THE UNITED STATES, THE SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT: WILL INTERNATIONAL CRIMINAL JUSTICE PREVAIL DESPITE US RECALCITRANCE

INTRODUCTION

Since 1945 when international criminal justice first became a reality the US has been its greatest champion and supporter. As part of the allied movement, the US played a central role in the creation of the Nuremberg International Military Tribunal.[1] Its support for the process continued through the Tokyo trial, and the various successor trials of Nazi doctors, lawyers, military leaders, political leaders among others.[2] The adoption of the convention on the prevention and punishment of the Crime of Genocide also highlights the importance of US support. Unlike the reticent Britain, the US was at the front line pushing for adoption of the convention. Additionally, in 1992 when proposals for international prosecution resurfaced following the outbreak of war in Bosnia-Herzegovina, the US took the initiative on a Security Council resolution to establish a commission of inquiry into reports of widespread violations of international humanitarian law.[3]

Interestingly enough, the US actively participated in the drafting process that led to the adoption of the Rome Statute. The International Law Commission's draft text was refined through a series of preparatory conferences in which the US played an active role, and even after the adoption of the Statute the US has supported international courts for Sierra Leone and Cambodia. More importantly, the ICC signifies the same values of global justice, human rights and the rule of law that the US is committed to.[4] Why then did the US withdraw its support for the ICC at the eleventh hour? What impact has this had on the Security Council's power to act when National authorities are unable and unwilling? In order to fully understand this question we must delve into the complex relationship between the US and the Security Council.

The Security Council and international criminal justice

Before the ICC came into the picture it was undoubted that the Security Council was unparalleled in matters of international criminal justice. Where National courts were unable or unwilling to prosecute perpetrators of the most serious crimes of international concern, the Security Council had to step in under its Chapter VII powers. By virtue of article 25 of the UN charter the SC has power to make binding decisions over all members of the UN. Additionally, section 29 of the charter furnishes the Council with authority to establish whatever subsidiary organs it deems fit. It was in the exercise of this power that the SC established the International Criminal Tribunal for Yugoslavia (ICTY) and empowered the tribunal to "put an end to such crimes and take effective measures to bring to justice the persons who are responsible for them" and thus "contribute to the restoration and maintenance of peace."[5] The International Criminal Tribunal for Rwanda was established soon after and for substantially the same

[1] Arieh Kochavi, "Prelude to Nuremberg: Allied war crimes, policy and the Question of Punishment" Durham (1998)
[2] T Taylor, "The Anatomy of the Nuremberg Trials (1992)
[3] UN Doc. S/RES/780 (1992)
[4] "Engage and Prosper," The Economist, 5 Aug 2000.
[5] SC Resolution 827(1993) preamble.

reasons.[6] Perhaps there was an element of 'tribunal fatigue' that led to the clamour for a permanent International Criminal Court that would eliminate the need for SC resolutions creating a new tribunal every time a new crisis arises. The genius of the Rome Statute was to build a stable regime founded on State consent, rather than the peremptory authority of the Security Council.

Article 24 of the UN charter confers upon the Security Council primary responsibility for the maintenance of International peace and security. One of the most contentious issues in the Rome negotiations was the role to be given to the SC in the new Court. The 1994 ILC draft statute which was favored by the US required SC permission to be obtained whenever the International Criminal Court wanted to act. More particularly, article 23 of the draft statute provided as follows:

a) The court would not be able to deal with matters of aggression before the council gave a determination that the state in question had committed the aggression which was the subject matter of the complaint.
b) The council could refer matters to the court pursuant to chapter VII of the UN charter.
c) The court could not, in the absence of council approval, commence a prosecution which was being dealt with by the council under its Chapter VII powers.

Had the proposed draft passed without amendment, it is not inconceivable that the US would have ratified the treaty without a second thought. The distinctions between the 1994 draft and the final version of the Rome Statute unlock the mystery of US opposition. . The 'like-minded caucus', which was a loose coalition of states, mainly 'middle powers' and 'developing countries' attacked the ILC draft provision as a serious encroachment upon judicial independence.[7]This deference to Council responsibility in matters of international peace and security was however displaced by the so-called 'Singapore' proposal that the council must act affirmatively in order to suspend an ICC investigation, even in the most delicate situations The Rome Statute dislodges the traditional power of the Security Council, requiring that a vote for suspension of ICC action be renewed every 12 months[8]. In order for the council to exercise this power it must adopt the resolution under its chapter VII powers identifying a threat to the peace, breach of the peace, or act of aggression under article 39 of the UN charter. The requirement that the Security Council adopt the resolution under chapter VII is a clear indication that this power of deferral represents a concession to the peace and security mandate of the council. Additionally, the SC has power to refer cases to the prosecutor in a 'situation in which one or more such crimes appear to have been committed'.[9] The Prosecutor presumably would then have the discretion to decide whether prosecution should be instituted, for while the Statute stipulates when the Court has jurisdiction, it does not state that the Court is bound to exercise it, nor can the Council oblige the Court to act. For most scholars, it was one of the achievements of the Rome Conference that the Security Council's involvement in the exercise by the court of its jurisdiction is limited to a mere power of referral

[6] SC Resolution 955 (1994)
[7] Kirsch and Holmes, "The Rome Conference on an International Criminal Court, the Negotiating Process" 93 AJIL (1999)
[8] Article 16 of the Rome Statute
[9] Article 13(b) of the Rome Statute

to the prosecutor, but to have dispensed with any security council involvement would have gone too far.[10]

The United States and the Security Council

Article 23 of the UN charter recognizes the US as one of the permanent members of the SC. Under article 27 of the UN Charter decisions in the 15 member Security Council on all substantive matters,for example, a decision calling for direct measures related to the settlement of a dispute, require the affirmative votes of nine members. A negative vote, a veto, by a permanent member prevents adoption of a proposal, even if it has received the required number of affirmative votes. This essentially means that the US as one of the P5 could potentially hamper SC action by use of the veto power.

As the largest economy and the only member of the SC capable of mounting and supporting transcontinental military operations with the necessary air transport, technical means of intelligence and logistics, the US is highly relevant to the efficacy of the SC.[11]Nothing shows the power the US has over the SC better than SC Resolution 1422 of 2002. This resolution was pushed through the council by the US with the threat of refusal to support a peacekeeping operation, and requested the ICC to defer any exercise of its jurisdiction for 12 months "if a case arises involving current or former officials or personnel from a contributing state not a party to the Rome Statute over acts or omissions relating to a UN established or authorized operation." A further resolution asking for suspension for another 12 months was adopted in 2003- resolution 1487.[12]

Under the Bush administration, the US negotiated bilateral agreements with other states under article 98(2) of the ICC statute positing that the court will not be able to request surrender of a US national to the court without the consent of the 'sending state.' Despite these agreements eventually being held incapable of preventing the ICC from requesting surrender, they do play an important role in demonstrating the lengths the US will go to in order to protect its interests. The US has also passed domestic legislation authorizing the president of the US to use military force in order to obstruct the operations of the court.[13] The prospect of SC referral of cases to the ICC initially lauded as a powerful trigger mechanism now seems handicapped in the face of US resistance.

One of the most crucial issues in as far as the ICC is concerned is that of enforcement. The court relies on member states cooperation in order to enforce its rulings. It is surprising that the court was not given stronger powers of enforcement. Part 9 of the Rome statute requires state parties to cooperate with the court in providing various forms of assistance such as the taking of evidence and the tracing of assets. Article 89(1) imposes the all-important obligation to surrender any person within a state's territory upon the request of the court. As regards sentences of imprisonment imposed by the court, there is no

[10]Dan Sarooshi, "The Peace and Justice Paradox: The International Criminal Court and the UN Security Council" in in D. McGoldrick, Chapter 4

[11] Ruth Wedgewood, "The International Criminal Court: An American View" *EJIL* 1999

[12] Aly Mokhtar, "The fine art of arm-twisting: The US, resolution 1422 and the Security Council deferral power under the Rome statute." (2002) 3 International Criminal Law Review 295

[13] American Service-members' Protection Act of 2002

obligation on states to provide prison facilities, and sentences will be served in a state selected by the court from a list of those that have declared their willingness to accept sentenced persons-article 103. States are bound by the statute to cooperate with the court failing which an uncooperative state may be referred to the Assembly of State Parties or in the case of a referral by the SC, to the council itself. Although the council has no power to impose mandatory requirements on the defaulting state, the Assembly of State has no power of enforcement[14] due to its size and low frequency of meetings. A solution to this potential enforcement problem is for the SC to use its chapter VII powers creatively and develop a consistent practice of making article 39 determinations that the failure by a state to cooperate with the ICC constitutes a threat to the peace and thus constitutes a basis for the imposition of chapter VII sanctions against the recalcitrant state.[15]Evidently, the SC still has a paramount role in the administration and enforcement of international criminal justice. Should the US exercise its veto power it is clear that the SC will be unable to assist the court in its enforcement functions.

The ICC as a pillar of hope

Despite grim convictions that the ICC is doomed to fail without SC, and by extension US, support I believe that the court is capable of surviving the onslaught and becoming a symbol of international criminal justice. This is because of various reasons chief of which is the fact that the Rome Statute makes provisions for the court to function without being fully dependent on the Security Council. I shall examine some of these provisions in turn.

Article 13 provides for three trigger mechanisms; self-referral by state party to the statute, a Security Council referral as well as the Prosecutor's power to initiate an investigation. Thus, even where the SC is unable to act in order to mobilize for restoration of international peace and security because of internal wrangles (for example the US exercising its veto power against an SC resolution made under chapter VII), the court will not be paralyzed and can still commence investigations through the remaining trigger mechanisms. This was a very important development that went a long way in strengthening the international criminal justice system. More specifically, article 17 of the statute provides that the court shall have jurisdiction where the state which has jurisdiction over a case is unwilling or unable genuinely to carry out prosecutions or investigations. The Security Council is no longer the alpha and omega of international criminal justice. In fact, the result at Rome was a new and exciting international institution, distinct from the United Nations and yet exercising authority in a field that had previously been occupied, albeit on a piecemeal basis, by the Security Council. In a sense, the Rome Statute was an attempt to effect indirectly what could not be done directly, namely reform of the UN and amendment of the charter. It is precisely because of this bold and exciting challenge to the existing mechanisms of the UN that so many states have enthusiastically joined the new venture.[16]

[14] Cryer, Friman, Robinson and Wilmhurst, International Criminal Law and Procedure (2nd edition, Cambridge 2010)

[15] Dan Sarooshi, "The Peace and Justice Paradox: The International Criminal Court and the UN Security Council" in in D. McGoldrick, Chapter 4

[16] Ruth Wedgewood, "The International Criminal Court: An American View" (1999) EJIL

Another important factor is ICC funding. The Statute stipulates the funds of the court and the Assembly of State Parties as assessed contributions made by state parties, and funds provided by the United Nation subject to General Assembly approval. In addition, the court may receive voluntary contributions in accordance with criteria approved by the Assembly of State Parties.[17] The court can therefore function and carry out its operations even in cases where the SC makes referrals of situations but fails to provide accompanying funding for the investigations. This increases the court's independence and ability to carry out impartial investigations and prosecutions.

Another contentious issue that further shows the importance of the ICC in matters of international criminal justice is its jurisdiction over nationals of non-parties. One of the key fears articulated by the US in as far as the court was concerned was that the court would be able to prosecute US nationals even though the US has not submitted to the jurisdiction of the court. Under the ICC statute the court has jurisdiction over nationals of non-party states in three circumstances. First, the ICC may prosecute nationals of non-parties in situations referred to the ICC prosecutor by the UN Security Council.[18] Secondly, non-party nationals are subject to ICC jurisdiction when they have committed a crime on the territory of a state that is a party to the ICC or has otherwise accepted the jurisdiction of the court with respect to that crime.[19] Thirdly, jurisdiction may be exercised over the nationals of a non-party state where the non-party has consented to the exercise of jurisdiction with respect to a particular crime.[20] In either of the first two cases the consent of the state of nationality is not a prerequisite to the exercise of jurisdiction. Experience has shown that the US can use the SC in order to circumvent this[21], but on paper at least, the court does have the legal mandate to carry out prosecutions in legitimate cases even without the consent of the SC or States in question.

The Rome Statute entered into force after achieving 60 ratifications in July 2002, decades earlier than predicted. Now, about a decade later, the number of ratifications has risen from 66 to 122. The 122nd accession by Ivory Coast on 15th February 2013 represents an important milestone in advancing towards universal ratification of the Rome Statute. This is an indication that the international community is almost wholly behind this noble enterprise and is ready to support the court in carrying out its duties. Perhaps the days of US hegemony in the field of international criminal law are behind us. However, in order for the ICC to succeed, a growing majority of the world's nations must support the Court and the Rome Statute. As Dominic McGoldrick suggests, if history is any indication the US will eventually come on board the ICC wagon. Time, patience and legitimacy may prove the US wrong in the sense that its reasons are unfounded in the practice of the ICC. US participation would be a strong encouragement for other states that have opposed the ICC to come on board.

[17] Article 115 of the Rome Statute
[18] Article 13(b) of the Rome Statute
[19] Article 12(2)(a)and (3) of the Rome Statute
[20] *Ibid*.
[21] Security Council Resolution 1422 (2002)

Conclusion

As illustrated by the foregoing analysis the relationship between the United States, the Security Council, and International Criminal Justice (with particular emphasis on the ICC) is a complex mish-mash of historical, legal and political factors that do not lend themselves to easy resolution. It is true that the Security Council has a primary responsibility in matters of International Peace and Security. It is also true that the US, being the richest country in the world, and a permanent member of the security council has the potential to aid or hamper any SC efforts to discharge its duties in as far as international criminal justice is concerned. By not ratifying the Rome Statute, the US dealt a major blow to the ICC and its capabilities. However, despite these bleak realities, the international criminal system can and is functioning without US support and acquiescence. In the pursuit of justice, neither the SC nor the US is indispensable. As evidenced by the number and speed of ratifications to the statute, the volume of communications received by the court and the cases already in progress; even though the US may not have faith in the system, a large majority of other states do. As Martin Luther King Jr. aptly put it "…the arc of the moral universe is long but it bends towards justice…"

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