

TRIAL AND ERROR

Challenges facing the International Criminal Court

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Constitutional issues in South Africa

On 18 July 1998 South Africa signed the Statute establishing the International Criminal Court (ICC Statute) thereby expressing its intention to ratify the Rome Statute and consequently ratified it in November 2000. South Africa adheres to the dualistic rather than the monistic system of implementing international treaties.¹ This means that an international treaty ratified by South Africa is law in South Africa only once it has been enacted into national law by an Act of Parliament, except for the self-executing provisions of such treaty. Consequently, in July 2002 the South African Parliament approved legislation implementing the crimes under the ICC Statute into national law.

Challenges facing the Court

Referral of cases

With the election of the judges, the Prosecutor, the Deputy Prosecutor and the appointment of the Registrar, the International Criminal Court is fully constituted and can already begin hearing cases. The Prosecutor of the ICC, Mr Moreno Ocampo, has indicated in his report to the Assembly of State Parties that his office has received no referrals from the United Nations Security Council or from any states. It had

however received 499 communications between July 2002 and July 2003, sent by non-governmental organisations and individuals from 66 different countries. After analysing all the information received by the his office, the Prosecutor has selected the situation in Ituri, in the Democratic Republic of Congo (DRC) as the first situation meriting attention. It is justifiable to select the Ituri region for a number of reasons.

Firstly, the jurisdiction aspect for the ICC is clear. The DRC is a party to the ICC Statute, the crimes have occurred in the territory of the DRC, and the victims and alleged perpetrators are nationals of the DRC. The ICC Statute provides that the Court may exercise jurisdiction if the crime was committed on the territory of a State Party to the ICC Statute or where the accused person is a national of a State Party to the ICC Statute. The Ituri situation satisfies one or both of the aforesaid requirements. Article 15 of the ICC Statute gives the Prosecutor power to initiate an investigation on the basis of information on crimes within the jurisdiction of the Court.

Secondly, the Prosecutor has received information that at least 5,000 civilians have died as a direct consequence of violence in Ituri since 1 July 2002—the date on which ICC jurisdiction began. Mass killings are just one type of crime being committed in Ituri. Crimes specifically

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targeting women and children are also being committed on a wide scale and there are more than 30,000 child soldiers serving among the ranks of the various belligerents in the DRC. The Twa are also being targeted as a group and are threatened with possible extinction. What this information does, which has been verified by various sources, is to confirm that crimes against humanity, war crimes and genocide are being committed in the Ituri region. These are crimes under the jurisdiction of the ICC and the Prosecutor is entitled to lodge an investigation and make arrests.

The challenge facing the Prosecutor is that it is not advisable or even safe, for his representatives to charge into Ituri and start investigating and arresting people. The Prosecutor needs the support and protection of states to successfully complete an investigation in Ituri. Ideally the DRC should make a referral to the ICC inviting the ICC to investigate the crimes that have occurred in Ituri and to hold the perpetrators accountable. A DRC referral would probably receive the support of various European states such as Germany, who are eager to have the court operating, and one presumes that it would receive the support of the African Union (AU) if the principles in the AU Constitutive Act are to be upheld. Article 4(h) of the AU Constitutive Act provides for the right of the AU to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity. A referral by the DRC would provide room for the AU to intervene by supporting an ICC investigation and assisting by providing the necessary co-operation to the ICC.

Witness protection and enforcement of sentences

The International Criminal Court will not have prison facilities of its own and will have to rely on the co-operation of States Parties to the ICC Statute for the acceptance of prisoners. The ICC will also rely on their co-operation for the relocation and protection of witnesses. The readiness of states to open their prisons to prisoners sentenced by the ICC and their willingness to provide sanctuary to witnesses will be crucial to the success of the Court.

The attitude of the US towards the ICC

The attitude adopted by the sole superpower, the United States, towards the Court will certainly have some influence, even unofficially, on whether the Court begins to investigate a case or not. The United States of America (US) signed the ICC Statute on 31 December 2000. However, by letter to the United Nations Secretary-General dated 6 May 2002, the US stated its intention not to ratify the ICC Statute. Therefore, having made clear its intention not to become a party to the Statute the US has no international obligation to refrain from acts that would defeat the object and purpose of the ICC Statute. Since then the US has entered into bilateral agreements with various States granting protection to US nationals from the ICC jurisdiction. If the US's non-support of the ICC extends to actively opposing the Court then there is cause for concern.

But the ICC is not the only means of justice in the DRC. It is indeed meant to be a last resort. One alternative means of justice for the DRC is for the national criminal justice system to be strengthened considerably (perhaps using international assistance) so that the DRC could carry out the prosecutions itself. If that were to occur it would be wonderful for the DRC and a welcomed triumph to the object and purpose of the ICC, which is to bring an end to impunity for international crimes. In any event the ICC is only responsible for the most serious crimes of international concern and the national system has to deal with the other crimes. Maybe an ICC involvement in the DRC would invite support from various quarters for the strengthening of the DRC criminal justice system in any event.

Increasing the number of ratifications

The attitude of the US towards the Court may have impacted negatively on the pace of ratification. As soon as the US started pressuring States to sign bilateral agreements granting protection from the ICC to US nationals, the pace of ratification also slowed. The misconception of the jurisdiction of the ICC is also slowing ratification. For example, there are

those who publicise suggestions that the ICC may investigate and prosecute leaders such as President Robert Mugabe of Zimbabwe for crimes against humanity. The truth is that the ICC's jurisdiction is only activated when the crime under its jurisdiction has been committed in the territory of a State Party or by a national of a State Party, and it has no retroactive effect.² Since Zimbabwe is not a State Party of the ICC Statute the ICC has no jurisdiction over what has occurred in Zimbabwe. If, or when, Zimbabwe becomes a State Party to the ICC Statute, its jurisdiction will be limited to events subsequent to ratification.

It is necessary for the ICC—if it is to be truly universal—that more states ratify its statute. Currently there are 91 states from all regions of the world that have ratified. However much more ratification is required to achieve universal acceptance. Suggestions by journalists that the ICC will investigate leaders for their past conduct before their State of nationality ratified the ICC Statute only causes reluctance by those leaders to support the ICC. Those suggestions are not true. It is therefore necessary that states, and in particular the leaders of states, know that the

ICC will not investigate past conduct of individual leaders. If Zimbabwe, or any other State for that matter, becomes a State Party to the ICC today, the ICC will not investigate any crimes against humanity, or any of the other crimes, committed *before* that state became a party to the ICC Statute.

Conclusion

The ICC is ready to operate and only exercises its jurisdiction where the national state is unable or unwilling to. It is therefore complementary to national jurisdiction and will not contest jurisdiction over a case if the national authorities are dealing with the matter.

Notes

1. Section 231 (4) of the South African Constitution Act 108 of 1996 provides that "Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."
2. See Article 24 read with Article 126(2) of ICC Statute.