

Geopolitical Analysis Concerning Universal Acceptance and Fairness of the International Criminal Court

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ABSTRACT

The International Criminal Court (ICC) has been criticised for its international acceptance and fairness as an international permanent court toward current US, China and Russia positions. In fact, they have not ratified it due to their own national considerations expelling possible prosecution of their nationals. On the other hand, they exercised their privileges as permanent members of the United Nations Security Council pursuant to Articles 13 and 16 of the Rome Statute referring foreign nationals before the ICC for prosecution of the most serious crimes as experienced in Sudan lately. This essay aims to discuss and to highlights the US, China and Russian's reasons for not ratifying the Rome Statute and their impacts to the universal and the fairness of the ICC.

Keywords: *ratification, prosecution, the most serious crimes, the Rome Statute*

The International Criminal Court (ICC) is a permanent international criminal tribunal recorded officially in 37 ILM 999 (ICC 1998). Since July 1st, 2002, it has performed to prosecute alleged perpetrators of the most serious crimes, i.e. war crimes, genocide and crimes against humanity (Bantekas and Nash 2007; CICC 2008). Although the ICC is an independent international judicial organ, it also relates to international political dimension when it deals with referral for certain situation referred by the United Nations Security Council (UNSC) acting under

Chapter VII of the United Nations (UN) Charter pursuant to Articles 13 and 16 of the Rome Statute.

The ICC differs from the previous two ad hoc international military tribunals, i.e. the Nuremberg International Military Tribunal (IMF) and the Tokyo International Military Tribunal for Far East (IMTFE), and from well known two ad hoc international criminal tribunals, the Ad Hoc International Tribunal for Former Yugoslavia (ICTY) and the Ad Hoc International Tribunal for Rwanda (ICTR) in terms of its legal source, jurisdiction, rules and procedures and enforcement mechanisms (Robinson 1999; Kelly 2000; McCormack and Simpson 1997; Bassiouni and Manikas 1996).

The political dimensions for such referral becomes more loudly criticised for example by Bantekas and Nash (2007) when three permanent members of the UNSC namely the United States, Russia and China are not Member States to the Rome Statute. According to Mundis in case of the US, it has openly adopted hostile attitudes against the ICC by consistently campaigning that the ICC may initiate prosecution against the US nationals and it may also breach the US Constitution. Meanwhile, Russia adopts a subtle “wait and see” consideration by stating that it needs time to harmonise the Russian Constitution as argued by Tuzmukhamedov (2005) and China has broader legal and political concerns toward its political interests in the UNSC at large analyzed by Jianping and Zhixiang (2005). According to Huntington Theory of Clash of Civilization (1996), viewed from geopolitical point, there is a belief that international relations will remain level of within continents emerging dominancy led by US in Latin America and by Russia and China in Asia including Australia while at the same time Europe and Africa will support to reduce the US, Russia and China dominancy. Samuel Huntington’s clash of civilization will be started in a very rapid and systematic way in near future.

Stemming from the above arguments, the UNSC first referral plays a role as a good case study. The UNSC referred to the Prosecutor of the ICC under Article 13 (b) of the Rome Statute to investigate situation in Darfur, Sudan in 2005. This referral has been accepted by the Prosecutor and then the Prosecutor issued arrest warrant and further prosecution for Ahmad Muhammad Harun, former Sudanese Minister of State Interior and for Ali Muhammad Ali-Abd-Rahman (Ali Kushayb), leader of Militia/*Janjaweed*. Bantekas and Nash (2007) in this regard argue that this referral draws US, Russia and China hypocrite for prosecution of the most serious crimes in their domestic arena.

This paper aims to discuss whether the ICC is really a universal international criminal tribunal for promoting and for strengthening international justice toward the US, Russia and China positions viewed from legal and political point of views.

To reach this aims, this paper is divided into three main parts; first, it will outline the ICC and its current works in this introductory chapter. Second, it focuses on the political and legal relevance of the US, China and Russia's positions to the ICC, especially their reasons for not ratifying the Rome Statute and their impacts to the ICC' acceptance and fairness as core elements of a universal criminal tribunal. Lastly, it will conclude and answer to the main concern of this essay whether US, Russia and China positions toward ICC really defects to the international acceptance and fairness of the ICC.

The US Position

The US response to the ICC can be traced into two sequences, i.e. before the Rome Conference and after the Rome Conference. These sequences will be outlined as follow. Before the Rome Conference, according to Schindler and Toman (1988), the US position was marked by two tendencies as follows. Firstly, the US attempts to exempt its nationals from the ICC prosecution. It had tended to support the ICC where the US government has a significant degree of control over it, or where the possibility of prosecution of the US nationals is either expressly precluded or otherwise remote. Secondly, the US increasingly prefers the resolution at national level. Finally, US is strongly interested in maintaining the primacy of the UNSC in matters of peace and security. The US regards the existence of the ICC as a threat to this primacy.

After the Rome Conference when not all American demands were successful, the collaboration with the ICC waned (Cerone 2007). The US constructive engagement was marked by its success to introduce Article 98 (2) of the Rome Statute which allows it to bypass the jurisdiction of the ICC by negotiating independently with other State parties. The US firm opposition was indicated by an action made by President Bush sending a letter to the UN declaring its intention not to ratify the Rome Statute and began a campaign to outwit its implementation. Throughout his Presidency, George W. Bush took several measures to hinder the viability of ICC's autonomy. These steps have proven to be increasingly effective. Kielsgard (2005) argues that through domestic legislation and diplomatic strategies described as shameless bullying. This Administration has taken actions seriously threatening to undermine the ICC. This opposition supported the creation of the promulgation of the American Service member's Protection Act (ASPA) and the Bilateral Immunity Agreement (BIA) with regard to the ICC's jurisdiction.

Pragmatic Exploitation is facilitated by a number of pragmatic experiences, for instance in the case of the transfer of the former Liberian President, Charles Taylor

to the Special Court of Sierra Leone, and in the Darfur referral to the ICC by the UNSC. In the Darfur referral, the US position abstains rather than votes against it. It implicitly recognises values and roles of the ICC.

The Russian Position

Russia adopts a “wait and see” policy for its intention to ratify the Rome Statute. Domestic legal consideration has been prominently delivered into two forms of legal arguments in international forum as follow. First, inadequacy between the Russian Domestic Legislation and the Statute of the ICC. The Russian Federation signed the Rome Statute on 13 September 2000. Almost eight years after this signature, no further steps towards an imminent ratification have been undertaken. Danilenko (2008) in this sense states that the collapse of the Soviet Union in 1991 saw the beginning of period of legal reforms, which were aimed at moving to a state under the rule of law and to “the gradual “opening” of the domestic legal system to international law.

Second, political Interests Vs. Fight Against Impunity. Tuzmukhamedov (2005) outlines, on a legal perspective there are clearly “no insurmountable obstacles in the way of harmonising the Russian Constitution and laws to the requirements of the ICC Statute”. Sasha (2008) outlines the ICC as a result of political consensus relies on states cooperation. As asserted by Judge Kirsch, president of the Court in the third annual report of the ICC to the UN General Assembly (UNGA) on 1 November 2007 “without arrests, there can be no trials [and] without trials, victims will again be denied justice and potential perpetrators will be encouraged to commit new crimes with impunity”. The issue of state willingness illustrates the paradox of the ICC dealing on the one hand with independence – as a judicial body – and on the other hand with interdependence between the different actors of the international stage.

Third, Russian Position within the UN System. At the international level, current Russian declarations on the ICC are rather different than those expressed by the US under the two successive Bush administrations. Malanczuk (2000) outlines that the relationship between the UN and the ICC is institutionalized by the possibility offered to the UNSC to refer to the Prosecutor under Chapter VII to “a situation in which one or more of such crimes appears to have been committed”. At the UN level, one can argue that the non-adhesion of three permanent members of the UNSC – Russia, China and the US – to the ICC Statute is the major weakness of the international criminal system. On the other hand, other will argue that the “veto mechanism” conferred to the P-5 could compromise the UNSC referral to the Prosecutor. In this case, the situation in Darfur is particularly symptomatic of the different obstacles that can be encountered when states interests are at stake.

As illustrated by Condorelli (2005), on 25 January 2005, the International Commission of Inquiry on Darfur, established by the UN Secretary-General (UNSG), in order to investigate whether or not gross violations of humanitarian law and human rights law have occurred in Darfur, submitted its report. After harsh negotiations, the Council responded to the Commission with a “compromised” resolution, which was adopted on 31 March 2005, by a vote of 11 in favour to none against, with four abstentions (Algeria, Brazil, China and the United States).

Despite its economic interests in Sudan and its previous support to the Khartoum regime, Russia accepted the Res. 1593 (Res. 1593 2005) and declared “that the struggle against impunity was one of the elements of long-term stability in Darfur. All those responsible for grave crimes must be punished (...) the resolution adopted today would promote an effective solution to the fight against impunity. Vera makes hypotheses that Russian position towards the question of Darfur outlines even more the fact that “the links between the Security Council and the ICC goes beyond the Statute itself to raise general international law and policy issues”. Russian authorities have undoubtedly adopted a “wait-and-see approach” toward their adhesion to the Rome statute. Scepticism, mistrust or considerations of “Realpolitik”, it is barely difficult to give a perfect answer to these questions given the lack of information we have. However, our analysis outlines in a way the lack of concern of Moscow regarding the mechanism of an international criminal court.

Indeed, the process of ratification seems to be suspended at the moment. Even though the Inter-Agency Panelled, mandated by the Ministry of Justice, finished its work on drafting amendments a long time ago, other concerns at the national and international level are on the forefront of the Russian political agenda. Certainly the non-ratification by nations such as Russia, China and the US represents a handicap for an institution meant to be universally recognized. But in the changing world politics of the XXI century, it would not be surprising to see the position of Moscow evolving more rapidly than expected today.

China’s Position

China is one of the most important states for the universality of the ICC. Its large population and growing political and military power cannot be ignored by other main international actors while its increasing presence in international arena makes China difficult to act against international community. There are six reasons why China has not ratified the Rome Statute as outlined below.

First, obligation of Non-States parties. Under Article 12 of the Rome Statute, the ICC has its subject matter of jurisdiction over crimes committed within the territories of State parties or committed by the national of State parties. This provision means that the ICC can have its jurisdiction on the crimes committed within the territories of non-State parties or committed by the national of non-State parties, if other requirements are met. Mrs. Xue Hanqin, the Chinese Ambassador to The Netherlands, observed in her speech, “although certain state has over-reacted to the article, disregard of state's consent is most likely to cause conflicts between states and the court, and thus impede judicial proceedings.” Some scholars, such as Gao and Jianping (2007) criticized this Article for the violation of Article 34 of the Vienna Convention on the Law of Treaty which stipulates that a “treaty does not create either obligations or rights for a third State without its consent.”

Second, War Crimes in Internal Armed Conflicts. China contends against the individual criminal responsibility borne by war crimes committed in internal armed conflict. Article 8 of the Rome Statute includes both the situations of international and internal armed conflict. Such broadening jurisdiction of the ICC which is not based on existing customary law, according to the China's argument, could make it easy to intervene the national criminal jurisdiction of State parties.

Third, Crimes against Humanity in Peace Time. China also argues that crimes against humanity in customary international law require its commission in times of war to bear the individual responsibility. Article 7 of the Rome Statute requires no nexus with armed conflict. As in case of war crimes, China argues that it reduces the threshold of “core crimes” resulting in unnecessary interference with domestic jurisdiction. This opinion, however, was again as the minority stance in the Rome conference, and both ICTY and International Law Commission confirm the lack of nexus between crimes against humanity and armed conflict in customary law.

Fourth, The Inclusion of the Crime of Aggression within the ICC's Jurisdiction. China proposed in the Rome Conference two conditions for the inclusion of crime of aggression namely, clear and precise definition of the crime, and the linkage with the UNSC. Final sentence of Article 5 (2) of Rome Statute stipulates that:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

This result means that while the crime of aggression is included in the statute, the definition of it and its linkage with the UNSC will be determined in the future review conference. China is now trying to exercise its influence on the definition of the crime by participating at the Assembly of States Parties as an observer and also in Special Working Group on the Crime of Aggression.

Fifth, The *Proprio Motu* Power of the Prosecutor. According to the Article 15 (1) of the Rome Statute: “The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.”

The *proprio motu* power in the Rome Statute means “the power to proceed with an investigation at the Prosecutor’s own initiative with the agreement of at least two judges of a three-judge panel...” China argues that “the Prosecutor’s right to conduct investigations or to prosecute *proprio motu*, without sufficient checks and balances against frivolous prosecution, was tantamount to the right to judge and rule on State conduct. The provision that the Pre-Trial Chamber must consent to the investigation by the Prosecutor was not an adequate restraining mechanism.” This *proprio motu* power has not been used yet, although the Prosecutor had said “he would be prepared to seek authorisation from a Pre-Trial Chamber to start an investigation under his *proprio motu* powers” before the DRC referred the case by itself. It is still unclear how this significant power will be exercised by the ICC.

Sixth, Political Considerations Underlying Legal Arguments. Sarooshi argues that traditionally Chinese foreign policy has been characterized by the principles such as to preserve China's independence, sovereignty and its territorial integrity. Although China is now one of the Powers in international relations, it has some disputes within its territory, such as Taiwan and Tibet. It causes China is still strongly opposing the attempt to interfere the domestic affairs.

This policy also applies to the issue of the ICC. Since the ICC has the possibility to involve the nationals of non-State party, to compete with the criminal jurisdiction of it, or even to have compulsory jurisdiction in non-State party, if the case is referred by the UNSC. Of course, China does not have the possibility to be referred by the UNSC because of its veto power. In addition, even if civil war occurs in China, it is not likely that Chinese nationals will be prosecuted in the ICC unless China ratifies the Rome Statute. Even if by any chance Chinese officials are sentenced guilty on ICC trial, it will not bear the state responsibility of China. Nevertheless, China’s attitude toward the ICC is still cautious. As Frédéric Mégret (2001), a member of French delegation to the Rome Conference, rightly pointed out, the argument concerning non-party jurisdiction is not self-standing argument, because it will be solved if a state ratifies the ICC statute. The argument of non-party jurisdiction is “therefore basically the opposition of a state that had decided not to join the ICC for reasons other than non-party jurisdiction.” This means,

although non-party jurisdiction is main problem for China, other concerns, such as war crimes in internal armed conflicts and crimes against humanity in peace time, are still strong enough to prevent China from ratifying the Rome Statute.

However, Chinese attitude toward the ICC does not seem unchanged in the future. According to its statement on the ICC, Chinese government said that “actual performance of the Court is undoubtedly an important factor for consideration.” The activity of the ICC has just started, and some of China’s concerns still leave the room for change (such as definition of the crime of aggression). The impartial and independent activity of the ICC will establish the credibility of China, hopefully in near future.

Conclusions

This paper is written for examining the question whether or not the ICC is a universally accepted tribunal. Needless to say, it is not sufficient to define “universality” as the geographical broadness which the jurisdiction of the ICC covers; we also have to take into account political and legal dimensions as practiced by the US, Russia and China. Since ICC mainly deals with atrocities of armed conflict related situation, their attitudes play important roles to be noted.

Unfortunately, so far, these countries are not eager to cooperate with the ICC for their domestic considerations. Consequently, this paper concludes that the US, Russia and China positions defects the ICC’s existence. However, it is important to confirm precise picture of the ICC again that it was created because States want it and actually need it for strengthening international justice for better international relationship. It is not the super-governmental organization whose main role is to accuse the military adventure of superpowers. Dormann (2005) points out rightly that ICC has jurisdiction only towards the most serious crimes most of which can be prosecuted under existing customary law. It exercises its jurisdiction only when a state is unwilling or unable to prosecute the alleged perpetrators under Article 17 of the Rome Statute.

It is rather simplistic to regard the ICC as a tool for international cooperation invented by idealists and liberalists while describing the policies of the US, Russia, and China as those of realists. We can find many realistic and pragmatic grounds which the ICC is based on, as mentioned above. That is why we believe that the ICC has the reasonable possibility to be a universally accepted tribunal, only if the attitudes of those countries turn out into pragmatic as well as becoming legally justifiable.

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