



A WEAK ICC: CAN THE INTERNATIONAL CRIMINAL COURT SUCCEED WITHOUT U.S. PARTICIPATION?

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Over the past decade the world has witnessed an increasing interest of the international community in combating impunity for war crimes, genocide, and crimes against humanity, which has resulted in the establishment of a number of judicial bodies. The creation of the International Military Tribunal (“Nuremberg Tribunal”) and the International Military Tribunal for the Far East (“Tokyo Tribunal”) would ultimately lay the foundation for future *ad hoc* tribunals. The establishment by the United Nations Security Council (“SC”) of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (“ICTY”) in 1993 and Rwanda (“ICTR”) in 1994 under Chapter VII of the United Nations (“UN”) Charter set the basis for future criminal courts and tribunals under international auspices in the following years.¹ During the summer of 1998, the UN sponsored a major diplomatic conference in Rome to negotiate a statute for a new international criminal court (“ICC” or “the Court”). After five weeks of exhaustive negotiations, the conference adopted the statute by a large majority. The birth of the Rome Statute brought new hopes and raised new challenges for international criminal justice. However, even before this document entered into force, it became increasingly clear that a showdown was looming between the Court and the U.S., which has not yet ratified the treaty and appears to have no intention of doing so in the immediate future.²

U.S. opposition to the ICC is extremely important to examine in depth, given that the U.S. is regarded as the sole superpower and has a determinative role in the conduct of global politics. This paper seeks to examine the evolving position that the U.S. has developed towards the ICC in the last few years. Having strenuously opposed the Court in the past,³ the U.S. is currently ap-

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¹ Fausto Pocar, *The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community*, 2 J. INT’L CRIM. JUST. 304, 304 (2004).

² “Both Obama and McCain generally favor the concept of a standing tribunal to deal with war crimes, but they share President Bush’s anxiety about the potential of politically motivated prosecutions of U.S. officials or soldiers...In a speech recognizing the 10th anniversary of the Rome Statute last April, John B. Bellinger, the State Department’s top lawyer, said the U.S. will cooperate actively with the court but will not ratify the Rome Statute for a long time. He said the U.S. relationship with the court will depend on ‘the extent to which the United States and ICC supporters agree to disagree.’” William C. Mann, *U.S. Policy on International Court Unlikely To Shift*, ASSOCIATED PRESS, 14 Oct. 2008.

³ The cautionary tone towards the Court began with President Clinton who did not sign the Rome Statute until 31 Dec. 2000, the last day it was open for signature. Clinton recommended that his successors follow his lead and refrain from seeking Senate ratification of his signature “until our fundamental concerns are satisfied.” Not only did Bush not submit the document to the Senate for ratification, he suspended Clinton’s signature saying that, “The United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its

proaching it with more flexibility, especially in the case of Sudan. This paper discusses whether the ICC can move forward without the help of the U.S., particularly in relation to the ability to compel Sudan, for example, to arrest suspects indicted for war crimes. By looking at the cases currently pending before the ICC, specifically those regarding Uganda and the Sudan, the article examines the current progress of the Court. In discussing why the U.S. opposes ratifying the Rome Statute, the article makes some predictions as to the ICC's potential for success.

I. FORMATION OF THE ICC AND OVERVIEW OF THE ROME STATUTE

The idea of creating a permanent international criminal court began long before the Rome Statute in the late 1990s. After WWI, there was momentum for an international tribunal to try German crimes. The Versailles Treaty provided that Germany hand over "persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers."⁴ Then, in 1937, the League of Nations organized and concluded a Convention for the Creation of an International Criminal Court, which was signed by representatives of ten European states.⁵ This court never materialized. After World War II, the Nuremberg and Tokyo Tribunals raised real expectations for the culture of accountability. At the request of the UN General Assembly ("GA"),⁶ the International Law Commission prepared a draft statute for an international criminal court in 1952, entitled "Report of the Committee on International Court Jurisdiction."⁷ Two years later, this draft was resubmitted in light of the comments contributed by Member States.⁸ These two statutes were quickly shelved, however, as the Cold War made the establishment of an international criminal court and progress on the war crimes agenda politically unrealistic.⁹

The UN did not resume its consideration of the proposed international criminal court until the late 1980s. In December 1989, the GA, responding to a request from a member state (Trinidad and Tobago, but in connection with illicit trafficking in narcotics across national frontiers), asked the International Law Commission, an organ of the GA, to resume its long abandoned work on an international criminal court.¹⁰ Their proposal did not get very far. It was not until the outbreaks of the conflicts in the former Yugoslavia and Rwanda

signature on Dec. 31, 2000." *U.S. To Back Out of International Court Treaty*, WASH. POST, 5 May 2002.

⁴ Treaty of Versailles, 28 June 1919, at Art. 229.

⁵ The Final Act of the Conference was published in League of Nations Document C.547.M.384.1937.V., 16 November 1937. The signatories were Belgium, Bulgaria, Czechoslovakia, France, Greece, Netherlands, Rumania, Spain, Turkey, and Yugoslavia.

⁶ G.A. Res. 489 (V), 12 Dec. 1950.

⁷ Report of the Committee on International Criminal Court Jurisdiction, U.N. Doc. A/2135 (1952), Supplement No. 11 (A/2136).

⁸ Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2645 (1954), Supplement No. 12 (A/2645).

⁹ William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 9 (Cambridge University Press, 2007).

¹⁰ G.A. Res. A/RES/44/39, 4 Dec. 1989.

that the idea of international criminal justice in the contemporary era ever really took hold.¹¹

While the International Law Commission continued its work on a draft statute for an international criminal court, the SC voted to create two *ad hoc* tribunals for the former Yugoslavia¹² and Rwanda,¹³ in response “to what it described as the deliberate, systematic, and outrageous violations of human rights and humanitarian norms committed” in these two territories.¹⁴ The work of both tribunals demonstrated that international investigations and prosecutions of persons responsible for serious violations of international humanitarian law were both possible and credible.¹⁵ “No less, the rules of procedure and evidence each Tribunal has adopted now form the vital core of an international code of criminal procedure and evidence that will doubtless have an important impact on the rules of the future international criminal court.”¹⁶ The development of an international criminal court continued partly as a result of “tribunal fatigue,”¹⁷ but also, “because a number of states wanted to remove the Security Council’s monopoly on international tribunals, which the states saw as being too selective in distributing justice.”¹⁸

The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened on 15 June 1998 in Rome.¹⁹ More than 160 states sent delegates to the Conference, in addition to a range of international organizations and hundreds of nongovernmental organizations. “These developments could not have taken place without a powerful new coalition driving further criminalization of international humanitarian law. ... [T]his new coalition includes scholars that promote and develop legal concepts and give them theoretical credibility, [and] NGOs that provide public and political support and means of pressure...”²⁰ The contribution of global society, and particularly this coalition, which resulted in the adoption of the Rome Statute, has been unprecedented in international treaty negotiations.²¹

¹¹ Steven R. Ratner, *The International Criminal Court and the Limits of Global Judicialization*, 38 TEX. INT’L L. J. 445, 446 (2003).

¹² UN Doc. S/RES/808, 22 Feb. 1993.

¹³ UN Doc. S/RES/955, 8 Nov. 1994.

¹⁴ Sterling Johnson, PEACE WITHOUT JUSTICE: HEGEMONIC INSTABILITY OF INTERNATIONAL CRIMINAL LAW 183 (Ashgate Publishing Company, 2003).

¹⁵ Theodor Meron, *War Crimes Law Comes of Age*, 92 AJIL 462, 463 (1998).

¹⁶ *Ibid.*

¹⁷ In the UN’s overview of why we need an International Criminal Court, one of the responses was to remedy the deficiencies of *ad hoc* tribunals: “The delays inherent in setting up an *ad hoc* tribunal can have several consequences: crucial evidence can deteriorate or be destroyed; perpetrators can escape or disappear; and witnesses can relocate or be intimidated. Investigation becomes increasingly expensive, and the tremendous expense of *ad hoc* tribunals may soften the political will required to mandate them.” United Nations, *Establishment of an International Criminal Court: Overview*, available at <http://untreaty.un.org/cod/icc/general/overview.htm>.

¹⁸ Philippe Kirsch, *The International Criminal Court: Current Issues and Perspectives*, 64 L. & CONTEMP. PROBS. 3, 4 (2001).

¹⁹ UN Press Release L/2867, *UN Diplomatic Conference to Establish International Criminal Court to Convene in Rome, 15 June–17 July*, 8 June 1998.

²⁰ Meron, *supra* note 15, at 468.

²¹ Cenap Çakmak, *The International Criminal Court in World Politics*, 23 INT’L J. ON WORLD PEACE 11 (2006).