How International Is International Criminal Justice?

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US reluctance to cooperate with the ICC and its effects on the ICC's legitimacy: how international is international criminal justice?

The horrible atrocities committed during World War II influenced many people to come to the conclusion that adopting codes of conflict was not enough. In order for such rules to be effective, an enforcement mechanism operating through criminal prosecutions must exist. Consequently, two tribunals at Nuremberg and Tokyo were established immediately after the war with the aim to prosecute German and Japanese crimes. Although these two tribunals did contribute greatly to the development of international criminal justice by prosecuting numerous high-rank officials who were responsible for some of the worst crimes against humanity, they suffered from great criticism. Namely, the two tribunals were often accused of seeking 'victor's justice', since no crimes committed by the victors were prosecuted, including the Katyn massacre of Polish officers by the Soviets and the fire-bombing of cities such as Dresden and Tokyo.

The Geneva Convention in 1949 identified notions such as 'war crimes' but did not help international criminal justice progress much due to the beginning of the Cold War. Soon after the Cold War was over, the world was struck by terrible crimes that had not been seen since 1940s: mass manslaughters in Rwanda and the former Yugoslavia. Both resulted in creation of ad-hoc tribunals—the International Criminal Tribunal for Rwanda based in Arusha, and the International Criminal Tribunal for the former Yugoslavia in The Hague. While the ICTR and ICTY have often been exposed to severe criticism, they are also praised for abolishing victor's justice in the international criminal justice system by prosecuting war criminals from all sides involved in conflicts, and by appointing judges and personnel who had nothing to do with the crimes whatsoever.

Nonetheless, most attention is paid to the International Criminal Court, an independent permanent body based in The Hague, aiming to provide justice to the victims and punishment to the criminals worldwide. The biggest issue the ICC is facing today is the lack of support by many great powers, most notably the United States. The USA is one a few democratic countries that is not a member of this institution, and it is the one that definitely affects the work of the Court the most. The aim of this paper will therefore be to examine whether international criminal justice is indeed "international" if American officials cannot be prosecuted for their crimes; in addition, this paper will analyze the USA's reluctance to cooperate with the ICC, as well as the shift in its foreign policy towards the ICC, and attempt to prove that the legitimacy of the ICC is indeed questioned due to the lack of US support.

Calling for an international criminal court

On 17 December 1996 the UN General Assembly (GA) scheduled a diplomatic conference to be held in 1998, with a goal to finalize the adoption of a convention that would establish an international criminal court. Consequently, the Preparatory Committee was created by the GA, which stressed the cooperative spirit of the international community in its reports later on. This notion of 'cooperative spirit' is very important since it was completely opposed to the previous reluctance of the international community to establish such a court. Perhaps the sudden interest arose due to the fact that crimes against humanity and genocides were again being committed, despite of the abolishment of those war practices and the establishment of the UN decades before (Begbeder 1999, p. 186). To be more precise, two years prior to the UN's decision to establish an international criminal court, the world had experienced the two

most horrific events that occurred after WWII: the Rwandan genocide and the Bosnian war. Hence, this lack of effective and fair national justice in many countries led to severe atrocities resulted in the need of the international community to establish an international court, whose birth is considered to be a significant victory as well as a historical advance for international justice (Begbeder 1999, p. 186-7).

Whereas the Nuremberg and Tokyo tribunals were clear advocates of victor's justice, the creation of the ICTY and the ICTR made an impact with regards to showing that it was possible to establish truly international criminal tribunals that appoint judges, prosecutors and other judicial personnel, and to prosecute perpetrators from all sides involved in the conflict. Nonetheless, the creation of these two tribunals by the UN Security Council (UNSC) was also exposed to criticism. The UNSC's choices were often questioned—why did the Security Council choose the former Yugoslavia and Rwanda specifically, and why not crimes committed by the USA or Iraq, for instance? In addition, these tribunals were established to try crimes committed within a specific time frame and during particular conflicts; hence, there was a general belief that a permanent criminal court was needed (ICC 2013). Some of these questions of legitimacy were to be answered by the creation of the International Criminal Court (ICC), whose competence was supposed to eventually extend to all countries. However, the institution failed to complete these tasks the moment the United States, as the most powerful country in the international arena, refused to join.

The creation of the ICC was preceded by multilateral intergovernmental negotiations, resulting in a formal international treaty to be approved and ratified by all countries (Begbeder 1999, p. 187). The US was one of only seven states that voted against the Rome Statute in 1998, along with Israel, China, Iraq, Libya, Yemen and Qatar, and it has not become a member to the present date (Human Rights Watch 2013). Today, the ICC lists as its mission as helping "end impunity for the perpetrators of the most serious crimes of concern to the international community" (ICC 2013). Although its creation was organized by the United Nations, the ICC operates as an independent international organization, not as a part of the UN system. As of 1 May 2013, the ICC has 122 member-states, which are obliged to fully cooperate with the Court and help its investigations and prosecution by arresting persons wanted by the Court, providing evidence, relocating witnesses and enforcing the sentences of convicted persons (ICC 2013). These include almost all European countries, in addition to numerous states from Africa, Latin America and Asia. However, the ICC has not managed to influence the US to join for over a decade of its work. On the other hand, the US did manage to make a great impact on the work of the ICC.

The problems with not ratifying and how we got there

Choosing not to ratify the ICC statute put the US in a position where it is neither subject to the Court's jurisdiction nor obliged to provide cooperation. Unlike its precedents the ICTY and the ICTR—which, being part of the UN system, impose a strict legal obligation on all UN member states to cooperate—the ICC leaves this obligation to operate on voluntary basis for the states that have not ratified the Rome Statute (Peskin 2002 p. 251). This loophole in executive power can be seen as the main root of the problems the ICC is facing today. Even though the Clinton administration was not the biggest fan of the establishment of the ICC, a significant change in foreign policy was detected only with the beginning of Bush's mandate.

What was listed as the greatest concern of the Bush administration back in 2002 when the Rome Statute entered into force, was the prospect that the ICC might exercise its jurisdiction to conduct politically motivated investigations and prosecution of the US military and political officials (Human Rights Watch 2003). For the Bush administration, the ICC was perceived as a threat to American exceptionalism. This reluctance to cooperate with the ICC soon culminated in the American Service Members' Protection Act of 2002, banning the US government from lending support to the ICC. The so-called 'Hague invasion clause' was included in the Act, authorizing the President to "use all means necessary and appropriate" to free American personnel held in custody by the ICC (Peskin 2002 p. 252). In addition, it provides for the withholding of US military aid for governments ratifying the Rome Statute and a prohibition to US peacekeeping activities unless immunity from the ICC is guaranteed for its personnel (Human Rights Watch 2003). This renunciation of the Statute marked the beginning of a comprehensive US campaign to undermine the ICC and a much more hostile foreign policy.

First, the Bush administration tried to negotiate a UNSC resolution that would exempt US personnel operating in UN

peacekeeping operation, which failed with the peacekeeping operation in East Timor (Peskin 2002 p. 251). Then, the US requested that its peacekeeping personnel be exempt from ICC jurisdiction in any operations. This immunity was not only approved, but also renewed the following year with a Security Council vote 12-0 in favor, with France and Germany both withholding their vote. The Secretary General at the time, Mr. Kofi Annan, said that both the ICC and the UNSC would be undermined if such renewals turned into an annual routine (Crawshaw, 2003). He pointed out that no UN peacekeeper of any nationality has been accused of a crime 'anywhere near the crimes that fall under the jurisdiction of the ICC' (quoted in Crawshaw, 2003). The ICC is, after all, the court of last resort, prosecuting only the most serious crimes and only where national courts are incapable or unwilling to prosecute. One would assume that the US, as a democratic country, is not eager to commit atrocities on a grand scale, so where did this fear come from? Perhaps US fear of politically motivated cases is justified, but the ICC safeguards this and makes it hard for malicious cases to avoid judicial first base. Still, the UNSC refused to renew the immunity again in 2004 after pictures emerged of US troops torturing and abusing Iraqi prisoners, so the US eventually had to withdraw its request (ICC 2013).

Furthermore, the Bush administration requested states worldwide to approve bilateral, so-called "impunity" agreements that would not require them to surrender any American nationals to the ICC. By the end of Bush's term in 2008, over 100 bilateral impunity agreements (BIAs) were signed (A Campaign for US Immunity from the ICC, 2013). This clearly led to the creation of a "two-tiered" rule of law for the most severe international crimes—one applying to US citizens, and another that applies to everyone else (Human Rights Watch 2003). Even though the US claimed that it did not pressure any of the states to sign BIAs, some US government officials said that any state's unwillingness to sign had affected US support for its membership in NATO. Different reports in the media and by foreign officials claim that threats of cutting both military and non-military aid were made towards smaller countries (A Campaign for US Immunity from the ICC, 2013). This so-called 'bullying'was proven when the US ambassador to Zagreb published an open letter warning that Croatia would lose $19 million in military assistance if it failed to sign the BIA. Another example would be Caribbean countries that have been threatened to lose hurricane assistance (Crawshaw, 2003).

Why does the ICC need the US?

It is often claimed that the lack of US support has lasting implications for the ability of the ICC to bring war criminals from other countries to trial, since the ICC has not been able to turn to Washington for much needed support in providing evidence for atrocities that have occurred in particular states (Perskin 2002 p. 252). The ICC is barely a bit more than a "paper tiger" without the support of the US as the most powerful state in the world (Kersten 2012). The US decision not to become party to the Rome Statute renders American war crimes immune to ICC prosecution, including those that may have already been committed in Iraq and Afghanistan (Peskin 2002 p. 252). Instead of being submitted to the international justice system like any other state that ratified the Statute, the US seems to do the exact opposite, doing its best to prevent a crucial judicial instrument from building up its strength. Does this mean that the US is conducting its own "international" justice? In her article "The Wrong Kind of American Exceptionalism", Barbara Crossette (2003) criticizes the US by saying that countries that represent the majority of the world's population are not as powerful as, for example, the EU, and they cannot stand down the US but are left to fight lonely battles against the US government with no international support. She also raises the question of why the state that established the principles of war crimes trials in Nuremberg and Tokyo and advocated for the creation of the ICTY and the ICTR is now so eager to destroy a court that promotes criminal justice worldwide (Crossette, 2003). Perhaps the real difference is the lack of American vulnerability in any of those ad-hoc tribunals as opposed to a complete and constant disposal the US would have to face at the ICC.

The shift in foreign policy under the Obama administration

In 2004, then-Senator Barack Obama said that the US should *"*cooperate with ICC investigations in a way that reflects American sovereignty and promotes our national security interests" (Statements of Barack Obama on the International Criminal Court, 2011). This was considered to be a big step, and indeed, with regards to the ICC, a lot of changes in US foreign policy have been made since Obama became president in 2009. According to the US Department of State, the US cooperates with the ICC only when it is consistent with US law and in the national

interest to do so. Under the Obama administration, the US has been supporting prosecutions by providing assistance to certain requests made by the ICC prosecutor. Since November 2009, the US has participated as an observer in the ICC Assembly of States Parties (ASP) meetings (US Department of State, 2013). A clear example of better cooperation was the UN resolution that imposed tough sanctions against Libya in 2011, which was the first time that the US supported the ICC. However, this still means that if in 2011 the US dropped a bomb in the no-fly zone in Libya, accidentally killing civilians, then those responsible for the attack would be subject to the jurisdiction of a US court only (Lederer, 2011).

In defense of this argument, David Scheffer, former US Ambassador-at-Large for War Crimes issues, argues that the days of Washington's desire to undermine the ICC ended when Obama entered office. The US is now a de facto member of the ICC, and even though that might not be the best possible means to achieve international justice, it should definitely be recognized as a win-win for "everyone other than tyrannical regimes and indicted war criminals" (quoted in Kersten, 2012). The aforementioned American Service Members' Protection Act provides an exemption that permits the US government to provide direct cooperation to the ICC when it suits it (Perskin 2002 p. 252). This "selective" cooperation benefits the US since it will occur only if the US finds the ICC useful for its political aims, whereas the US will not hesitate to engage in undermining the ICC if cooperation is seen as an obstacle (Kersten, 2012). Hence, some would argue that the US has been engaging in selective cooperation in the past year under Obama's leadership, which is not necessarily a positive thing.

The argument is that the ICC might start justifying the US national interest-based selective cooperation due to popular belief that the Court must keep improving its relations with the US. Since there are no signs of the US ratifying the Statute any time soon, the ICC might simply be satisfied with periodical cooperation (Kersten, 2012). However, this would only prove that the international justice is subjugated to US exceptionalism, instead of being above it. After all, being at the whim of the non-member state's national interests could not be anything else but a recipe for disaster. It would endanger the legitimacy of the Court, whose member states will not want to be part of an institution that sets double standards for its members. If the US can cooperate with the ICC only when it pleases them without being punished when they refuse to engage, why would other countries not want the same? The international justice system has come too far to allow itself to fail again; but unfortunately, it seems that the international arena has not made enough progress to achieve the point of not being controlled by hegemony in all spheres—including justice.

Conclusion

The international criminal justice has come far, and if it continues to move forward at the same pace it has been moving for the past twenty years, it could become a powerful force in the international arena. This, however, cannot be achieved without the support of the United States. As Aryeh Neier, American human rights activist and the former Executive Director of Human Rights Watch, argues, "The main reasons to promote international criminal justice are to provide justice for victims and their families; to punish those who deserve such punishment; and to restore a sense of justice and respect for the rule of law"(Neier 2012). Truly international justice includes all victims, Iraqi or Japanese, and all perpetrators, American or Russian, regardless of their nationality or the power they possess. Truly international justice demands the support of each and every state because that is the only way to ensure that horrible crimes such as the Holocaust or the Rwandan genocide will never happen again. Truly international justice must be above individual nation-state, even if that state is the most powerful state in the international arena; when it comes to justice, the US must not be exceptional.

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