

LEGITIMACY AND EFFECTIVENESS OF THE INTERNATIONAL CRIMINAL COURT (ICC): CRITICAL PERSPECTIVES



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The number of violations of international humanitarian law's norms had become an increasing phenomenon. The situation requires urgent and effective international control and prosecution in international tribunals for grave crimes presenting a real threat to security and peace. In order to control such crimes, the relevant legal mechanisms for international prosecution were established through the creation of International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). However, the long court delays and high operational expenses of these tribunals led to the establishment of International Criminal Court (ICC). This article will critically assess the perspectives of the ICC in terms of its legitimacy and effectiveness in comparison with the ICTY and ICTR.

Key words: International criminal law, International Criminal Tribunal for former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), International Criminal Court (ICC), genocide, crimes against humanity, war crimes, legitimacy, Central African Republic (CAR).

INTRODUCTION

The situation of violating international humanitarian law requires urgent and effective international control and prosecution as this presents a real threat for security and peace.¹ For this reason, the UN Security Council established the relevant legal mechanisms for international prosecution that include International Criminal Tribunal for former Yugoslavia (ICTY)² and International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994 respectively. However, due to slow, long proceeding and costly expenses of those tribunals, the International Criminal Court



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(ICC) was established. The diplomatic session adopted the ICC Statute in 1998, and the Court entered into force in 2002. In fact, after an extensive number of rough, inhuman and flagrant violations of human rights, the establishment of the International Criminal Court (ICC) has been the most anticipated decision of the international community. Humanity has entrusted the hope of establishing a fair, independent, impartial international justice body capable of finishing all those atrocities that occurred during the two world wars.

The main difference between the ICC and both tribunals is that the ICC jurisdiction has directed to pre-eminence principle of complementarity with national courts.³ This means that the ICC gives an opportunity to domestic courts to extend their prosecution for international crimes; it intends strengthening national jurisdictions, while the ICTY and ICTR (the tribunals) jurisdictions have a primacy of over national courts.⁴ For a long time, it has been a dispute, which of these three legal institutions are exercising their obligations and duties better as all of them have a number of failures and successes.

This article will attempt to uncover major problems impeding the Court and the tribunals to implement the idea of bringing to justice individuals accused in the widespread violations of human rights. Even though, it is very difficult to compare and evaluate the work of the ICC and the tribunals because of their different structure, features, budgets and jurisdiction, this critical analysis will try to determine which of these legal mechanisms has been more successful. Nevertheless, legitimacy and effectiveness are regarded to be two key measures determining success of the International Criminal Court or the tribunals.⁵ For this

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¹Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press 2001) 22.

²UN Doc. S/RES/827 (1993).

³Ibid art 17.

⁴ICTR Statute art 8(1); ICTY Statute art 9(2).

⁵Anthony M. North & Joyce Chia 'Towards convergence in the interpretation of the Refugee Convention' in James C. Simeon *The UNHCR and the supervision of International refugee law* (Cambridge University press 2013) 214, 236.

reason, to what extent the work of the ICC as well as of the tribunals has been legitimate and effective will be considered below. Furthermore, a level of the impartiality will be assessed. Finally, conclusion will be provided.

LEGITIMACY

Before starting discussion in respect of the level of legitimacy of the ICC and the tribunals, it is necessary to identify what the term "legitimacy" could mean. Assessment of legitimacy could be determined in relation to the actors being involved: the parties; those who are directly affected by the result of the proceedings; the international high rang politics; Countries; the wider international legal community; and society in general.⁶ As noted, the International Criminal Court established by the consent of states parties to the Rome Statute, have 'greater' legitimacy than the tribunals created by Security Council as an institution of limited membership.⁷ The aspect of institutional legitimacy of the ICC is a level of efforts put in to achieve a fair justice in comparable cases. It is important to consider whether it is comprehended as doing so.⁸ The potential universal character of the permanent court raises this component of legitimacy. Despite the fact that the ICC was not created because of universal jurisdiction, its potential character extends the possibility of non-state parties to assume its jurisdiction.

The work of the ICC could be evaluated by determination of whether its prosecutions, investigations and judgments comply with the standards of fair treatment. Institutionally the ICC is more legitimate than the tribunals. For instance, from the position of the government of Rwanda, there have been many doubts about legitimacy of the ICTR because the government voted against the creation of Tribunal for Rwanda.⁹ Three political communities from former Yugoslavia have been indicted by the ICTY but there has been perception that they are anti-Croatian and anti-Serbian ones.¹⁰ There is no any guarantee that these communities think that the work of the ICTY has been legitimate. This control of perceptions in war crimes for courts has critical importance because in majority of conflicts as well as in post-conflict situations such supposed war crimes can enjoy a hero status in their communities. There is also could be precepts with the international trials that it is true that people of Country are being tried through official representative persons.

EFFECTIVENESS

According to Ainley, the ICC has greatly contributed to ending impunity and it has had a positive influence onto domestic criminal systems.¹¹ The creation of the ICC happened because of slow, long proceedings and costly expenses of the tribunals. One of the reasons why the ICC is more effective than them is that since the ICC was created the staff established a centralised database "ICC Legal Tools" which includes all cases, court's materials of the ICC and other prior ad hoc tribunals. Through this database, persons could receive all latest and authoritative texts of international criminal law such as conventions, statutes and precedents.

⁶Ibid.

⁷Dominic McGoldrick 'The Legal and Political Significance of a Permanent International Criminal Court' in Dominic McGoldrick, Peter J. Rowe 'The Permanent International Criminal Court: Legal and Political Issue' (Hart Publishing 2004) 453, 460.

⁸Ibid.

⁹Anthony M. North & Joyce Chia 'Towards convergence in the interpretation of the Refugee Convention' in James C. Simeon 'The UNHCR and the supervision of International refugee law' (Cambridge University press 2013) 214, 237.

¹⁰n (30) 455.

¹¹Kirsten Ainley, 'The International Criminal Court on Trial', (2011) 24(3) Cambridge Review of International Affairs 309, 311.



The entrance of the International Criminal Court (ICC)

The ICC legal Tools projects comprise 44,000 documents, including legal commentaries from practicing international lawyers.¹²

Further evidence on effectiveness of the ICC is that the court is independent and it does not need to wait for the permission from the UN SC to start investigation of circumstances of case, while the tribunals have to receive the establishment of order to begin an investigation. This feature of independency accelerates the pace of investigation and adjudication of a particular case.¹³

Other significant proof of its effectiveness is that the ICC plays a paramount role in ending impunity. Before the permanent ICC court was established, international tribunals had difficulties in prosecuting Head of States. Most of them could avoid criminal responsibility because of their sovereign immunity.¹⁴ Whereas, the Statute of the ICC determines that sovereign immunity will not be a ground to avoid criminal responsibility:

*'This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of Government or parliament, elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of, itself constitute a ground for reduction sentence. Immunities or special procedural rules which may attach official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person.'*¹⁵

However, there are others claims questioning its effectiveness. One of significant reasons for such a claim is that expensive 'activities' and long court proceedings of the ICC are quite similar to nature of the tribunals. Since the ICC has been established, its cost for the international community has reached around 900 million dollars.¹⁶ Are there any justifications of these expenses? France, Germany and Britain provided some financial support to the court, while European Union and the Netherlands mostly cover all budget of the Court, plighted 10 years

¹²The ICC Legal Tools Project website at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Legal+Tools>.

¹³n (14) 315.

¹⁴Ibid.

¹⁵Rome Statute of International Criminal Court art 27.

¹⁶Jon Silverman, 'Ten Years, 900 M: Does the ICC Costs too Much?' BBC News (March 12, 2012), <http://www.bbc.co.uk/news/magazine-17351946>



of free rent as well 70 million dollars for beginning costs.¹⁷ Even though State parties are seeking to limit the funding that is obtained by the ICC yet as showed above, funding is necessary for the Court to work.

Moreover, there is some evidence that ICC might not be so effective, because victims of crimes have a deficient knowledge about the ICC. According to study about accountability and social reformation published by Central African Republic (CAR):

A) 23% of victims think that the European Community created the ICC;

B) 65% of victims with some knowledge about the ICC suppose that it is located in CAR and could investigate grave offenses prior to 2002'.

The shortage of knowledge produces irrelevant and unreal expectations from the ICC and in addition it dissatisfies the victims and builds some doubts about the effectiveness of the Court.¹⁸

Other point indicating some doubts about the effective work of the ICC is that ICC does not have a "police force" and it seems to be the main obstruction to execute warrants of arrest issued by it.¹⁹ The absence of cooperation from states and non-states caused a long process of executing arrests; thereby, the Court could not do anything. The reason of that is the late commencement of trial giving to advocates of accused person the right to protest against all documentation provided by prosecutor as a main evidence of accusations against. Consequently, any actions of the ICC to reject accused person to use his/her right to challenge evidence would have put some doubts about legitimacy of the Court's proceedings.²⁰ This clearly illustrates that the level of efficiency of the ICC depends on states interaction and the international society. It is hard to imagine that the prosecutor would go to another sovereign country without permission of this state to conduct a detailed investigation. Speaking about the tribunals, according to Dagmar Stroh

*"The courts were fully functional after overcoming several initial problems [sic]" but noticed that collaboration of states leaves an "indispensable requirement for efficient proceedings."*²¹



¹⁷Rita Mutyaba 'The International Criminal Court: Its Impact and Challenges It Faces' (Georgetown University Law Center), http://www.academia.edu/4019723/The_International_Criminal_Court_Its_Impact_and_the_Challenges_It_Faces (24 January 2017).

¹⁸Patrick Vinck & Phuong Pam, 'Building Peace Seeking Justice, A Population-Based Survey on Attitudes about Accountability and Social Reconstruction in the Central African Republic' (Human Rights Center, University of California, Berkeley 2010) 32.

¹⁹Young Sok Ki, 'The Cooperation of State to Establish an Effective Permanent International Criminal Court' (1997) 6 Journal of International Law and Practice 157, 160.

²⁰Moses Retselisitsoe Phooko, 'How Effective the International Criminal Court has Been: Evaluating the Work and progress of the International Criminal Court' [2011] Notre Dame Journal of International, Comparative, & Human Rights Law 182, 207.

²¹Dagmar Stroh, 'State Cooperation with the International

The Rome Statute provides a number of different provisions about duties to cooperate and Article 86 partially covers:

*'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'*²²

Due to the binding nature of this provision, contracting states have an obligation to provide some support to the ICC including the arrest and identification of the place of suspects.²³ Unfortunately, African Union declared that it will not give any support to the Court and it has convinced all supporters of Africa not to cooperate with the court in executing warrants of arrest and "surrendering" of President Al Bashir.²⁴ In fact, the President of Sudan who is Omar Al Bashir, has been the first sitting President to be wanted by the ICC, and the first person to be charged by the ICC for the crime of genocide. However, neither of the two warrants of arrest against him has been enforced, and he is not in the custody of the Court.²⁵ Many African states, along with China as a key ally of Sudan, have called for the ICC proceedings to be suspended, arguing it will hamper efforts to bring peace to Darfur. The Sudanese leader is said to have been emboldened by the decision of 22-members, participants of Arab League, not to enforce the warrant; even though, three of its member countries are state parties of the ICC. Thus, the court was incapable to detain the Sudanese and other suspects in the African region. It is evident that without support from member states, the ICC would be ineffective.²⁶

IMPARTIALITY

There have been amount of large-scale legal and political critiques about work of the ICC. The representation of political compromises in the Rome Statute introduces the great achievement of the North's views on human rights and state sovereignty at the expense of the South and the third world states. The ICC has been the first global organization that have been trying to restore failing developing states.²⁷ According to Louis Arbor acting as the Prosecutor of the ICTY, developing states could be "overshadowed", therefore, *'there is a risk that developed countries could impose their own concept of morality and justice in developing countries. It can slide into moral and cultural imperialism if we are not careful.'*²⁸

Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2011) 6 Max Planck Institute for Comparative Public Law and International Law 249, 249.

²²Rome Statute of International Criminal Court art 86.

²³Ibid art 92, 93.

²⁴n (23) 196.

²⁵Situation in Darfur, Sudan ICC-02/05 <https://www.icc-cpi.int/darfur>.

²⁶Ibid, 196.

²⁷n(30) 461.

²⁸Ibid.



A general view shows the headquarters of the African Union (AU) building in Ethiopia's capital Addis Ababa, January 29, 2017

President Kagame of Rwanda believes that there had to be the establishment of some guarantees which provided that developed countries will not use the ICC as a political tool against poor states.²⁹ Indeed, there is an argument that the ICC is only targeting the African continent. For instance, in the official statement of the Government of the Gambia:

*«There are many western countries, at least 30, that have committed heinous war crimes against independent sovereign states and their citizens since the creation of the ICC and not a single western war criminal has been indicted».*³⁰

ACCORDING TO THAT THE WITHDRAWAL

*«is warranted by the fact that the ICC, despite being called International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans».*³¹

Thus, undoubtedly, there is a high likelihood that because of the design and complementary character of the ICC, the Court is unable to conduct the effective investigation and put forward the accusation against persons committed crimes. In fact, this was a reason of why the Government of the Republic of Gambia issued the notification of withdrawal from the ICC Statute in 2016; however, there has been a change in their decision when the new government of the Gambia came to power in 2016. Thereby, recently, on February 2017, the new government has provided notification to the Secretary General of the UN on its decision to rescind the notification of withdrawal from the previous government with immediate effect. This means that the Gambia still considers itself as a state party and will continue to honor its obligations under the Rome Statute.³²

The design of the permanent court is probably to reserve rich countries. Any perception of inequality will have to be controlled by the ICC but it

will be unable to proportionate its docket to repel geo-political divides; even though, provisions not always come true. Good example for it, in 1990 the Yugoslavia was not a developing state, but if its history repeats it will fall into jurisdiction of the ICC. Countries from all over the world, third world states and first world states ratified the Rome Statute. However, not all countries were in favor for the establishment of the ICC. For example, such developed countries as USA and Turkey and developing country as India were against.³³ In fact, taking into account the recent events related to Syrian conflict, there are many arguments around this issue. For example, Putin has issued a decree against the ratification of the Rome Statute as the ICC has not "lived up to expectations and failed to become a genuinely independent judicial body".³⁴

In fact, most of the countries that are the United States, China, Israel, Ukraine, and Syria have signed the Statute without the ratification; therefore, the ICC jurisdiction does not apply to them. Under these circumstances, war crimes and crimes against humanity committed in Syria, as well as in Ukraine and other countries seem to be left without punishment. With regard to that, Secretary-General Ban Ki-moon, speaking at the UN headquarters in New York at a special meeting devoted to the work of the ICC, said that the effectiveness of the system of international justice depends largely on the willingness of States to cooperate with the ICC. Ratification of the Rome Statute by countries that have not yet done it would end the impunity of perpetrators of crimes related to fundamental human values.

CONCLUSION

In conclusion, the ICTY, ICTR and ICC were established because of grave crimes recognized under international humanitarian law as they present a serious threat to security and peace. Despite the fact that they have different jurisdictions, structure and budget, they have similar objectives that include a restoration of destroyed peace in territory of their jurisdictions and stopping impunity. Their work highly contributes to the development of the International Criminal Law.

The arguments discussed above have illustrated that all these legal institutions have achievements and failures at the same time. Considering the ICC, it could be noted that a main weakness in the work of ICC is that there is no 'police force' considered to be the primary obstacle for immediate execution of arrest warrants. The absence of cooperation and interaction between States Parties is also continuing to cause delays in executing arrests warrants. Even though, the Rome Statute has provisions obliging the State Parties to support the ICC, the State Parties not always cooperate with the Court that makes the work of the ICC be ineffective. This has been evident in the case of such countries as Russia, US, and Rwanda presented above. In addition to that, the high cost expenses and long proceedings are other shortcomings of the Court. However, the Staff of the Court has reached a great goal by creation of a big database "ICC Legal Tools" which gives people an opportunity to access 44,000 legal documentations and receive a legal support from international qualified lawyers. The Rome Statute determines that every person should be responsible for the crimes committed, and without distinction based on official capacity.

Considering the legitimacy of the ICC, it could be noticed that in contrast to the tribunals, the Court had wider support in the time of

²⁹ibid.

³⁰Gambia withdraws from International Criminal Court, <http://www.aljazeera.com/news/2016/10/gambia-withdraws-international-criminal-court-161026041436188.html>

³¹ibid.

³²CN.62.2017 Eng. (2017) <<https://treaties.un.org/doc/Publication/CN/2017/CN.62.2017-Eng.pdf>> accessed 27 February 2017.

³³n(30) 462.

³⁴Autonomous Nonprofit Organization, 'Russia refuses to ratify Rome statute as ICC 'failed to become truly independent'' (6 February 2017) <https://www.rt.com/news/367109-russia-icc-rome-statute> accessed 6 February 2017.



Permanent headquarters of the International Criminal Court at The Hague (file) UN Photo/Rick Bajornas

its establishment while the legitimacy of creation of two tribunals discussed above was questionable. Nevertheless, there were many legal and political critics about the work of the ICC which put some doubts in legitimacy of the Court. They suppose that the design and complementary character of the ICC will not work appropriately for all countries developing and developed. However, if to examine the work of the ICC in general, it looks more effective, successful and legitimate than of the ICTR and the ICTY. Furthermore, it was not surprising that the ICTR was closed on 31 December 2015 and the ICTY is expected to be closed at the end of 2017. Instead of them, the Mechanism for International Criminal Tribunals ("Mechanism" or "MICT"), formally referred to as the International Residual Mechanism for Criminal Tribunals, mandated to perform a number of essential functions previously carried out by the ICTR and the ICTY, has been created in 2010.

Thus, the ICC presents a unique multilateral permanent international court in the world that has a mandate to investigate and prosecute individuals participating in the international atrocity crimes of genocide, crimes against humanity, and war crimes.³⁵ These days, the jurisdiction of ICC may expand including the crime of aggression as well.

³⁵Rome Statute of International Criminal Court art 5(1).

Д.У. Мухамеджанова, Г.Д. Раисова: Халықаралық Қылмыстық Соттың (ХҚС) заңдылығы мен тиімділігі: сыни бағалау.

Халықаралық гуманитарлық құқық нормаларының бұзылуы барған сайын айқын құбылысқа айналып барады. Бұл жағдай халықаралық трибуналдарда бейбітшілік пен қауіпсіздікке нақты қауіп тудыратын аса ауыр қылмыстар үшін кідіріссіз және тиімді халықаралық бақылау мен соттық қудалауды талап етеді. Осындай қылмыстарды бақылау мақсатында халықаралық қудалауға арналған тиісті құқықтық механизмдер қалыптасты, атап айтқанда, бұрынғы Югославия бойынша Халықаралық қылмыстық трибунал (БЮХТ) және Руанда бойынша Халықаралық қылмыстық трибунал (РХҚТ). Дегенмен, соттың істі қарауының ұзаққа созылуы және бұл трибуналдарды қамтамасыз етудің өте көп шығындары Халықаралық қылмыстық соттың (ХҚС) құрылуына себепші болды. Осы мақаланың мақсаты – ХҚС қызметін БЮХТ және РХҚТ-мен салыстыра отырып, заңдылық пен тиімділік тұрғысынан сыни талдау.

Түйінді сөздер: халықаралық қылмыстық құқық, бұрынғы Югославия бойынша Халықаралық трибунал (БЮХТ), Руанда бойынша Халықаралық қылмыстық трибунал (РХҚТ), Халықаралық қылмыстық сот (ХҚС), геноцид, адамзатқа қарсы қылмыстар, әскери қылмыстар, заңдылық, Орталық Африка Республикасы (ОАР).

Д.У. Мухамеджанова, Г.Д. Раисова: Законность и эффективность Международного Уголовного Суда (МУС): критический анализ.

Нарушение норм международного гуманитарного права становится все более заметным явлением. Ситуация требует безотлагательного и эффективного международного контроля и судебного преследования в международных трибуналах за тяжкие преступления, представляющие реальную угрозу миру и безопасности. В целях осуществления контроля за такими преступлениями, были созданы соответствующие правовые механизмы для международного преследования, а именно Международный уголовный трибунал по бывшей Югославии (МТБЮ) и Международный уголовный трибунал по Руанде (МУТР). Однако затяжные судебные разбирательства и высокие расходы на содержание этих трибуналов повлияли на создание Международного Уголовного Суда (МУС). Целью настоящей статьи является проведение критического анализа деятельности МУС с точки зрения законности и эффективности в сравнении с МТБЮ и МУТР.

Ключевые слова: международное уголовное право, Международный уголовный трибунал по бывшей Югославии (МТБЮ), Международный уголовный трибунал по Руанде (МУТР), Международный Уголовный Суд (МУС), геноцид, преступления против человечности, военные преступления, законность, Центральная Африканская Республика (ЦАР).