

RECENT DEVELOPMENTS

INTERNATIONAL CRIMINAL LAW

From Nuremberg to The Hague: exploring international criminal accountability

Ffion Forteau*

Introduction and historical context

This blog explores the historical significance and ongoing relevance of the International Criminal Court (ICC) in recent times. It focuses on the court's role in prosecuting individuals who commit major international crimes, its aim to ensure accountability. By delving into the realm of international criminal law, the ICC upholds human rights, the rule of law, and international justice, curbing abuses of power by individuals in positions of authority. This blog highlights, *inter alia*, the ICC's jurisdiction, its case acceptance criteria, and sentencing practices. Therefore, understanding the origins of the ICC and its offerings is essential for a comprehensive understanding of its impact in the pursuit of global justice.

The origins of the ICC can be traced back to the international military tribunals established after World War II, most notably the Nuremberg trials conducted between 1945 and 1946, which aimed to prosecute high-ranking officials for their involvement in war crimes.¹ This precedent laid the groundwork for the establishment of ad hoc tribunals in the 1990s, established by the UN Security Council.² These tribunals served as temporary courts for addressing international crimes in the former Yugoslavia and Rwanda. Building on these earlier efforts, the ICC originated from the Rome Statute of International Criminal Court 1998,³ and began operating in July 2002, having been ratified by 60 countries. Situated in The Hague, Netherlands, the ICC holds jurisdiction over crimes committed after July 2002 within ratifying countries or by individuals from such countries, regardless of their own national affiliation.⁴

Individual liability and international crimes

When considering individual liability for international crimes within the ICC framework, it is important to note that the Court only prosecutes individuals rather than the states themselves. While ratification is required for ICC jurisdiction, there are other avenues for holding individuals accountable.

Under Article 12 of the Rome statute,⁵ geographical jurisdiction plays a significant role in determining prosecutorial reach. This means that the crimes committed by the citizens of non-parties on the territory of parties can still be prosecuted. Additionally, through ad-hoc authorisation, states can participate in specific cases, even if they have not joined the ICC. For instance, this scenario could apply to Ukraine and Russia, given they both are not in the ICC. Therefore, ad-hoc authorisation provides the ICC greater flexibility to exercise jurisdiction beyond just its member states.

* LLB Student, Coventry University

¹ United States Holocaust Memorial Museum, 'International Military Tribunal at Nuremberg' (*Ushmm.org*2019) <<https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg>> accessed 2 April 2024.

² 'Ad Hoc Tribunals - ICRC' (*www.icrc.org*29 October 2010) <<https://www.icrc.org/en/doc/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm>> accessed 2 April 2024.

³ International Criminal Court, 'Rome Statute of the International Criminal Court' (International Criminal Court 1998) <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 2 April 2024.

⁴ Amy McKenna, 'The International Criminal Court (ICC)', *Encyclopædia Britannica* (2019) <<https://www.britannica.com/story/the-international-criminal-court-icc>> accessed 2 April 2024.

⁵ International Criminal Court, 'Rome Statute of the International Criminal Court' (International Criminal Court 1998) <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 2 April 2024.

Article 5 of the Rome Statute identifies four international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.⁶ These offences form the basis for individual liability and potential prosecution. The Court's jurisdiction over these grave breaches of international law aims to prevent the future commission of these atrocities and ensure accountability, even for those in positions of power. By recognising the ICC's mandate to investigate and prosecute these core crimes, states affirm the principle of the rule of law – that everyone is equal to the law – in connection to the most serious violations of human rights and humanitarian law.

An example that demonstrates individual accountability is the case of Thomas Lubanga Dyilo, the former leader of the Union Congolese Patriots (UPC) militia group in the Democratic Republic of the Congo. He was convicted by the ICC in 2012 for the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities. Despite not having pulled the trigger himself, Lubanga was found criminally responsible under the principle of individual criminal liability. The Court determined that as the leader of the UPC, Lubanga had control over the under-aged soldiers and was aware that they were being recruited with the intention of using them in armed conflict. His failure to prevent or punish these crimes committed by his subordinates led to his conviction.⁷

Challenges faced by the ICC

The ICC plays a vital role for promoting accountability in cases of international crimes. However, the ICC encounters significant weaknesses that hinder its effectiveness. One of the primary challenges is its limited jurisdiction, which poses difficulties in ensuring universal accountability. The ICC's jurisdiction operates on the principle of complementarity, meaning it can intervene only when national courts are unable or unwilling to genuinely prosecute crimes.⁸ This principle respects state sovereignty but could create jurisdictional gaps in situations where a non-member state chooses not to join the ICC and fails to prosecute crimes domestically. Without the option for ICC intervention, this would leave serious international crimes without any avenue for accountability.

This limitation becomes evident in conflicts like Syria, where the ICC has been unable to address alleged crimes due to Syria's non-membership and the absence of a UN Security Council (UNSC) referral.⁹ The Security Council's inability to make consistent referrals hinders the ICC's jurisdiction, as seen with the invasion of Ukraine by Russia (which is not an ICC member),¹⁰ and the ongoing conflict between Israel and Hamas, where Palestine only recently joined the ICC in 2021 while Israel has not recognised its jurisdiction.¹¹ Resolving these challenges, through reforms to the ICC's framework or the UNSC's decision-making process, is crucial to strengthen the Courts capacity to ensure accountability for the most serious international crimes, even without full state cooperation.

Recent events, such as the invasion of Russian soldiers in the conflict in Ukraine, further underscore the jurisdictional constraints of the ICC, as Russia is not an ICC member and no referral has been made by the Security Council. The ongoing war between Israel and Hamas also underscores the jurisdictional constraints of the ICC, as Palestine ratified the Rome Statute only in 2021, while Israel has expressed its non-recognition of the ICC's jurisdiction. This makes it challenging to impose accountability on

⁶ International Criminal Court, 'Rome Statute of the International Criminal Court' (International Criminal Court 1998) <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 2 April 2024.

⁷ International Criminal Court, 'Lubanga Case' (*Icc-cpi.int*2019) <<https://www.icc-cpi.int/drc/lubanga>> accessed 15 May 2024.

⁸ 'Informal Expert Paper: The Principle of Complementarity in Practice' (2003) <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>> accessed 2 April 2024.

⁹ United Nations, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution | UN Press' (*press.un.org*22 May 2014) <<https://press.un.org/en/2014/sc11407.doc.htm>> accessed 2 April 2024.

¹⁰ Andrew Henderson, 'Six Countries That Aren't Part of the ICC' (*Nomad Capitalist*29 August 2018) <<https://nomadcapitalist.com/global-citizen/countries-arent-part-of-icc/>>.accessed 2 April 2024

¹¹ Reuters, 'ICC Prosecutor Says Israel Must Respect International Law' (*Reuters*3 December 2023) <<https://www.reuters.com/world/europe/icc-prosecutor-urges-israel-hamas-respect-international-law-2023-12-03/>> accessed 2 April 2024.

these states, and addressing these challenges is imperative to strengthen the ICC's capacity to hold perpetrators accountable and ensure justice for victims.

Political interference poses another significant challenge to the ICC, jeopardising its impartiality and undermining its mandate. Powerful states often exert political pressure or non-cooperation to hinder or obstruct the courts work when their interests are at stake. The United States, for instance, has been highly critical of the ICC and has taken measures to impede its functioning. In 2019, the U.S. revoked the visa of the ICC's chief prosecutor, Fatou Bensouda, and imposed travel restrictions on ICC personnel investigating alleged war crimes by U.S. military personnel in Afghanistan.¹² Political pressure on the ICC is not limited to the U.S. - other states have also sought to influence the Court. Some African countries, for example, have accused the Court of exhibiting partisan behaviour and targeting African leaders,¹³ resulting in threats of withdrawal. Additionally, Palestinians have accused the ICC prosecutor of bias following their visit to Israel.¹⁴ These actions raise concerns about national sovereignty and politically motivated prosecutions.

Lastly, enforcement challenges weaken the ICC's impact, hindering its ability to bring suspects to justice and ensure effective judgments. Article 86 and 59(1) showcases the requirement on member states' cooperation to execute arrest warrants and enforce sentences.¹⁵ A notable example is the case of former Sudanese president Omar al-Bashir, who managed to evade multiple ICC arrest warrants and travel freely, despite facing charges of genocide, war crimes, and crimes against humanity.¹⁶ This example vividly highlights the obstacles that the ICC faces in enforcing its decisions.

Strengthening accountability within the ICC

To address the weakness of accountability within the ICC, two points must be considered. First, expanding the ICC's jurisdiction by encouraging more states to join and ratify the Rome Statute is crucial. For instance, cooperation with regional courts and tribunals can bridge jurisdictional gaps, ensuring accountability for crimes committed in non-member state territories. Additionally, bringing greater diversity in the composition of judges and prosecutors at the ICC, in terms of geographical representation, legal traditions, and professional backgrounds, would broaden the court's perspectives and experiences.¹⁷ This would significantly strengthen its capacity to hold perpetrators accountable by enhancing its understanding of different cultural contexts and legal frameworks, and allowing it to navigate complex jurisdictional challenges more effectively.

Second, political interference undermines the ICC's impartiality and effectiveness. Safeguarding the independence and impartiality of the ICC is vital in addressing this challenge. Recognising the need to enhance state cooperation is a significant step. As the court is "almost completely dependent on state cooperation"¹⁸, active engagement with individual states would promote greater cooperation.

Conclusion

The ICC remains a vital institution in ensuring international criminal accountability. Its unwavering commitment to prosecuting individuals accused of the gravest offences is integral to upholding the

¹² 'US Revokes ICC Prosecutor's Visa over Afghanistan Inquiry' (*The Guardian* 5 April 2019) <<https://www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor>> accessed 2 April 2024.

¹³ Amy McKenna, 'The International Criminal Court (ICC)', *Encyclopædia Britannica* (2019) <<https://www.britannica.com/story/the-international-criminal-court-icc>> accessed 2 April 2024.

¹⁴ Mat Nashed, Zena Al Tahhan, "'Alarming": Palestinians Accuse ICC Prosecutor of Bias after Israel Visit' (*Al Jazeera* 9 December 2023) <<https://www.aljazeera.com/features/2023/12/9/alarming-palestinians-accuse-icc-prosecutor-of-bias-after-israel-visit>> accessed 2 April 2024.

¹⁵ International Criminal Court, 'Rome Statute of the International Criminal Court' (International Criminal Court 1998) <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 2 April 2024.

¹⁶ Ahmad Hassan and others, 'President of the Republic of Sudan' (1993) <<https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/AlBashirEng.pdf>> accessed 2 April 2024.

¹⁷ Jeremy Sarkin, 'Reforming the International Criminal Court (ICC): Progress, Perils and Pitfalls Post the ICC Review Process' (*Sciendo* 2021)

¹⁸ *Ibid*, 15-16.

principles of global justice. The ICC's commitment to ensuring the rule of law, regardless of position or power, solidifies its place as a cornerstone of the international justice system. Its unwavering dedication to international criminal accountability stands as the backbone against the worst excesses of human cruelty, upholding the fundamental principle that justice must prevail, no matter how powerful the perpetrator. However, it is suggested that by addressing jurisdictional constraints and combating political interference, the ICC can strengthen accountability mechanisms and enhance its effectiveness in delivering justice.