THE SHADOW OF POLITICS IN THE ADMINISTRATION OF INTERNATIONAL CRIMINAL JUSTICE: AN ANALYSIS OF HOW THE ROME STATUTE INSULATES THE INTERNATIONAL CRIMINAL COURT FROM POLITICAL INFLUENCE

PRELUDE TO THE ICC

The quest for a permanent international criminal court began long before the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court (ICC) in 1998.[1] When the United Nations General Assembly approved the Genocide Convention in 1948, it charged the International Law Commission with the responsibility to carry out a study on the possibility and desirability of establishing an international judicial organ for the prosecution of, inter alia, the crime of genocide.[2] …" It is understandable that a community such as the international community, in seeking a more structured organization, even if only an incipient 'institutionalization', should have turned in another direction, namely toward a system vesting in international institutions other than States the exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented.[3] However, despite the so-called Nuremberg promise that the trials after the Second World War would set a precedent for others, it was not until 1994 that the ILC produced the final draft for the statute of an international court.

The Rome conference was by no means a walk in the park. It took weeks of negotiations, cajoling and compromises for the parties to come up with a final statute. The most serious controversies surrounding the creation of the court were about its independence from political use and misuse; And especially with regards to the powers exercised over the court by the Security Council. The ILC draft in article 23 envisioned a broad range of powers to the Security Council:

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.

[1] The first serious proposal for an international court was probably made in 1872 by Gustav Moynier, one of the founders of the International Committee of the Red Cross, who was concerned that national judges would not be able fairly to judge offences committed in wars in which their countries had been involved: Christopher Keith Hall, "The First Proposal for a Permanent International Criminal Court" (1998) 322 *International Review of the Red Cross* 57.

[2] GA Res. 260(III) B. This study was to be undertaken by the ILC in parallel with its drafting of the substantive rules of international criminal law.

[3] Y.B.I.L.C., 1979, vol. D (Part One), p. 43

The above provisions, and others led to great criticism of the court as suggested because with the contemplated measures true independence from political maneuvering would be nothing more than an aspiration. The final statute reflected all these concerns as well as the importance of the Security Council in maintaining international peace and security.

It is undoubted that for the ICC to achieve its key objectives and to "guarantee lasting respect for and the enforcement of international justice"[4], it must not be or be perceived as a tool for hegemonic states. To this end, in its structure and organization as well as in the conduct of its duties under the statute every care must be taken to ensure that political considerations do not cloud the independence of the court. Only if the judges are independent will the court be able to carry out its functions of administering justice properly. This is recognized by the "Basic Principles on the Independence of the Judiciary", which the UNGA endorsed in 1985

The following essay attempts to analyze the provisions of the Rome statute which secure the ICC's independence and how successful these attempts are. The statute contains 13 distinct parts preceded by a preamble outlining why the state parties thought it necessary to establish the court. In this essay I will make an attempt to first point out the provisions that do secure independence followed by those that hamper this goal. I will thereafter wind up with a conclusion as to whether the court is truly independent or not.

THE ROME STATUTE

The preamble provides "…Determined to these ends and for the sake of present and future generations, to establish an **independent permanent International Criminal Court** in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole…" These words attest to the importance of independence in the court's exercise of jurisdiction if the spirit and object of the statute are to be adhered to.

Over the years there have been several international criminal tribunals: notably the Nuremberg Tribunal, the ICTY and the ICTR. These tribunals were temporary, and established to carry out very specific functions as limited by the terms of reference in their respective statutes. Nuremberg was criticized for epitomizing "victors justice", while the ICTR and the ICTY were created under Security Council resolutions which essentially means that the council was responsible for deciding how much power, and how much independence, if any, the tribunals would exercise. These and other criticisms gave impetus to the move for a permanent court of justice that would have jurisdiction over the most serious crimes that shock the conscience of humanity. The fact the court is Permanent is likely to increase independence of its functions because there is no fear of its disbandment depending upon prevailing political whims.

[4] Preamble to the Rome Statute

PROVISIONS THAT GUARANTEE INDEPENDENCE

Article 1 provides "…and shall be complementary to national jurisdictions…" **Articles 17-19** set out matters to be considered in determining admissibility of a case. Therefore the ICC's jurisdiction is narrow; cases can only proceed in circumstances when a national court cannot do the job. Whether a national court is unable to or unwilling to legitimately proceed is not within the sole discretion of the Prosecutor

Article 2 provides that the court shall be brought into relationship with the UN through an agreement to be concluded by the president of the court with the approval of the Assembly of States. The ILC itself acknowledged that such a relationship ought not to affect the independence of the court; "a close relationship between the court and the United Nations was considered essential and a necessary link to the universality and standing of the court, though such a relationship should in no way jeopardize the independence of the court."[5] Had the ICC been established through the UN either as a subsidiary organ of the GA under article 22[6], or by the Security Council in the exercise of its delegation powers under article 29[7] or under its chapter VII powers it would not be unrealistic to foresee a situation where such a subsidiary organ would face the risk of political intrusion in the performance of its duties.

Articles 5-8 define the crimes that will fall within the jurisdiction of the court. **Article 5** is emphatic that the court's jurisdiction shall be limited to "the most serious crimes of concern to the international community as a whole". This takes out of play purely political squabbles between states. Thus, it is unlikely that states or even individuals could use the court as a weapon in any infraction of a purely political nature. The article also puts the crime of aggression squarely within the jurisdiction of the court without requiring SC determination of the matter prior to this[8]. Had this proposal, with the USA as its chief campaigner, passed, then an element of politics would have entered the judicial sphere through politicized SC referrals.

Further to this, the high definitional threshold that must be proved for each of the crimes necessarily implies that a purely political agenda disguised as a genuine international crime will not pass judicial scrutiny. For instance:

a) The special intent for genocide in **article 6** calls for "intent to destroy, in whole or in part…"

[5] 1996 report of the Preparatory committee.
[6] "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions"
[7] "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions"
[8] Article 23 of the 1994 ILC draft provided *inter alia*, "the prior determination by the Security Council under Article 39 of the Charter of an act of aggression by a state, as a prerequisite for a complaint to be brought before the Court by a state regarding individual acts of aggression"

b) **Article 7** requires that crimes against humanity be committed as part of a "widespread or systematic attack…"

c) Article 8 provides that war crimes will be within the purview of the court only "when committed as part of a plan or policy or as part of a large-scale commission…"

Before any individual can be held criminally responsible under the statute the above must be proved. This reinforces the argument that it is improbable for the court to carry out purely political prosecutions.

Article 14 provides that state parties may refer a "situation" for investigation. By using the word situation rather than states or individuals or other such terms, the risk of political references is further curtailed. This is so because the state merely refers a situation, while the power to carry out investigations and to determine who to be prosecuted is reserved to the prosecutor and the court.

Article 15 provides for a *proprio motu* prosecutor who may initiate investigations on his own motion. This was one of the most contentious issues during the negotiation process. Countries such as the USA were worried about the possibility of a prosecutor who would carry out a politically motivated prosecution on behalf of antagonist states and would not be subject to the oversight which national authorities have over their own prosecutors. These fears should have been allayed by provisions of the statute which guarantee prosecutorial independence. Various procedures for investigation and prosecution ensure that the case is a proper one in terms of evidence, and jurisdiction, and that national courts are not genuinely handling the case. These have the effect of restricting the prosecutor's authority, while not infringing on his independence.[9] For instance **Article 15(3)** requires the authorization of the pre-trial chamber before investigations can be proceeded with.

Article 27 provides that the statute applies equally to all persons without any distinction based on official capacity. This means that even sitting heads of state can be held responsible for violations of international criminal law. Omar-al-Bashir is the first sitting head of state to be indicted by the ICC, which has charged him with five counts of crimes against humanity and two counts of war crimes. By giving the court such broad judicial powers, it is evident that the court can remain truthful to its cause. No political considerations can hamper the exercise of jurisdiction over persons who meet the criteria set out in the statute. No matter how powerful the suspect in question, justice can and will run its course unimpeded.

Article 40 provides that the judges shall be independent in the performance of their functions and shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

[9] Allison Marston Banner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *AJIL* 510

Article 41 provides that judges should not participate in any case where their impartiality has been compromised. It goes on to give the prosecutor or the person being investigated power to request disqualification of a judge.

It is interesting to note the British sentiments on justice after the Nuremberg trials, "The question of the fate of the Nazi leaders is a political, and not a judicial question it would not rest with judges, however eminent or learned, to decide finally a matter like this, which is of the widest and most vital public policy."[10] Nothing best shows the flawed Nuremberg than this assertion. As argued by critics, Nuremberg was a victors' tribunal, set up to try the leaders of a defeated power. Perhaps this keen awareness led the makers of the ICC to include articles 40 and 41 with the hopes that the judges chosen will be of sufficient character and integrity to refuse to bow to political pressure.

Article 42 goes on to require the office of the prosecutor to act independently as a separate organ of the court. By giving the prosecutor *proprio motu* powers his independence is assured because he can commence investigations without having to kowtow to Security Council whims.

Article 48 provides privileges and immunities to the judges, the prosecutor, his deputy and the registrar in the exercise of their duties. This is one of the most important independence guaranteeing provisions because it ensures that the individuals can carry out their tasks without fear of reprisals.

Provisions that Hamper Independence of the Court

Article 16 gives the Security Council power to defer investigations or prosecutions for a period of 12months subject to renewal. This technically means that the council can defer matters before the court indefinitely. Regrettably, this is an open invitation to the SC to affect and even dominate the proceedings. The adoption by the SC of resolutions suspending non-existent proceedings in 2002 and 2003 at the behest of the previous US administration was one such controversial use of article 16.[11]

Article 36 provides that judges shall be elected from a list of nominees made by state parties to the Rome statute. The judges shall be elected by secret ballot at a meeting of the Assembly of State Parties convened for that purpose under **article 112.** Judges therefore are to be chosen by politicians and diplomats, which brings a political element into the appointments system.

Article 98 precludes the court from asking for the surrender of a suspect if that would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of the state to the court. The US

[10] Quoted in G. Robertson, Crimes Against Humanity: The Struggle for Global Justice, at 212 (2000

[11] 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

has been the key user of these so called Article 98 agreements which have the impact of diminishing the courts independence to carry out impartial prosecutions.

Articles 103-111 provide the procedure through which court decisions will be enforced. It is surprising that the ICC was not given stronger powers of enforcement. To be sure, state parties have a legal duty of cooperation under **article 86**, but states often slack on this sort of duty, and rhetoric is a limited goad. One might wish that there was more attention in Rome to the necessary convergence between the ICC and the SC council for effective enforcement of the court's orders.[12]

Articles 115-116 of the statute provides that the expenses of the court shall be provided from assessed contributions of the state parties, funds provided by the UN, as well as voluntary contributions. For any judicial institution, the mode of financing is of high importance for the independence of that institution. Politicians may be tempted to exercise influence on the judicial system by not allocating sufficient money to the judiciary. Perhaps, a provision should have been put in place to require the SC to provide financing whenever it refers a matter to the matter to the court. The experience of enforcing the Omar-al-Bashir warrant clearly shows the handicaps the court has in terms of funds to execute its rulings.

CONCLUSION

Twelve years after the Rome statute entered into force, the ICC has become one of the most important international institutions. As at May 2013, 122 countries are state parties to the statute of the court. The prosecutor had received over 8874 communications as at September 2010, and has opened investigations into 7 countries in Africa.[13] Because of the nature of the crimes within the ICC's jurisdiction - genocide, crimes against humanity, war crimes and aggression - which are often committed with some political objective in mind, it is undoubted that every decision of the ICC will have political overtones.

In drafting the statute it was necessary to avoid "weakening the Statute to the point where the Court would be constantly paralyzed" and not worth having.[14] As Judge Kirsch stated: "Thus the balancing sought in Rome was to create a Statute strong enough to ensure the effective functioning of the Court, with sufficient safeguards to foster broad support among States".[15]

In addition to the provisions already discussed, other examples of safeguards incorporated into the Rome Statute to alleviate States' concerns include:

a) Provisions on election and qualifications of prosecutors and judges;

[12] Ruth Wedgewood, "The International Criminal Court: An American View" (1999) *EJIL*
[13] International Criminal Court, September 2010, Communications, Referrals and Preliminary Examinations
[14] Philippe Kirsch QC and Darryl Robinson "Reaching Agreement at the Rome Conference (2002: Oxford University Press) at page 67
[15] *Ibid*.

b) Provisions for removal of officials for serious misconduct or breach of duty;

c) Incorporation of the fair trial provisions;

d) Specific protection for national security information.

On balance, it appears that the measures put in place make it very unlikely that the court has ended up being enslaved by the political machinations of hegemonic states. The fraught relationship between the SC and the court is both the problem and the solution to the independence question. Only time will tell whether the court will be successful in achieving its goals without undue interference.

BIBLIOGRAPHY

Treaties, Conventions and UN Documents

Charter of the United Nations, United Nations Conference on International Organization Documents Vol. 15 (1945)

Rome Statute of the International Criminal Court 2187 UNTS 90

Charter of the International Military Tribunal at Nuremberg, UKTS 4 (1945) Cmnd 6671; 5 UNTS 251; (1945) AJIL Supp 257

Charter of the International Military Tribunal for the Far East, Tokyo, 1946: Report of the Working Group on the Question of an International Criminal Jurisdiction, ILC Ybk 1992, vol. II (2), 58 at 59-61

Relationship agreement between the International Criminal Court and the United Nations ICC-ASP/3/Res. 1

Books and Journals

R. Cryer, H. Friman, D. Robinson and E. Wilmshurst *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010)

P. Kirsch and D. Robinson *Reaching Agreement at the Rome Conference* (Oxford University Press 2002)

R. Wedgewood "The International Criminal Court: An American View", 1999 10 *European Journal of International Law* 93

D. Akande "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits" 1 *Journal of International Criminal Justice* (2003) 618

D. Scheffer "The United States and the International Criminal Court" (1999) 93 *AJIL* 12

D. McGoldrick "Political and Legal Responses to the ICC," in The Permanent International Criminal Court, Chapter 14

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

W. Schabas, "The United States Hostility to the International Criminal Court: It's all about the Security Council" *EJIL* 2004 701

A. Banner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *AJIL* 510

A. 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

Miscellaneous

US Department of State, ‘United States Engagement with the ICC and the Outcome of the Recently Concluded Review Conference’ http://www.state.gov/s/wci/us_releases/remarks/143178.htm

Human Rights Watch, ‘The United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements, www.iccnow.org/documents/HRWArt98legalpaper.pdf

Human Rights Watch: The ICC and the Security Council: Resolution 1422, Legal and Policy Analysis, http://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm