A window on International Law

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The first steps of the International Criminal Court

The International Criminal Court (ICC), sitting at The Hague (The Netherlands) since 2002, is an international tribunal with jurisdiction over individuals who commit war crimes, crimes against humanity and genocide. Hopefully in the future the Court will also have jurisdiction over the crime of aggression, if an agreement on its definition can be found.

In many respects, the ICC is the achievement of the experience of the International Military Tribunals sitting at Nuremberg and Tokyo immediately after the end of WWII, as well as of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, instituted by the United Nations in the 1990s and still operating. It marks, however, a turning point because it is a permanent institution, which means that its mandate extends potentially to international crimes committed everywhere and by everyone after the entry into force of its constitutive treaty, the Statute of the ICC (or Rome Statute). The Statute, signed in Rome in July 1998, entered into force on July 1 2002. Today the ICC is fully operational as judicial body, with eighteen judges, representing the world's principal legal systems, and a Prosecutor. More than half the States of the world have ratified the Statute and hence joined the Court.

To date, four situations have been referred to the Court. The first one concerns the allegations of grave crimes committed on the territory of the Democratic Republic of Congo since July 2002. The second one concerns Northern Uganda and the Lord's Resistance Army. The third situation concerns the crimes committed anywhere on the territory of the Central African Republic and the fourth is the situation in Darfur, a region of Sudan. The first three cases were referred to the Court by the respective governments of the States where the crimes were committed. As to Darfur, it was the United Nations Security Council which decided to refer the situation to the Prosecutor of the ICC.

According to the Rome Statute there is a distinction between a preliminary analysis of a situation and a formal investigation. The Chief Prosecutor of the Court, after thorough consideration of the jurisdiction and admissibility requirements of the Rome Statute, decided to open investigations in the cases of the Democratic Republic of Congo (June 2004), of Uganda (July 2004) and of Darfur (June 2005). The situation in Central African Republic is currently under the exam of a Pre-Trial Chamber, which may trigger a formal investigation in the future.

Not many would have predicted such a successful start for the ICC. Indeed, the making of the Rome Statute was marked by the opposition between the group of the so-called "like-minded States" and, on the other hand, the USA, Russia and China. The former included leading Western States such as Australia, Canada, France, Germany, Italy and the UK, as well as States from all the other regions of the world, all committed to the setting up of a strong and independent Court; whereas the latter strongly tried to oppose these efforts. Eventually, the Statute adopted in Rome was closer to the project of the like-minded States. After its adoption, the USA

progressively developed a position of overt hostility towards the Court. Not only did the USA decide not to ratify the Statute, which means not joining the Court, but also it started a worldwide campaign to persuade as many States as possible to follow the same path.

It would be clearly beyond the scope of this short note to discuss the reasons why the USA has decided to campaign against the Court and to analyse in detail the actions it has undertaken accordingly. May I refer all interested readers – also the non-specialists in international law – to the well-documented and extremely captivating analysis by leading international lawyer Philippe Sands.[1] As Professor Sands clearly points out, top on the list of the American concerns is the independence of the Court's Prosecutor, with the related risk of politically-oriented prosecution. The first steps of the ICC clearly prove that these fears, which seem to be shared by a number of States, are unjustified.

Fears of unaccountable prosecutorial discretion derive from the fact that the Prosecutor may start an investigation motu proprio, i.e. on his own initiative, without any possible control by States or by the Security Council – which, as shown above, are the other two actors capable of triggering the jurisdiction of the ICC. However, a safeguard from possible abuses of prosecutorial discretion comes from the fact that the Prosecutor can in no case start an investigation without the authorisation from a Pre-Trail Chamber, in other words a panel of independent judges. Furthermore, the Democratic Republic of Congo (DRC) case proves that the Prosecutor is actually capable to exercise self-restraint. Indeed, he started following closely the situation in DRC since mid-2003, but he refrained for a long time from starting an investigation on his own initiative, precisely knowing that his work would be facilitated by a referral and active support from DRC itself. Shortly thereafter the government of the DRC welcomed the involvement of the ICC and decided to refer the situation to the ICC in April 2004.

As to referral from the Security Council, many States of the non-aligned movement strongly opposed such a role for the Council, raising the fears of political bias. However, in the Darfur case the Security Council was able to adopt its Resolution 1593 (2005) to refer this situation to the ICC precisely because the United States was abstaining, and not opposing it, notwithstanding its long standing campaign against the Court.

Above all, the opponents to the ICC should bear in mind that the powers and effectiveness of the Court are in many respects dependent on the cooperation of the States parties. According to the Rome Statute, the ICC is complementary to the jurisdiction of States, in the sense that "the ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings. The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings."[2] In other words, the Court is intended to work when genuine prosecution by States is not possible. The four cases currently before the ICC provide good illustrations of this principle.

As the Preamble of the Rome Statute puts it, the ICC was born from the concern that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation". There is therefore no reason why States ready and willing to prosecute war crimes, crimes against humanity and genocide should fear any ICC interference with their judicial activities.

1 Philippe Sands, *Lawless World. America and the Making and Breaking of Global Rules*, Penguin, 2005, p.60 ff. Philippe Sands is Professor of Law at University College London.

2 See the informal expert paper "The principle of complementarity in practice", prepared for the ICC's Office of the Prosecutor (http://www.icc-cpi.int/library/organs/otp/complementarity.pdf).

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