

THE ICC: HIGH EXPECTATIONS, AMBIGUOUS RECORD

After a decade of work, the International Criminal Court (ICC) has developed into an established institution of international criminal justice. Structural, legal, and political challenges remain, however: The gaps in membership are a problem, the focus on Africa has been criticised, and the relationship between justice and peace is a source of tension. Despite these difficulties, the ICC also has a preventive effect.



Passing on the baton at the ICC: Fatou Bensouda (Gambia) took over as chief prosecutor from Luis Moreno Ocampo (Argentina) on 15 June 2012. REUTERS / Pool New

The International Criminal Court (ICC) in The Hague began its work on 1 July 2002. It has 122 state members: Just recently, Cote d'Ivoire deposited its instrument of ratification and became the latest member of the court. The growing number of states parties to the treaty is a success for the court. A number of important countries such as the US, Russia, China, or India are not yet members of the ICC, however.

The ICC has jurisdiction for the prosecution of the most serious crimes: genocide, crimes against humanity, and war crimes. In the future, it is likely it will also be handling the crime of aggression (initiating a war of aggression). The ICC can prosecute only individuals, not countries. It is a court of last resort: Its jurisdiction only applies if the respective national authorities are un-

willing or unable to prosecute the culprits. The purpose of the ICC is to ensure that the perpetrators of the most severe crimes do not escape punishment. It is therefore also designed to have a preventive effect.

The record of the ICC's work is ambiguous. The establishment of the court has been a success in itself. Another positive outcome is that non-members can no longer ignore the ICC either, and that at least some of them are cooperating pragmatically with the court. The picture is less encouraging when one considers its achievements to date. In terms of numbers, they are rather modest: Eight investigations are currently underway. Overall, 23 arrest warrants have been issued, but the majority of these have not been served. So far, there have been six trials in total, but only two sentences.

It was almost ten years before the court announced its first sentence in the case of Congolese rebel leader Thomas Lubanga Dyilo in 2012. The ICC has therefore been accused of a lack of efficiency. Other challenges and tensions are related to the gaps in membership, the current regional focus of investigations on Africa, the tense relationship between justice and peace, and the discrepancy between the high ambitions and the realistic capabilities and capacities of the court.

The creation of the ICC

The creation of the first permanent International Criminal Court was a milestone for international criminal jurisdiction. At a conference in Rome on 17 June 1998, 120 countries voted in favour of the Rome Statute, with seven opposed and 21 abstentions. With this international treaty, the conference participants established the court and defined its mandate. After 60 states had ratified the Rome Statute, it took effect on 1 July 2002. Today, around 700 people from 90 countries work in The Hague.

The international military tribunals of Nuremberg and Tokyo after World War II marked a first attempt to hold accountable, under the principles of international criminal justice, the main perpetrators of crimes that affected the entirety of humanity. In the context of the Cold War, plans to create a permanent international criminal court were doomed to failure. It was not until the Cold War ended that the project once again picked up momentum. In 1994, the UN General Assembly

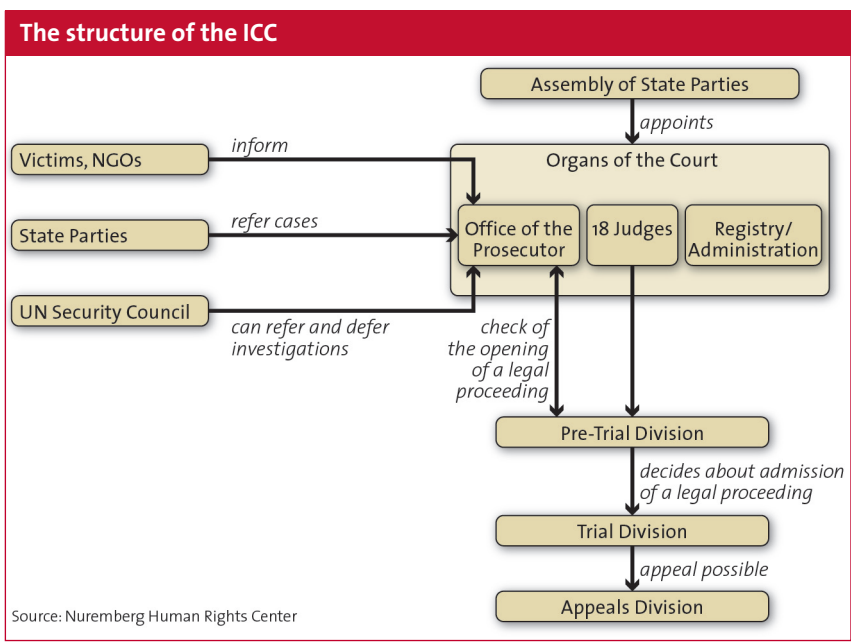
decided to pursue a draft statute submitted by the International Law Commission. The process gained significant momentum through the international special tribunals for former Yugoslavia (1993) and Rwanda (1994). They confirmed the enduring relevance of the topic and the fundamental practicability of such an authority.

A preparatory committee appointed by the UN General Assembly prepared a revised version of the statute for the diplomatic conference in Rome, which was attended by more than 160 countries. A majority of these managed to reach agreement on controversial matters such as the role of the UN Security Council (UNSC), the list of relevant crimes, the exclusion of caveats, and the possibility of proceedings being initiated at the behest of an independent chief prosecutor. In this development, the so-called “Group of Likeminded States”, which argued in favour of a strong independent court, was particularly influential. It was made up of about 60 countries, mainly from Europe, Africa, and Latin America. Numerous NGOs also supported the group. This coalition managed to prevail against the stance of the five permanent UNSC members, which argued they should have more influence on the court. Finally, 120 states agreed on the last draft on the Rome Statute, including France, the UK, and Russia.

Jurisdiction and structure

The Rome Statute stipulates that the ICC has jurisdiction in cases of genocide, crimes against humanity, war crimes, and the crime of aggression. It also defines the elements of these crimes. The precise definition of aggression was not laid down until the 2010 ICC Review Conference in Kampala. The states parties to the treaty must ratify this amendment separately. This clause will take effect in 2017 at the earliest if at least two thirds of member states agree and at least 30 states have ratified the amendment.

The ICC’s jurisdiction is limited in several ways. A crucial element is that of complementarity. The court can only become active if the appropriate national authorities are unwilling or unable to prosecute the perpetrators in a meaningful way. Its jurisdiction is also limited in time: The ICC can only judge matters that took place after the entry into force of the Rome Statute on 1 July 2002. As a rule, the time of entry is the relevant cut-off date for states joining later.



Furthermore, the work of the ICC is subject to geographic limits. By acceding to the Rome Statute, a state party acknowledges the ICC’s jurisdiction. In this way, the court – subject to the abovementioned limitations – can in principle intervene if a crime has taken place on the territory of a member state or if this crime is attributed to a person who is a citizen of a member state. Furthermore, non-members can voluntarily acknowledge the ICC’s jurisdiction on a case-by-case basis and thus submit to its authority. Finally, the Rome Statute gives the UNSC the right to refer events that took place on the territory of a non-state party to the ICC based on Chapter VII of the UN Charter. This was the case, for instance, in 2005 (Darfur/Sudan) and 2011 (Libya). Currently, a number of actors are demanding that the UNSC refer the Syria conflict to the ICC. The UNSC can also instruct the court to postpone or suspend an investigation by a (renewable) period of 12 months. In order to do so, the UNSC must pass a resolution to that effect with a majority vote. Also, this requires that all permanent members refrain from exercising their power of veto.

The court takes action either based upon its being made aware of a relevant event – or, in the jargon of the ICC, a “situation” – by a member state, due to referral from the UNSC, or based upon the initiative of the prosecutor (*proprio motu*). The latter case may be prompted, for instance, by reports by victims or NGOs. Once the Office of the Prosecutor has assessed the initiation of proceedings, a Pre-Trial Division determines whether the charges are admissible. A Trial

Division hands down the sentence, which can be appealed at the Appeals Division. The 18 judges of the ICC are chosen by the Assembly of States Parties (cf. illustration). One hallmark of the ICC is the fact that victims have comparatively far-reaching opportunities to participate in the whole process. Also, a Trust Fund for Victims has been created for them.

Currently, 122 countries are members of the ICC (Africa: 34 states, Asia-Pacific: 18, Eastern Europe: 18, Latin America and Caribbean: 27, Western Europe and others: 25). Another 17 states have signed the Rome Statute, but not ratified it. The US, Israel, and Sudan, though signatory states, now refuse to ratify the ICC Treaty. The main reasons cited by Washington for refusing to join are the lack of supervision of the ICC by the UNSC and the desire to protect US troops overseas from criminal prosecution. The ICC is financed by members’ contributions according to an allocation key. Its 2013 budget is €115 million. The lions’ share is contributed by European member states, with Germany as the main contributor.

Investigations: Limited achievements

The ICC is currently investigating eight situations. The Office of the Prosecutor is assessing situations in Uganda, the Democratic Republic of the Congo (DRC), the Central African Republic, Darfur (Sudan), Kenya, Libya, Cote d’Ivoire, and Mali. In the cases of Uganda, the DRC, the Central African Republic, Cote d’Ivoire, and Mali, the governments in question themselves called upon the ICC to initiate investigations. The situ-

ations in Darfur and Libya were referred by the UNSC. The investigation in Kenya was initiated by the chief prosecutor. In addition to these ongoing investigations, the ICC is engaged in preliminary enquiries regarding Afghanistan, Colombia, Georgia, Guinea, Honduras, Nigeria, and South Korea.

The ICC's actual record of achievements is regarded with scepticism by many observers. Some examples may illustrate why this is the case. For instance, the proceedings in Uganda have been underway since 2004. The ICC has issued warrants for the arrests of five leaders of the Lord's Resistance Army (LRA) for crimes against humanity and war crimes. One action was dismissed due to the death of the defendant. The four other suspects are still at large. In the DRC case, too, proceedings were initiated in 2004. In this case, the ICC handed down its first sentence against Congolese rebel leader Lubanga, who was convicted of recruiting child soldiers and sentenced to 14 years in jail. However, the long duration of the trial was severely criticised. The then chief prosecutor, Luis Moreno Ocampo of Argentina, was accused of having delayed proceedings and withholding exonerating evidence from the defence. Of the remaining defendants, two remain at large. In one case, the charges were dismissed, one defendant was found not guilty, and another trial is currently still underway.

The situation in Darfur attracted huge attention. This case was referred by the UNSC to the ICC, as Sudan had signed, but never ratified the Rome Statute. A particularly spectacular development was the ICC's decision in 2009 to issue a warrant for the arrest of Sudanese President Omar al-Bashir. The African Union (AU) criticised this decision and called on its members to refuse cooperation with The Hague. Indeed, al-Bashir has since travelled to selected other countries on occasion, even though all state members are obliged to arrest him. Several observers have also criticised that the bringing of charges against al-Bashir sabotaged the peace process in Sudan. It was not clear either whether international actors were even permitted to negotiate directly with a person for whom the ICC had issued an arrest warrant. Despite the charges against him, al-Bashir was re-elected as president of Sudan in March 2010. He is still at liberty. Arrest warrants had been issued for four other individuals; in one case, the Pre-Trial Division refused to bring charges, while the three others have not yet been arrested.

In Kenya, where violence broke out after the 2007/2008 elections, the ICC chief prosecutor initiated an investigation on his own authority for the first time. Two of the individuals summoned to the court in this context, Uhuru Kenyatta and William Ruto, stood for election together in the latest Kenyan polls. In February 2011, the UNSC unanimously referred the situation in Libya to the ICC, which subsequently issued warrants for the arrests of Muammar al-Ghaddafi, his son Saif al-Islam, and former intelligence chief Abdullah al-Senussi. The warrant for al-Ghaddafi was withdrawn after his death. Libya, which is not an ICC member, refuses to extradite the two other suspects despite the UNSC resolution.

Challenges

The ICC is an ambitious institution. Its establishment and the creation of the victims' fund have created great hopes and expectations among states, organisations, and not least the victims of crimes. However, the court's effective authority, resources, and capabilities are limited and will remain so for the foreseeable future. There is therefore a divide between aspirations and reality. For the long-term acceptance of the ICC, it is essential that it should succeed in bridging this gap in a credible manner.

One essential weakness is the court's lack of universality. There are about 70 states that are not ICC members. Among these are the three permanent UNSC members China, Russia, and the US, as well as countries such as India, Pakistan, Turkey, Egypt, Israel, Indonesia, or Thailand. This means that the applicability of the Rome Statute is severely restricted, giving rise to charges that the ICC only punishes the "weak" and lets the "mighty" get off scot-free.

The incomplete roster of members not only undermines the court's jurisdiction, but also its ability to enforce the law. Since the ICC has no enforcement apparatus of its own, it depends on the willingness of states to cooperate. The further removed the ICC is from true universality, the patchier its ability to assert itself will be. This state of affairs is somewhat mitigated by the fact that some non-members and even formerly harsh critics such as the US now cooperate at least partially with the ICC on a pragmatic basis, as illustrated, for instance, in the unanimous referral of the Libyan situation to The Hague.

The ICC is also often accused of having its gaze fixed too closely on cases in Africa.

Critics say that the court applies double standards in assessing situations and allows itself to be instrumentalised for the political and neo-colonial aims of its main donors. Indeed, the distribution of investigations initiated at The Hague is regionally unbalanced. All eight cases are related to African states. However, in five of these cases, the ICC was involved by the governments of the countries in question themselves, and in two other cases, the court became active due to referrals by the UNSC. In order to refute such criticism, the court also points to preliminary investigations in other regions. Such criticism is likely to weaken acceptance of the ICC in public opinion – particularly in Africa – as long as its activities are not more balanced in geographic terms.

The nexus of justice and peace is another field of tension. Certain experts argue that the prospect of criminal prosecution by the ICC makes it impossible to persuade criminal potentates such as Bashar al-Assad to step down. This makes peace negotiations more difficult, prolongs conflicts, and ultimately causes more victims, according to these critics. On the other hand, the advocates of international criminal justice note that a peace based on unpunished crimes is often not sustainable. In the interests of the victims, and in order to facilitate societal reconciliation in the conflict areas at a later date, one should not allow the most severe crimes to go unpunished, they argue. Furthermore, these voices contend that international criminal justice can only develop its preventive effect if its norms are not undermined by the granting of amnesties. In the future, such dilemmas between considerations of justice and peace can be expected to repeat themselves. As far as the practical effects of criminal charges on peace negotiations are concerned, the UN states in its mediation guidelines that contact with individuals charged with crimes in The Hague is permissible, but must be kept to the bare minimum necessary for a mediation process.

Despite all criticism, one should remember that what matters is not only what the ICC itself does as part of its proceedings. Equally important is the effect it has at the international level in terms of strengthening national authorities and legislation and its (preventive) effect in cases that are not prosecuted at The Hague. Thus, the trial of Lubanga started off public debates in several countries about the recruitment of child soldiers

and contributed to the release of child soldiers in Nepal. UN Secretary-General Ban Ki-Moon has described such effects as the “shadow of the Court”. This shadow is likely greater than might be expected from the concrete effects of the ICC’s activities in the first decade of its existence.

Switzerland and the ICC

Switzerland is among the ICC’s keen supporters. It was a founding member of the “Group of Likeminded States”. The Federal Council signed the Rome Statute on 18 July 1998. Subsequently, it expedited the domestic political adaptations necessary in order to be among the 60 initial signatories. On the one hand, in doing so, the Federal Council wanted to signal its engagement on behalf of international humanitarian law and human rights. On the other hand, it was aiming for active influence on the further development of the ICC, for instance in terms of selecting judges, determining procedural rules, or securing financing. On 12 October 2001, Switzerland joined the ICC as its 43rd member by depositing the instrument of ratification.

Cooperation with the ICC is enshrined in the Federal Law on Cooperation with the International Criminal Court. In 2012, the Swiss contribution to the regular ICC budget was about CHF2.3 million. This was supplemented by voluntary payments, including to the victims’ fund. Swiss officials hold several key positions at the ICC. For instance, in December 2011, the Swiss ambassador at The Hague became one of two vice-chairmen of the Assembly of States Parties.

There are several reasons for Switzerland’s engagement in expanding international criminal justice in the framework of the ICC. For one, this is in line with the country’s traditional support for legal norms in international relations. As a small state that has only limited instruments of power at its disposal, Switzerland believes its interests are best protected by a system governed by legal norms. Furthermore, fostering the protection of human rights is one of Switzerland’s foreign policy goals. As the depositary state of the Geneva Conventions, it advocates a strengthening of international humanitarian law. The promotion of peace is also one of the main priorities of Swiss foreign policy. In this context, it believes that combating criminal impunity is an important prerequisite for sustainable peace solutions – while being aware that criminal procedures alone are not sufficient to achieve that goal.

The topic of dealing with the past, which covers numerous other measures, is accordingly one of the focal areas of Switzerland’s civilian peacebuilding efforts.

At the 2010 ICC review conference, Switzerland together with countries such as Brazil, Argentina, and Canada successfully argued in favour of defining the crime of aggression and including the elements of this crime in the ICC’s area of jurisdiction. In 2012, Switzerland began efforts in preparation of ratifying these changes. The consultation process is expected to be initiated later this year. However, ratification may still be two or three years away. Switzerland’s parliament will have the final say on the changes.

Currently, Switzerland supports strengthening the ICC in two ways, of which one is more discreet and the other appeals more strongly to public opinion. Behind the scenes, Switzerland is engaged in lobbying on behalf of expanding membership in the Rome Statute. For instance, in its bilateral relations with non-member states, it urges them to sign the statute. In certain countries, it also supports projects that facilitate membership in the ICC and are designed to implement the provisions of the Rome Statute at the national level.

Switzerland garnered world-wide attention when, together with 57 co-signatory states, it handed the UNSC a petition in mid-January 2013 asking for the situation in Syria to be referred to the ICC. Five UNSC members – France, the UK, Australia, Luxemburg, and South Korea – also support the Swiss initiative. The latter is not uncontroversial, however. Some countries, such as Sweden, criticise that this move would preclude al-Assad from seeking exile as a last resort. Even some ICC supporters, such as Canada and Brazil, chose not to support the petition. It remains uncertain whether those in power in Syria will ever have to answer for their deeds in their own country or at The Hague. However, the more comprehensive the ICC membership becomes, the smaller are the loopholes for offenders.

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