

The International Criminal Court (for the Geography Encyclopedia project) by Amy Ross¹

The International Criminal Court (the ICC) is the world's first permanent body established to prosecute genocide, crimes against humanity, war crimes, and aggression.² The creation of the ICC was the result of decades of advocacy and campaigning by human rights activists, compromises between nation-states, and transformations in the international political order. The hope attached to the ICC is that a permanent court, capable of prosecuting the most powerful perpetrators on the planet, will prevent future atrocities. The ICC's jurisdiction, theoretically, extends to the entire globe, but in practice is subject to intense geopolitical power. The ICC must also navigate complex relationships with nation-states and the local communities most directly affected by extreme violence. The ICC is an intensely interesting phenomenon from a geographical perspective. It is both a product and producer of globalization; an agent of geographical transformation as well as a result of such processes.

The international community has been imagined to be a superior space for holding perpetrators accountable, as local and national politics repeatedly protected the powerful—a condition referred to as 'impunity.'³ The observation that "A person stands a greater chance of being tried and judged for killing one human being than for killing 100,000,"⁴ highlights the dilemmas of accountability in the wake of mass atrocity. Although it is the powerful that are in a position to commit genocide, and other massive forms of violence, that same power often protects against prosecution. Proponents have argued that conducting trials 'elsewhere' provides a 'spatial fix' in that international courts may circumvent and therefore overcome local impunity. While courts distant from the location of the atrocities (and outside the national jurisdiction) might prove capable of holding the most powerful perpetrators accountable, critics of doing justice from 'afar'

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² The ICC has jurisdiction over the so-called 'crimes of international concern:' genocide, crimes against humanity and war crimes, all over which are defined in detail in the Rome Statute:

(<http://www2.iccpi.int/Menu/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm>) A fourth category, the crime of aggression, will be defined and adopted by 2009. The debates concerning how to define aggression proved highly contentious during the 1998 negotiations that led to the Rome Statute; the parties agreed to table the debate in 1998 in order to move ahead with the other issues. For more on the debates concerning aggression, see Politi, Mauro and Giuseppe Nesi, eds. 2004. *The International Criminal Court and the Crime of Aggression*. Ashgate, England.

³ See Ross, Amy, 2001. "Geographies of Justice: International law, national sovereignty and human rights" *Finnish Yearbook of International Law*, Vol. XII, 2001, pgs. 10-19.

⁴ José Ayala Lasso, United Nations High Commissioner for Human Rights (1996). As quoted in Morris, Virginia and Michael Scharf. 1998. *The International Criminal Tribunal for Rwanda*. Transnational Publishers: New York at xv).

argue that the proceedings may have less relevance for the local communities, and present troublesome issues concerning national sovereignty.

Interest in a permanent international body devoted to prosecuting war crimes has been expressed at various points in history.⁵ During the political polarization of the Cold War period, the super-powers blocked the establishment of an independent international institution devoted to prosecuting war crimes. As the Cold War moved towards its closure (1989-1991), interest returned in the form of a proposal to prosecute drug-trafficking in the Caribbean as an international crime. Although the proposal drifted, the idea of an international court remained in the air. Violence during the breakup of the former Yugoslavia spurred the establishment of a war crimes tribunal in 1993 (the International Criminal Tribunal for the former Yugoslavia—ICTY), and a second tribunal was established following the genocide in Rwanda in 1994 (the International Criminal Tribunal for Rwanda –ICTR). Subsequent courts were established in Sierra Leone and Cambodia.

While there is a relative consensus concerning the establishment of these ad-hoc tribunals, certain powerful sectors remained averse to a permanent international court that would have jurisdiction over every potential perpetrator on the planet. Among those objecting were the likely subjects – the notoriously violent dictators and despots who had every reason to resist judicial accountability. Objections also came from the US government, which expressed fears that submission to the jurisdiction of an international court would undermine US sovereignty and its potential for global military activity. While the US had supported ‘international justice’ for the peoples of Rwanda, the former Yugoslavia, Sierra Leone and Cambodia, the US government was far less willing to consider such courts for its own nationals.

The situation came to a head during the conference held in Rome in 1998 to draft and approve a statute for an International Criminal Court. For five weeks, the U.S. delegation to the United Nations conference wrestled with the rest of the world over the ICC treaty. Washington strenuously objected to elements in the treaty that gave the ICC its powers, and in the minds of the vast majority of the other participants, made the court viable. The United States insisted on conditions that would essentially make it impossible to try an American. Frustrated delegates worried that the resultant ICC would be either weakened by 'American exceptionalism,' or weakened by the lack of involvement of the U.S.

Certain accommodations and compromises were made in an attempt to bring the U.S. on board. The principle of ‘complementarity’ was among the most significant. Complementarity assures that national jurisdictions have the first obligation to prosecute. It is only when a nation-state proves 'unable or unwilling'⁶ to prosecute its suspected criminals that the ICC can assume jurisdiction. In a world with less impunity, Colombian

⁵ Bass, Gary Jonathan. 2001. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton University Press; Princeton NJ.

⁶ These terms are left undefined, and will be determined in practice, an indication of the contentious elements to the aspects of national vs. international jurisdiction.

national courts would prosecute Colombians, Burmese courts would prosecute Burmese, etc. But if national courts fail, the ICC is there to act.

A further restriction on the ICC's powers is the ways in which a case can be brought to the ICC. There are three 'trigger' mechanisms which allow the ICC to take up a case. A case can be heard pursuant to 1) a state party referral (a party to the Rome Statute requests the ICC's intervention); 2) a Security Council referral, and 3) *proprio motu*, in which the Prosecutor may initiate investigations on the basis of information on crimes within the jurisdiction of the court. In particular, allowing the Security Council a veto over the court, as the Security Council can affectively shut down an investigation/prosecution by ordering the ICC to abstain from such action for a year, (renewed on a yearly basis), effectively provided the U.S. with the ability to shut down any case. Despite these appeasements, the United States became increasingly isolated, watching as its allies coalesced into the group of "like-minded nations."

A notable aspect of the formation of the ICC was the role of international non-governmental organizations (NGOs). International social movements were essential to the creation and promotion of the ICC. A group of more than 800 NGOs established the Coalition for the International Criminal Court, and participated at unprecedented levels in the drafting of the Rome Statute, the lobbying of State parties, and the hard, grass-roots work of bringing diverse national constitutions in line with international aspirations regarding human rights norms. Additionally, victims were to have a greater role in both the prosecution and in terms of the possibility of receiving reparations; provisions supported by the NGOs.

When the Rome Statute was drafted and approved in 1998, most observers close to the process believed that it would actually take many years (decades) for the ICC to materialize. In fact, the process moved quite quickly to fruition. By 2002 the Rome Statute had garnered the requisite 60 signatories and came into affect. The Dutch government agreed to host the offices of the ICC in The Hague, a city with an established community of international institutions. The Dutch government also provided substantial financing for the ICC's infrastructure, and passed national legislation associated with the presence on its territory of suspected war criminals and the others who would be participating in such trials. In its gestation, the ICC also benefited from its location in The Hague in that many of the staff had significant expertise and experience from working in the ICTY.

When the ICC got started in 2002-2003, its staff was extremely conscious of the vulnerability of the institution. At the ICC's first major press conference in July 2003, the chief prosecutor⁷ sought to explain how the fledgling court was going to proceed among a universe of possible crimes. Extreme violence was everywhere... but what to count as legitimate warfare, and what to declare a crime against humanity? The ICC, in its initial statements, stuck to careful ground, narrowly interpreting its jurisdiction and stressing the limits of its resources. Temporally, the ICC's jurisdiction covered crimes

⁷ The ICC first chief prosecutor is Luis Moreno-Ocampo.

committed after it came into affect, which meant that any crimes committed before July 2002 were off limits. But by far the question of how the ICC would act *spatially*—how it would interpret its territorial jurisdiction-- was the most provocative. In theory, the ICC is distinct in that it can exert jurisdiction (with justification) anywhere on earth. This is its promise, and its problem. Its very strength ---its universal reach—is also the source of the enmity it has attracted.

In its first five years of operation, the ICC can be analyzed through the lens of its actions and its omissions: cases taken and others ignored or rejected. The most obvious issue is that the four cases taken in the first five years have all been in Africa: Uganda, the Democratic Republic of the Congo (DRC), Sudan and the Central African Republic. That all twelve indictees are African men has raised charges of neocolonialism. There are concerns that the ICC is yet another version of ‘victor’s justice’ in which the powerful (in this case the wealthy ‘Western’ nations which dominate the institutions of the international community, including the permanent members of the U.N. Security Council) use institutions such as the police and judiciary to criminalize the actions of the weak, while simultaneously legitimizing their own violence. Of its omissions, the ICC controversially rejected requests to investigate alleged crimes in Iraq.⁸

The International Criminal Court has been lauded as the culmination of millennial aspirations for justice and the future protection of human rights. Yet, to date, the ‘international’ court has indicted only African men. Granted, these suspects are accused of heinous violence; rape, child abduction, forcing family members to kill each other--- documented in detail by reputable human rights watchdog organizations. Yet their violence and alleged crimes exist alongside those of the State, which happens to be the same authorities that cooperate with the ICC. In the case of Uganda, the Prosecutor has investigated and indicted the bizarre, reclusive and quite possibly insane Joseph Kony of the Lord’s Resistance Army, but has (to date) ignored the violations committed by the Ugandan State. With the exception of an investigation into the actions of Sudan’s president, the ICC has failed to challenge state-power.

As of October 2008, 108 states have signed and ratified the Rome Statute, representing all regions of the world, with 30 African states parties, 23 states parties from Latin America and the Caribbean, 14 from Asia, 16 from Eastern Europe, and 25 from Western Europe and other states (including Canada and Australia). Future issues associated with prosecuting and preventing atrocities will likely exhibit complex, overlapping and intertwined geographies. International institutions are proliferating, but local and national politics and social movements remain intense; rather than ‘overshadowed’ by the international, local and regional practices seem fully engaged and inflamed. The

⁸ The issued a statement justifying its decision regarding Iraq: International Criminal Court, “Iraq response,” (10 February 2006), at http://www.icc-cpi.int/organs/otp/otp_com.html. The ICC also published a rationale of as to its failure to investigate alleged crimes in Venezuela: International Criminal Court, “Venezuela Response,” (10 February 2006), at http://www.icc-cpi.int/organs/otp/otp_com.html

International Criminal Court's activities (and its absences) during its gestation and infancy illustrate complicated social, political and legal geographies.