁰ There have also been cases where the war criminal has been indicted by the court, but who is never brought in front of the court because the nation’s own authorities refuse to arrest the criminal and transfer him or her to the ICC.²¹ This is the case in Darfur, where two war criminals have been issued arrest warrants by the ICC, but whose national police force claims that the ICC has no jurisdiction with regards to the situation in Darfur and has thus refused to hand over the two criminals to the ICC.

ICC Cases

As of the time this paper is being written, there have only been four cases taken up by the ICC: the case against Northern Uganda, the case against the Democratic Republic of Congo (DRC), the case against Darfur, and the case against the Central African Republic (CAR).²²

Uganda

The case against Uganda occurred on December 16, 2003, when Uganda made a referral to the prosecutor regarding the Lord’s Resistance Army (LRA) and their atrocities against the Acholi people.²³ By 2005, the five LRA leaders, Joseph Kony being the most senior leader, were indicted by the ICC and charged with crimes against humanity and war crimes.²⁴ An arrest warrant was issued for Kony and the other leaders; however, Kony stated that “he would not surrender unless granted immunity from prosecution.”²⁵ With the lack of cooperation from Kony to turn himself in to the Ugandan authorities until the ICC indictments are dropped and no way for the ICC to force the local Ugandans to turn him over,²⁶ the case against the LRA in Uganda is one example of the problems facing the ICC since its inception. Kony will not turn himself in until he knows that he will not be prosecuted by the ICC and there are some who argue that

if Kony was prosecuted and charged under the ICC, that he will be living the good life in jail compared to those in Uganda who he persecuted for many years.²⁷ Therefore, some argue that the reason why Kony will not turn himself in is because he knows that once he gives himself up to the Ugandan authorities that they will have mob rule justice against him and he will not make it out alive.²⁸

The Ugandan case also brings up a quandary with regards to how to interpret Article 17 of the Rome Statute. Article 17 outlines the criteria that needs to be present for the ICC's jurisdiction to be irrelevant and the case to be inadmissible.²⁹ Article 17 states that if the state in question is unwilling or unable to implement jurisdiction, that the ICC can step in and prosecute the criminals; however, if the state is willing and able to prosecute the criminals under their own national legal system, then the ICC does not have jurisdiction over the matter.³⁰ Payam Akhavan's article brings up the dilemma of what happens when, as with the case of Uganda, the state is both willing and able to prosecute the criminals, but they have decided to postpone their own investigations and prosecutions and hand the situation over to the ICC?³¹ It can be argued that this transfer of responsibility towards the LRA case stems from the fact that the Ugandan authorities had been attempting to stop the LRA's crimes for years offering blanket amnesty towards the leaders, but had failed to make any real progress. However, with the creation of the ICC, Uganda finally saw the chance to use an international court that was built to deal with situations like theirs and felt that if they handed the situation over to the ICC that they would have more success with their powers to capture Kony and bring him to trial. So far Kony has not been brought to justice and his fugitive status looms over the ICC.

Democratic Republic of Congo

The case against the DRC was brought forth on March 3, 2004 with regards to the grave situation in the Ituri region of the DRC.³² The situation regarded a Thomas Lubanga Dyilo, who was issued an arrest warrant for recruiting child soldiers under the age of fifteen via abducting them from their homes, schools and on the road and then threatening their families with death if they refused to give up their children as soldiers.³³ While child soldiers are the main focus point of the warrant issued, Congo has been an area of absolute calamity with regards to humanitarian crises, with "reports of mass killings, rapes, cannibalism, and other gross violations of human rights."³⁴ The complete lack of any judicial system in the DRC was also one of the main reasons why the Congo situation was im-

mediately pertinent to the ICC's jurisdiction under Article 17, as there was no way that the DRC could legally handle the situation within its own domestic jurisdiction.³⁵ It is for this reason that the initial ICC plan to arrest and prosecute each and every offender of war crimes individually in the DRC had to be redrawn as a plan to only arrest and prosecute the top leaders of the offenses, because if the ICC chose to prosecute every single individual offender in the DRC, it would have to do so by itself as the DRC has no workable judicial system.³⁶ The result of this would be the ICC using up years of its time and resources taking hundreds or even thousands of Congolese to court.

However, the DRC case under the ICC has turned into its most successful case so far. Three of the four offenders, including Lubanga, who have arrest warrants issued against them have been captured and transferred to ICC custody.³⁷ They are now awaiting trial. While some may argue that the trial proceedings and formalities that are leading up to their convictions are taking too long, (eg. Lubanga has been at the ICC since 17 March 2006), it can also be argued that the ability of the ICC to catch the top war criminals in the state using the international mechanisms available to them shows promise for the Court and displays that the Court is learning as it goes along. The real lack of any judicial system in the DRC enabled the ICC to take full control over the methods and manner in which they were able to go after their top criminals without having to deal with any need for any domestic approval from the DRC in order to satisfy Article 17 conditions.

Darfur

The referral on the situation in Darfur was put forward on 31 March 2005 by the UNSC via Chapter VII of the UN Charter.³⁸ The decision was near unanimous, with four nations abstaining from voting and none against.³⁹ The decision came at the behest of the UN after a UN Commission of Inquiry conducted an investigation into the Darfur situation and created a report outlining the atrocities that had been taking place in the region since 1 July 2002.⁴⁰ This led to the ICC Prosecutor, Luis Moreno-Ocampo, to open an investigation into the Darfur situation on 6 June, 2005.⁴¹ The crimes that had been committed were crimes of murder, torture, rape, forced displacement, and the pillage and destruction of villages.⁴² These constituted war crimes and crimes against humanity; however, it had been determined by the Commission of Inquiry that the Sudanese government "had not pursued a policy of genocide."⁴³ The ICC took action against the Sudanese humanitarian affairs minister Ahmad Muhammad

Harun, and against the Sudanese militia known as the Janjaweed, led by Ali Kushayb.⁴⁴ Recently they have also issued an arrest warrant against the President of Sudan Omar al-Bashir charging him with crimes of genocide, crimes against humanity and war crimes in Darfur.⁴⁵

Problems, however, have arisen with regards to the case. While the arrest warrants have been handed out and several investigations have been made, with sufficient evidence having been collected to prove the crimes have been committed, the Sudanese authorities have made announcements that they refuse to arrest the indicted persons involved⁴⁶, proving a flaw within the ICC's capabilities. It has been suggested that in order for situations like Darfur to be remedied, the parties of the ICC who want the criminals brought to justice need to help the ICC to capture the indicted war criminals by taking direct action.⁴⁷ It also has to be noted that while the UN has issued peace missions to be undertaken in the Darfur region, the goals of these peace missions are not to capture war criminals.⁴⁸ This means that any UN support that the ICC has been able to get within the Darfur region has not been focused towards achieving the same goal. It is a lack of cooperation with the ICC by the UN and other states that has led to the inability to secure the capture of the indicted war criminals in Darfur. It also does not help the ICC's situation when three of the permanent members of the UNSC, China, Russia, and the US, of whose involvement in peace missions is essential, are not members of the ICC.⁴⁹

Central African Republic

The situation in the CAR was brought to the ICC's attention on December 2004 under referral from a representative of President Bozizé with an investigation being initiated on 7 January, 2005.⁵⁰ A mission was sent to the country in late 2005 to decide whether to proceed with an investigation, with initial reports pointing towards waiting to see whether the domestic justice system could handle the problems.⁵¹ However, after the Pre-Trial Chamber progress report arrived, it was decided by the Prosecutor to move forward with the case as quickly as possible.⁵² However, it was not until 22 May, 2007 that the Prosecutor of the ICC opened up a formal investigation of the CAR.⁵³ The investigation cited crimes that occurred in CAR, mainly during the 2002-03 armed conflict. The crimes included murder, looting, and rape.⁵⁴ The rape in particular was the most prevalent crime, as it was reported to have occurred on a mass scale with "at least 600 victims identified in...5 months."⁵⁵

An arrest warrant was issued for Jean-Pierre Bemba under the charges of crimes against humanity and war crimes. He was arrested on 24 May, 2008 in Brussels, Belgium⁵⁶ and subsequently transferred to the ICC after requests were made to the Kingdom of Belgium.⁵⁷ He is currently standing trial at The Hague and will eventually either be convicted or released if he is found innocent. This can be viewed as another success story of the ICC, where the accused war criminal Bemba was issued an arrest warrant, was arrested by Belgian forces who decided to transfer him to The Hague, and now is currently in the midst of a trial to determine his fate and hopefully find justice for all the victims of the atrocities that occurred under his reign.

United States and the Rome Statute

As mentioned in the section on the Rome Statute, the creation of the ICC did not come without its detractors and skeptics. The most notably outspoken and vocal opponent of the ICC has arguably been the United States under the Bush administration. When the Rome Statute was created in 1998, it was done so under the Clinton administration. While Clinton did not vote for the creation of the ICC, as NGOs had transformed the Court into something not in line with the US vision, he worked prominently over the two years remaining in office in order to make the Court the best that it could possibly be.⁵⁸ This all changed when the Bush administration came into power, as they unsigned the Rome Statute and notified the UN that it no longer would be part of the ICC.⁵⁹ According to the US Policy regarding the ICC, the main objection that the US has to the ICC is the ability for the ICC to prosecute a citizen of the US without the US Government's consent as well as the claim that the ICC "lacks necessary safeguards to ensure against politically motivated investigations and prosecutions."⁶⁰ The US also objected to the inclusion of crimes of aggression in the Rome Statute, the principle of complementarity with regards to who the Court could prosecute even without State Party consent, and the Chief Prosecutor's power of *proprio motu*.⁶¹

It can be argued that under the Bush administration there are serious fears that with the lack of international support for the US and its foreign policy that signing onto the ICC would enable numerous states to bring cases against the US, harming the Bush doctrine and Bush's plans to unilaterally rid the world of terrorism. The Bush administration has taken measures to ensure that the US military forces will not have chance of being prosecuted by the ICC. Included in these measures is the

barring of US military assistance to states who have signed onto the Rome Statute, unless those states are NATO allies, major non-NATO allies, or Taiwan.⁶² The Bush administration also pushed for immunity for any US troops that were working with a UN peacekeeping force arguing that even ICC supporters agree that some countries may waver with regards to participating in UN peacekeeping missions if their personnel have the chance of being prosecuted under the ICC.⁶³ While UN General Secretary Kofi Annan assured the US that the ICC would only be prosecuting those who commit the most heinous crimes, as outlined in the Statute, and to the best of his knowledge, these crimes come nowhere near anything the UN peacekeepers have done in any mission, the US holds firm that it does not trust the ICC and its abilities to infringe on state sovereignty.⁶⁴

In a counter argument to the US's position on the ICC, one can argue that the infringement of state sovereignty for the purposes of maintaining peace and human rights is exactly what the US did with regards to the invasion of Iraq in 2003. The objection of the US to the ICC on the grounds of infringement of state sovereignty is "not available to the US, which has shown a willingness to sacrifice state sovereignty for the sake of defending certain fundamental rights."⁶⁵ The Bush administration acts as a rogue state on the international stage. While they want to advance human rights and peace in the world, they want to do so using whatever means necessary and the ICC has the potential to intervene in their missions if word gets out that they are committing war crimes and atrocities against the enemy. This reluctance of the US to cooperate with the ICC on humanitarian cases has been a huge impediment on the effectiveness of the ICC as the US is one of the most powerful nations in the world and a permanent member of the UNSC. As the ICC needs UNSC approval in order to engage in investigating cases of states not part of the Statute, US refusal to help the ICC on these matters has led to many procedural issues that make arresting and prosecuting war criminals more difficult. However, there is hope for future cooperation of the US with regards to the ICC, as President-elect Barack Obama has stated that the US should ratify the Rome Statute and "cooperate with ICC investigations in a way that reflects American sovereignty and promotes our national security interests."⁶⁶

ICC Contributions and Future Potential

While it has not achieved all of the goals that it set out to achieve so far, the ICC has managed to make some contributions towards advancing

human rights and accountability in the world. It has undertaken four of the gravest situations occurring in the world right now and initiated investigations which have led to the issuance of twelve arrest warrants. Of these arrest warrants, four have been taken into custody, six maintain their fugitive status, and two have been confirmed as dead. It has yet to be seen how long the trials will last before convictions and sentences are handed out; however, the mere fact that the ICC has been able to take four war criminals into custody should be seen as an accomplishment. With the arrests of those involved in war crimes in the DRC and the CAR, the accountability of state leaders and rebel groups has increased. Those who commit the crimes stated by the Rome Statute will need to be wary of their possible arrest and conviction in order to atone for the crimes that they have committed. With many states of the world having signed onto the Rome Statute, it can be argued that the ability for the ICC to arrest criminals in the world has been made easier, as long as the crimes have taken place within a state that ratified the Statute.

However, with every positive outcome of the ICC, there are negative outcomes as well. Those war criminals in the areas of Darfur and Uganda have, for the most part, been able to escape justice. The constant reliance on cooperation from signatory and, occasionally, non-signatory states has caused problems with regards to the ICC's ability to arrest war criminals, as not all states are willing to give up their war criminals and not all states are willing to work within the ICC in order to catch said criminals. The cases which have been tied to the UNSC have given the ICC more jurisdiction over the states that are harboring the war criminals and not cooperating with ICC orders; however, the fact that the US is a permanent UNSC member and also an outspoken critic of the ICC, has led to roadblocks for the ICC even when UN involvement has been a factor.

The actions and accomplishments of the ICC so far show that its future potential is immense. This argument stems from the fact that the incoming Obama administration is an outspoken supporter of the ICC and the Rome Statute, indicating a complete reversal of the less enthusiastic Bush administration. The trials of the arrested war criminals that are under way can only serve as learning experiences so the ICC is better learned for the next time they decide to take on a case; the same can be said of the failed cases against Darfur and Uganda. While some argue that the ICC and its mandate "will require justice at the expense of peace"⁶⁷, meaning that governments which grant amnesty to war criminals as part of peace deals will not be given a free pass by the ICC, it can also be argued that the governments who make peace deals with war

criminals have no way to ensure that the war criminals abide by their peace deals. The other problems arise from the fact that many war criminals who are committing crimes are the governments themselves, thus creating the impossibility of a government granting itself amnesty in return for peace within its nation. It is situations like these when the ICC is most needed and can become most effective, especially with support of the UN and the newly pro-ICC US government.

Conclusion

In conclusion, it has been shown that the ICC has had a rough start and has been criticized from a few sides with regards to how effective and legal the Court actually is. Its lack of jurisdiction in states which are not signatories of the Rome Statute and the lack of cooperation from all states with regards to capturing criminals has led to some undeniable setbacks, most notably in the Darfur region. However, the cases of the DRC and the CAR have given hope to those who believe in the power of an international court. The UN is continuing to help the ICC when it can and authorizing it to investigate cases that are not solely within the ICC's jurisdiction. This gives the ICC more power and ability to investigate and prosecute those who believed that they could get away with their crimes. The major turning point in the ICC has recently come with the election of Obama and his support for the ICC and his call for the US to ratify the Rome Statute. This signals the turning of the page in the history of cooperation with the ICC, as its most powerful and outspoken opponent under the Bush administration has the potential to turn into its biggest ally. With the support of the US within the UNSC, getting UNSC approval for investigating cases normally outside ICC jurisdiction becomes much easier and has the potential to make the world much safer.

Notes

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⁴ Author Unknown, "Efforts to Obtain Immunity from ICC for U.S. Peacekeepers," *The American Journal of International Law* Vol. 96, No. 3 (July 2002): 725.

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⁷ W. Chadwick Austin and Antony Barone Kolenck, "Who's afraid of the Big Bad Wolf? The International Criminal Court as a weapon of asymmetric warfare," *Vanderbilt Journal of Transnational Law* Vol. 39, No. 2 (March 2006): 295.

⁸ International Criminal Court, *The Rome Statute*, 17 July 1998, 3.

⁹ *Ibid.*

¹⁰ United Nations Department of Public Information, *The International Criminal Court*.

¹¹ *Ibid.*

¹² *Ibid.*

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¹⁵ Majbritt Lyck, *Peace Operations and International Criminal Justice: Building Peace After Mass Atrocities* (New York: Routledge Publishing, 2009), 91, and Danner, *Enhancing the Legitimacy*, 527.

¹⁶ International Criminal Court, *The Rome Statute*, 10.

¹⁷ Lyck, 30.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Author Unknown, "U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC," *The American Journal of International Law* Vol. 99, No. 2 (April 2005): 501.

²¹ Lyck, 32.

²² Author unknown, "International Criminal Court: Situations and cases," *International Criminal Court*, 3 October 2008, <<http://www.icc-cpi.int/cases.html>> (22 November 2008).

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²⁴ Paul Jeffrey, "Hope for Uganda," *America* Vol. 199 No.4 (August 2008): 11.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*, 12.

²⁸ *Ibid.*

²⁹ Akhavan, 413.

³⁰ Ibid.

³¹ Ibid.

³² William A. Schabas, *An Introduction to the International Criminal Court*, (New York: Cambridge University Press, 2007), 42.

³³ Ibid, 44.

³⁴ Mahnoush H. Arsanjani and W. Michael Reisman, "The Law-in-Action of the International Criminal Court," *The American Journal of International Law* Vol. 99, No. 2 (April 2005): 397.

³⁵ Ibid, 398.

³⁶ Ibid, 399.

³⁷ Anonymous, "Statement by the Office of the Prosecutor following the transfer to The Hague of Mathieu Ngudjolo Chui," from *The International Criminal Court*, February 7, 2008. <http://www.icc-cpi.int/pressrelease_details&id=330&l=en.html> (23 November 2008).

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⁴⁷ Ibid, 221.

⁴⁸ Ibid, 222.

⁴⁹ Ibid.

⁵⁰ Schabas, 52.

⁵¹ Ibid.

⁵² Ibid.

⁵³ International Criminal Court, "ICC-OTP-BN-20070522-220-A_En," from *International Criminal Court*, May 22, 2007. <http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220_A_EN.pdf> (23 November 2008).

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⁶³ Author Unknown, *Efforts to Obtain Immunity*, 725.

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⁶⁵ Harrington et al., *Introduction*, 14.

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