

Political Challenges and Legal Complexities in Evidence Collection at the International Criminal Court

Lika CHIMCHIURI

Sokhumi State University, Tbilisi, Georgia, lika.chimchiuri@sou.edu.ge

ABSTRACT: Nowadays, due to the ongoing armed conflicts in the world, the International Criminal Court (ICC) is at the epicenter of attention and is facing significant political challenges. The court is subject to political pressure from the dominant states. Moreover, there are legal difficulties, such as the issue of cooperation from countries that are not members of the Rome Statute and delay in exercising the court's jurisdiction in their territories, which make gathering evidence difficult. All of the above-mentioned hinders the effectiveness and legitimacy of this universal system. The topic addresses pressing issues such as the complex political landscape in which the court is run, issues of political bias, the willingness of powerful states not to comply with the ICC, challenges of ensuring cooperation among member states, the principle of complementarity, etc. The goal of the research is to clearly highlight the challenges faced by the ICC and to provide appropriate recommendations regarding necessary measures.

KEYWORDS: International Criminal Court, political challenges, legal complexities, evidence collection, cooperation of non-member states

Introduction

The permanent international judicial body implementing criminal justice, the International Criminal Court, is once again at the center of global attention today. The ongoing severe armed conflicts in the world, such as the Russia-Ukraine war and the struggle for dominance between hegemonic states, Russia and the United States, pose a threat to international peace and security and violate fundamental principles of international law. Perpetrators committing crimes in conflict zones, as defined by the Rome Statute, remain unpunished.

The aim of this article is to highlight contemporary challenges and difficulties faced by the court. Specifically, it discusses political obstacles. Political conflicts and geopolitical interests impact the relationship between states and the ICC. In many cases, powerful countries perceive the court's actions as politically motivated or biased, which leads to significant resistance and the withdrawal of states from the court's jurisdiction. This creates legal issues that hinder case proceedings, the exercise of judicial jurisdiction, the collection of evidence, and the implementation of criminal prosecution.

The paper employs comparative legal and dogmatic research methods; with the latter, we compare and analyze the views of renowned and competent scholars. Through the comparative legal method, we contrast the Rome Statute with the laws of various countries regarding the ICC, drawing attention to significant issues such as jurisdictional matters, cooperation with the court, difficulties in evidence collection, and more. In examining various cases, the article emphasizes the complex relationship between international justice and political considerations.

Historical Context of the International Criminal Court

The Nuremberg and Tokyo Military Tribunals, established in the aftermath of World War II, highlighted the necessity of creating a permanent international criminal court (Turava 2015, 22). However, the political tensions of the Cold War and the geopolitical interests of states delayed its establishment. Later, the wars in Yugoslavia and Rwanda once again demonstrated to the international community the brutality of war crimes, underscoring the need for legal mechanisms to address them. These conflicts led to the creation of temporary tribunals for Rwanda and Yugoslavia. The tribunals proved effective, and the perpetrators were held accountable, strengthening the international community's resolve to establish a permanent international court.

From June 15 to July 17, 1998, a diplomatic conference of plenipotentiaries was held in Rome under the auspices of the United Nations with the goal of founding the International Criminal Court. At the Rome Conference, the vast majority of states supported the Statute of the International Criminal Court, known as the Rome Statute. This statute provided the legal basis for the establishment of the first-ever permanent institution of criminal justice in world history (Turava 2015, 55). As a result, the permanent International Criminal Court (ICC) was established in 2002. The ICC is authorized to administer justice exclusively against individuals accused of committing crimes specified in the Rome Statute, namely: genocide, crimes against humanity, war crimes, and the crime of aggression.

During the 20th century, millions of children, women, and men fell victim to unimaginable atrocities that profoundly shook humanity's conscience. These grave crimes threaten global peace, security, and prosperity, and they must not go unpunished. Their effective criminal prosecution should be ensured by states at the national level through the adoption of appropriate measures and the strengthening of international cooperation. Member states of the Statute are obligated to exercise their criminal jurisdiction over individuals responsible for committing international crimes, with the International Criminal Court (ICC) acting as a complement to national criminal jurisdiction. This means that a case may only be referred to the ICC when a state is either unable or unwilling to pursue effective criminal prosecution and justice for any of the specified crimes committed within its territory or by its citizens.

As of today, 125 countries are members of the Rome Statute. The ICC continues to play a crucial role in delivering justice and seeks to expand its jurisdiction on a global scale.

Political Challenges

The International Criminal Court faces many political challenges in carrying out its work. Powerful states, including the United States of America and the Russian Federation, refuse to ratify the Rome Statute and cooperate with the court. As you know, the court's jurisdiction extends only to the member states of the Rome Statute, and the aforementioned obstacles prevent it from acting universally and establishing justice.

The U.S. relationship with the International Criminal Court (ICC) has been complicated from the very start (Stromseth 2015, 640). America was concerned because it did not want the ICC prosecutor to be given too much power because it could prosecute American soldiers for political reasons, or the court would demand the extradition of criminals. America does not want anyone to interfere in its sovereignty. The U.S. actually had long supported the concept of an International Criminal Court. Congress had actually voted resolutions back in the 1990s calling for the creation of an international criminal court based on the Nuremberg tribunals after World War II. But when the Clinton administration participated in the negotiations of the treaty, the Rome Statute that created this International Criminal Court, the U.S. was not comfortable with the outcome and ended up being one of only seven countries in the world that voted against the treaty (NPR 2022).

The court may exercise its jurisdiction with respect to a crime referred to in Rome Statute: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; (c) or The Prosecutor has initiated an investigation in respect of such a crime in accordance with *proprio motu* principle (Rome Statute 1998) According to this ICC investigate and potentially prosecute perpetrators from any country including U.S., when alleged crimes occur in ICC member states (like Afghanistan). American citizens will have to be tried in international criminal court, instead of American courts, which America is not happy about. So to protect its citizens, it passed the following measure, the American Service-Members' Protection Act, sometimes referred to as the "Hague Invasion Act," which allows the use of force to free American personnel detained by the ICC. This act shows how seriously the US takes any attempt by the ICC to prosecute its citizens.

Several states expressed the initiative to withdraw from the Rome Statute member states due to perceived biases or concerns over sovereignty. These include Burundi and the Philippines, which are no longer members of the Rome Statute. Such an attitude from states threatens the authority of the Court and its effectiveness, reducing its jurisdiction and legitimacy in the global arena.

States withdraw from legal regimes on the basis of cost-benefit analysis involving quite diverse, and often predominantly domestic, factors. Commentators have already pointed to the different rationales underpinning South Africa's and Burundi's withdrawals: In the case of South Africa, in particular the government's frustration with domestic courts holding it to account for refusing to arrest Sudan's president Omar al-Bashir, who is subject to an ICC arrest warrant, when he visited the country last year; and in the case of Burundi, the fact that the ICC has started scrutinizing members of the incumbent regime for their potential responsibility for large-scale violence in the country (Hansen 2016). Same goes for Russia. Russia signed the Rome Statute in 2000 but never ratified it. And in 2016 formally withdrew its signature after ICC made a report condemning the annexation of Crimea as an occupation. With this action Russia rejected ICC's jurisdiction.

Ukraine's ongoing conflict with Russia has raised jurisdictional challenges. The court started an investigation based on the appeal made by Ukraine, as we know a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation (Rome Statute 1998). Recently, Ukraine has started to ratify the Rome Statute, which will enter into force on January 1, however, despite all this, Russia opposes the jurisdiction of the court, it does not recognize or join the Statute, therefore the court cannot fully implement its activities and prosecute the perpetrators. An example of this is that on 17 March 2023, Pre-Trial Chamber II of the International Criminal Court ("ICC" or "the Court") issued warrants of arrest for two individuals in the context of the situation in Ukraine: Mr. Vladimir Vladimirovich Putin and Ms Maria Alekseyevna Lvova-Belova (ICC 2023). Despite this arrest warrant, they cannot be caught and prosecuted, and the crimes continue on the territory of Ukraine.

Legal Complexities in Evidence Collection at the ICC

The International Criminal Court also often faces problems in collecting evidence during its investigations, as it relies on the cooperation of States Parties to the Rome Statute to have access to evidence. States that do not cooperate with the court hinder the investigation and prevent the court from gathering evidence.

Besides that, according to the Complementarity Principle, a case is inadmissible when the case is being investigated or prosecuted by a State that has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution (Rome Statute 1998). This also leads to complex jurisdictional questions.

A new challenge is also emerging: the collection of digital evidence. Trans-border access remains a problem not only for the ICC but for many countries. Every country has different laws regarding access to online data, something the ICC has to wrestle with. New technologies have the potential to both advance accountability for international crimes and aid in their perpetration (Zarnsky 2024, 169).

The ICC faced similar obstacles in the case of Omar Hassan Ahmad Al Bashir. He was the first person prosecuted by the ICC as head of state (Dgebuadze 2021, 156). The investigation conducted by the ICC prosecutor raised reasonable suspicion that al-Bashir, as Sudan's president and commander-in-chief of the military, played a substantial role in the "execution of a common plan" to unlawfully attack a section of Darfur's civilian population (Dgebuadze 2021, 156). But until Omar Al Bashir is arrested and transferred to the seat of the Court in The Hague, the case will remain in the Pre-Trial stage. The ICC does not try individuals unless they are present in the courtroom (ICC, Prosecutor v. Al Bashir, ICC-02/05-01/09). During the investigation of this case prosecutor faced challenges collecting evidence, Sudan did not cooperate with court and ICC investigator could not operate freely in Darfur. Most evidence was gathered from refugees from neighboring countries and this affected the credibility and admissibility of witness testimonies.

In addition, the court faced significant challenges in the case of Jean-Pierre Bemba Gombo, the president and commander-in-chief of the Movement for the Liberation of the Congo (MLC). Bemba was accused of committing war crimes and crimes against humanity from October 26, 2002, to March 15, 2003, within the framework of the ongoing military conflict in other parts of the Central African Republic. He was found guilty by the court on March 21, 2016, and sentenced to 18 years in prison. However, on June 8, 2018, the Appeals Chamber overturned the Trial Chamber's decision and acquitted Bemba of the charges (Dgebuadze 2021, 165).

In the Bemba case, we find Incidents of intimidation of witnesses, which made it difficult to gather reliable testimony. This prompted the ICC to take new measures to protect witnesses, introducing protocols so that witnesses could testify anonymously, with the court shielding their identities from publicity. They changed the sound and image. Witnesses could also testify via video link or in seclusion chambers (ICC, Prosecutor v. Bemba, ICC-01/05-01/08).

Moreover, the court has limited resources, but still ensures a thorough and fair investigation. The mentioned contradictions and tensions emphasize the need for international dialogues so that states can better cooperate with the International Criminal Court, as it is one of the important mechanisms to fight against impunity.

Conclusion

Since its establishment in 1998, the International Criminal Court (ICC) has perpetuated impunity and played a crucial role in international criminal justice by providing a permanent accountability mechanism. The ICC faces major political and legal challenges that hinder its effectiveness in delivering justice. Its authority is also undermined, and the lack of cooperation from states in gathering evidence with the ICC makes it difficult to carry out its work. To overcome these obstacles, the court should examine its procedures, prosecutorial techniques, and judicial attitudes. Making big adjustments now could lead to a bright future for the court. Unfortunately, due to the political reality, necessary cooperation from all sides cannot be achieved, as the political aspects of large countries always

overshadow the possibilities for objective cooperation. Only certain global and negative events can lead to a consensus, influenced by the majority of world states, as was the case during World War II and the large coalition against the fascists. Today, such a coalition seems to be forming against Russia, but it has also gained supporters, such as China, Iran, and others, which complicate the ability to exert significant political pressure on this group.

The ICC cannot succeed if it is surrounded by hostile powers, as its investigations rely on the host country's willingness to cooperate. Future developments may require increased support and collaboration from its participants. The ICC must invest in increasing support among member nations and globally. To realize its legitimacy, it should promote international dialogue, strengthen cooperation, and actively engage in diplomatic communication with member and non-member countries. Conducting campaigns to introduce the populations of these states to the role and function of international criminal law would contribute to raising public awareness and support.

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