

THE UNIVERSAL ASPIRATIONS OF THE INTERNATIONAL CRIMINAL COURT

A short comment on the American position

MAX DU PLESSIS

Introduction

The Statute of the International Criminal Court (ICC) was adopted on 17 July 1998 by an overwhelming majority of the states attending the Rome Conference. Included in that body of like-minded nations was a large number of African delegations, and of 54 African states, 44 have signed and 15—South Africa amongst them—have ratified the statute. At a global level, the Rome Statute has currently been signed by 139 states and 76 have ratified it, with the US its most significant absentee. It has been remarkable that within four years the treaty achieved the 60 required ratifications. The statute entered into force on 1 July 2002, at which time the Court's jurisdiction over genocide, war crimes and crimes against humanity took effect (the statute does not have retrospective effect).

This short note will focus on the international aspirations of the ICC when it comes to criminal justice at the global level. The fact that African, American, Asian and European nations were able to come together and finalise the Rome Statute suggests the existence of a social system built on universal respect for the idea of human rights. This system recognises that to allow the most serious war crimes and crimes against humanity to go unpunished diminishes and threatens all those who live under it.

What makes the ICC so significant is that it will be the first permanent international criminal court the world has seen. Africans are, of course, no strangers to the idea of international criminal justice, having witnessed in recent years the creation of the International Criminal Tribunal for Rwanda. But that tribunal had to be created as an ad hoc response by the Security Council to the genocide in Rwanda, because none existed at the time. Now, with the ICC in position, and states universally signing up to its statute, if events such as those in Rwanda (or Yugoslavia) take place again there will be a dedicated and permanent tribunal ready to deal with the perpetrators of genocide, crimes against humanity, and war crimes. In addition, the tribunal, staffed by international officers and backed by international money, will be on call to step in where national judicial systems have collapsed, as was the case in Rwanda.

The prospects for the ICC as a universal protector of humanity become difficult to imagine, however, when not all states buy in to that vision. For the African region it is therefore disheartening that Ethiopia, Mauritania, Rwanda, Somalia, Swaziland and Tunisia have so far not signed the statute. Even more worrying is that the world's most powerful nation has not only opted out of the ICC, but has taken strident

measures to oppose it. Through its actions the US has set not only a poor example for other nations to follow, but its growing hostility to the Court—starting with its decision to oppose the adoption of the Statute at Rome, and most recently exemplified in its move to ‘un-sign’ the treaty—does little for the hope of international criminal justice.

With or without the involvement of the Americans, however, the Court is expected to be up and running in March 2003. It is important nonetheless to consider why the US has refused to join the world’s first permanent international criminal court, and to appreciate that other nations need not follow suit.

The fear of jurisdiction

US opposition to the ICC is motivated, primarily, by the Court’s ability to exercise jurisdiction over crimes committed by nationals of states not party to the treaty.

The ICC Statute creates a system of jurisdiction over the core crimes of genocide, crimes against humanity, and war crimes (the crime of aggression will be hammered out later). Once a state ratifies the Rome Statute or consents to jurisdiction on an ad hoc basis, it recognises the Court’s jurisdiction over all core crimes committed by its nationals or on its territory.

In terms of Article 12 of the statute, the Court may exercise jurisdiction if:

- a) the state where the alleged crime was committed is a party to the statute (*territoriality*), or
- b) the state of which the accused is a national is a party to the statute (*nationality*).

The jurisdictional allowance in a) is anathema to the US since it allows a state party to bring cases before the Court against nationals of a non-party state *if the crime was committed on its territory*. The most serious concern underlying this objection is said to be a political one—the concern that members of the US armed forces, in fulfilling their wide-ranging peacekeeping and security obligations abroad, will be subject to frivolous, politically

motivated charges. This, the US suggests, will have a knock-on effect for international peace, in that the US will be forced to reduce its commitment to participate in international peacekeeping missions so as to avoid the risk of its peacekeepers being subjected to malicious prosecution.

In response, the US has taken various measures to undermine the Court and to reflect its opposition. One measure that has attracted much attention is the passing by the US of the American Servicemembers Protection Act 2001. The act restricts US participation in any peacekeeping mission and prohibits military assistance for those nations that ratify the Rome Statute, with the exception of NATO member countries and other major allies (Australia, Egypt, Israel, Japan, the Republic of Korea and New Zealand). Under the act, the US may not participate in any peacekeeping mission unless the president certifies to Congress that the Security Council has exempted US Armed Forces members from prosecution, and each country in which US personnel will be present is either not a party to the ICC, or has an agreement with the US exempting US Armed Forces members from prosecution.

In addition, the act prohibits any governmental entity in the US, including state and local governments or any court, from co-operating with the ICC in matters such as arrest and extradition of suspects, execution of searches and seizures, taking of evidence, seizure of assets and similar matters. Perhaps the most alarming provision of the act, however, is section 8, which authorises the US president to use all necessary and appropriate means to free US or allied personnel detained by or on behalf of the ICC. The act has elicited a marked response from the European Union and, not surprisingly, the Netherlands, which will host the ICC in The Hague. Matters have not been helped by the US efforts in June and July to veto a six-month extension of the UN peacekeeping mission in Bosnia on the grounds that no immunity to the ICC’s jurisdiction had been granted by the Security Council to American peacekeepers serving under UN auspices.

Nothing to fear

The US has set its face against the Court and international criminal justice because the ICC will have jurisdiction (even over Americans) by virtue of a crime having been committed on a state party's territory. According to the US, the consent of the state of nationality of the accused is mandatory before an international criminal court can exercise jurisdiction.

At the Rome negotiations the US delegation therefore sought to require the consent of the state of nationality of the accused in every circumstance before the Court could have jurisdiction. Thereby, a state could shield its nationals from the Court, even for crimes committed abroad, by simply withholding its consent to the Court's exercise of jurisdiction.

However, this suggestion did not attract much support from other states at Rome, and for good reason. The world's dictators would too easily frustrate the purpose of the Court—imagine Cambodia, ruled by Pol Pot, giving him or Cambodian nationals up for trial. The Rome Statute therefore reflects a rejection of the American insistence on the consent of the national's state as a necessary ingredient for jurisdiction. As a result, for the ICC to exercise jurisdiction over an offence, the consent either of the state of nationality of the accused or of the state on whose territory the crime was committed, is required.

This jurisdictional allowance is not as controversial as the US suggests. When the states parties to the ICC allow the Court to exercise the type of jurisdiction which it does under Article 12 of the Rome Statute, the Court is being allowed to do so only on the basis of established jurisdictional grounds—that of nationality and territoriality.

On the basis of *nationality*, international law has long recognised that a state may prosecute its own nationals for crimes committed anywhere in the world. And on the basis of the *territorial* principle international law allows a state to claim jurisdiction over a person who commits crimes on its territory, regardless of that

person's nationality. It is the territorial principle and its ramifications for non-party states which underlies the US objection to the Court. However, this principle has been recognised for many years. As Philippe Kirsch, Chairman at the Rome Conference, has explained, the Rome Statute:

does not bind non-parties to the statute. It simply confirms the recognised principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations.

Indeed, the US is itself party to numerous international conventions that empower states parties to exercise jurisdiction over perpetrators of any nationality found within their territory, regardless of whether the state of the accused's nationality is also a party to the treaty. Such conventions include the 1949 Geneva Conventions, the 1970 Hijacking Conventions, and the 1984 Torture Convention, to name but three.

In any event, there are various safeguards built into the statute which ensure that all states have nothing to fear from the Court, and which ought to allay US fears of a rogue prosecutor acting out of spite against American peacekeepers. The Preamble to the Rome Statute says that the Court's jurisdiction will be *complementary* to that of national jurisdiction. The complementarity scheme creates a complex relationship between national legal systems and the ICC, but in a nutshell, the Court is required under the statute to decline to exercise jurisdiction when a case is being appropriately dealt with by a national judicial system.

Because a national judicial system will have the first bite at the cherry in respect of any investigation which affects its territory or its nationals, the ICC will be able to step in only where a national judicial system is *unwilling* or *unable* genuinely to investigate. The principle ensures that the ICC operates as a system of international criminal justice which buttresses the national justice systems of states parties. In any case, Article 18 of the Rome Statute requires that the ICC

prosecutor notify all states parties and states with jurisdiction over the case before beginning an ICC investigation, and cannot on his/her own initiative begin an investigation without first receiving the approval of a Chamber of three judges. At this stage, it would be open to states (including non-party states) to make it clear that they will investigate allegations against their own nationals themselves. In such a situation the ICC must then suspend its investigation. The Court will only take over if the national system is unable to investigate, for example, because of a breakdown in its judicial systems (the Rwanda example) or because it had refused to investigate without appropriate justification.

If it had investigated and subsequently refused to prosecute, the Court could only proceed if it concluded that that decision was motivated purely by a desire to shield the individual concerned. This, one can surmise, is an unthinkable prospect in any state committed to the Rule of Law if an accusation appeared to have any basis in fact. South Africa, along with other like-minded states such as the UK, Canada and New Zealand, is therefore satisfied that its citizens enjoy the complementarity safeguard built into the statute and confident that its nationals would be protected from

malicious or politically motivated prosecutions.

Conclusion

The overriding concern of the international community to bring an end to impunity for war crimes and crimes against humanity will be advanced significantly by the emergence of the ICC. The US balks at the thought of its nationals being dragged before the Court on trumped-up charges by a gung-ho prosecutor. This is a trumped-up fear that other states need not react to once they realise that the Court's exercise of jurisdiction is well within the parameters of existing international law principles, and that the Court will act only where national jurisdictions cannot. Those African states (committed to the Rule of Law) that are still dithering about signing the Rome Statute need fear nothing—national legal systems retain the option to prosecute if they are able and willing.

While the current US administration does not appear open to persuasion on this point, this should not be allowed to detract from the international aspirations of the Court. Only with universal acceptance of the ICC—by Africans, Americans, Asians and Europeans—will the world be in a proper position to bring an end to impunity for gross violations of human rights.