

The Democratic Dilemma of the International Criminal Court

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Crimes of the character of genocide, systematic war crimes, and crimes against humanity rarely are committed without the authorship or collusion of governments. The crimes of the Nazis, the Khmer Rouge, the 1994 “interim government” of Rwanda, factions in the former Yugoslavia, and countless others were committed pursuant to state policy and authority. This fact poses a problem in the enforcement of the international law prohibiting those extraordinary crimes that does not arise in most other areas of criminal law enforcement. A government that is responsible for the crimes is unlikely to be efficacious in their prosecution. For that reason, the law in this field is unlikely to be enforced effectively through the usual mechanisms of domestic law enforcement. This circumstance creates a fundamental problem for international criminal jurisdiction: how to design a jurisdictional structure that circumvents obstruction by perpetrator regimes while maintaining legitimate foundations for the exercise of judicial power.

Two jurisdictional mechanisms frequently are offered in response to this problem: universal jurisdiction and the jurisdiction of the International Criminal Court (ICC).¹

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1. The ICC will be established pursuant to the Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 [hereinafter ICC Treaty].

Each of these forms of jurisdiction places power to prosecute in authorities outside the government that may be implicated in the crimes. By vesting prosecutorial power in an external authority, perpetrator regimes are impeded in their ability to shield perpetrators from justice. The present essay will focus on the ICC,² examining its jurisdictional structure in terms of the theme of punishment and democracy that is the subject of the present symposium.

The jurisdictional structure of the ICC poses a tension between two sorts of accountability: the legal accountability of the perpetrators of international crimes, on the one hand, and the democratic accountability of the ICC itself, on the other. The ICC Treaty solves the problem of colluding regimes' shielding perpetrators from justice by providing that, under some conditions, the ICC may exercise jurisdiction over defendants even if their states of nationality are not parties to the Treaty and have not otherwise consented to jurisdiction. Within this solution, as we shall see, lies a deep democratic dilemma.

The International Criminal Court is to be a permanent, international judicial institution with jurisdiction over genocide, war crimes, and crimes against humanity.³ The relationship between the ICC and national courts is to be governed by the "complementarity regime" laid out in the Rome Treaty, which is the constituting document of the court.⁴ Under the system of complementarity, the ICC may exercise jurisdiction only if states are unable or unwilling to do so.⁵ As Article 17 of the Rome Treaty states, a case shall not be admissible before the ICC if the case "is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unable or unwilling genuinely to carry out the

2. For an essay by this author on universal jurisdiction, see Madeline Morris, *Universal Jurisdiction in a Divided World*, 35 *New Eng. L. Rev.* 337 (2001).

3. See ICC Treaty, *supra* note 1, art. 5.

4. See ICC Treaty, *supra* note 1.

5. *Id.* art. 17.

investigation or prosecution.”⁶ In this way, complementarity gives priority to *states* in the enforcement and development of humanitarian law. But, it also provides the ICC with the authority to conduct prosecutions when states are unable or unwilling genuinely to do so.

If the state where the crime is alleged to have occurred, the “territorial state,” is a party to the ICC Treaty, or consents ad hoc to the jurisdiction of the court, then the ICC would have authority to prosecute even if the defendant’s state of nationality were not a party to the treaty and did not consent to ICC jurisdiction.⁷ This authority is the ICC’s so-called “jurisdiction over non-party nationals.”

What is ultimately at stake, beneath the heated controversy concerning ICC jurisdiction over non-party nationals,⁸ is a tension embodied in the Rome Treaty between the human rights embodied in humanitarian law (rights to freedom from genocide, war crimes, and crimes against humanity) and the human right to democratic governance.⁹

Under the complementarity system, then, the ICC, an international institution, may, in some circumstances, prosecute an individual even without the consent of that defendant’s state of nationality. (“Consent” will be used in this essay to include both consent via participation in the ICC treaty and ad hoc consent.) As we have seen, the advantage of affording the ICC this power to prosecute without the consent of the defendant’s state of nationality

6. *Id.*

7. See *id.* art. 12.

8. For a number of articles addressing this controversy, see Symposium, *The United States and the International Criminal Court*, 64 *Law & Contemp. Probs.* 1 (Winter 2001).

9. A human right to some form of democratic governance is reflected in the Universal Declaration of Human Rights, the International Covenant on Political and Civil Rights, and in numerous regional documents. See Universal Declaration of Human Rights, art. 21, adopted Dec. 10, 1948, G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, art. 25, adopted Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

is that this jurisdictional structure circumvents the problem of perpetrator regimes' shielding their own nationals from justice. An international court is needed most when the perpetrator is shielded by a government. For that reason, the ICC needs and has, by the terms of the Rome Treaty, genuinely "supra-national" powers—which are to be used in those particular instances where a state is unable or unwilling to render accountability at the state level. In those instances, the defendant is called to account not before the court of any state, but before an international institution. In essence, this is a supra-national solution to the problem of national transgressors.

This kind of supra-national authority is a new departure. Even while complementarity comports with, and supports, the authority of states in a state-based international system, it also goes beyond state authority; it makes an exception. Where genocide, war crimes, or crimes against humanity are alleged, there is now to be an authority higher than the state.

We may ask at this point whether the ICC is really a supra-national authority or whether, instead, it is merely the delegee of the territorial state's authority. After all, for the ICC to have jurisdiction over non-party nationals in any given instance, the territorial state must be a treaty party or consent ad hoc to jurisdiction. But the ICC is *not* merely the delegee of the territorial state's authority; the ICC is indeed a truly supra-national authority. Even while the ICC's jurisdiction arises from the delegation of jurisdiction by the states parties, those states parties also delegate to the ICC substantial control over the exercise of that jurisdiction—such that the ICC is empowered to operate as a truly separate and distinct international entity. This is manifested in a variety of ways.

First, under complementarity, the ICC is the ultimate judge of whether the territorial state has genuinely exercised jurisdiction over a case. If the ICC determines that the territorial state's exercise of jurisdiction has not been genuine, then the ICC may exercise jurisdiction, even over the objection of that state. So, in a dispute over

jurisdiction between the territorial state and the ICC, the ICC has authority superior to that of the territorial state, to override the territorial state's claims, and seize jurisdiction.

A second manifestation of the truly supra-national nature of the ICC's authority is found in its governance structure. The ICC is loosely governed by its Assembly of States Parties (composed of a representative from each state party). The Assembly of States Parties has control over both administrative and substantive matters including, for example, changes to the Elements of Crimes (that is, the legal definitions of the crimes within ICC jurisdiction). The Assembly of States Parties governs by majority (or super-majority) rule. Therefore, in any particular prosecution, the ICC may be applying rules and law that were decided upon by a majority or super-majority of the ICC's member states, over the dissenting vote of the state on whose territory the particular crimes occurred.

Third, the ICC will have influence and law-making authority beyond that of the territorial state or, for that matter, that of any state. The ICC, like the International Court of Justice, will have the power to shape and make international law to a degree far exceeding that of any state's domestic courts.

In these respects, and many more, we see that the ICC is not in any simple way the agent or delegee of the territorial state.¹⁰ It is a separate and distinct

10. Not only is the ICC not simply the agent of the territorial state, but the delegation of jurisdiction from the territorial state to the ICC will transform the character and consequences of the jurisdiction significantly. In important respects, the ICC, as it exercises the jurisdiction delegated to it by the territorial state, will be less accountable than would the courts of the territorial state (or even a third-party state exercising universal jurisdiction). States exist within a web of bilateral and multilateral relationships with other states that involves a broad range of issues and interests. This web of relationships imposes various forms of interstate accountability and constraint. For better and for worse, the ICC would be largely independent of any such interdependent relations with states. For a full examination of the transforming effects of the delegation of jurisdiction from a territorial state to the ICC, see Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 *Law & Contemp. Probs.* 13 (Winter 2001).

international institution. The ICC really does present a supra-national solution to the problem of national transgressors. And this is a genuine innovation.

There is a feature of this innovation that has gone curiously unexamined. A supra-national judicial authority has been created, but there has been virtually no examination of its democratic legitimacy. In contrast to the case of the World Trade Organization (WTO), for instance, where a so-called “democratic deficit” has been a focus of debate, in the case of the ICC, a powerful new international institution has been created with virtually no discussion of the democratic features of this new power.

The ICC will wield governmental authority. As a judicial body, it will prosecute and punish individuals. Where is the democratic linkage between this institution of governance and the governed?

For nationals of states that are parties to the ICC treaty, their representation comes through their own governments’ consent to the Treaty, and continues through their governments’ participation in the Assembly of States Parties.¹¹

What, then, about non-party states? What is the democratic basis for the ICC’s power as applied to populations whose states have *not* consented on their behalf? Here, the ICC’s claim to democratic legitimacy breaks down. There is no democratic linkage between the ICC and those non-party nationals over whom it would exercise authority.

Why, then, have we heard no clamor—indeed, no discussion—of democratic legitimacy in relation to the ICC? Why has there been virtually no discussion of democracy relative to the ICC, even while the “democratic deficit” of other international institutions, like the WTO, has been a *cause célèbre*?

The reason is comprehensible. The mandate of the ICC is viewed as being very thin and very important. The

11. For states parties that are non-democratic, the “governed” are not represented by their governments—either in the ICC or anywhere else. But this is a separate problem, beyond our immediate concern.

unarticulated assumption seems to be that, if ICC jurisdiction over non-party nationals entails any democratic loss at all, it is de minimus—because the court’s mandate is so narrow. The implicit reasoning is that: first, the ICC’s jurisdiction over non-party nationals is an exception that gives the ICC authority to act only when states fail to do so. And, second, that exception to states’ prerogatives is a thin one because, unlike the WTO, the ICC is not intended to make law and policy. Rather, its mandate is to apply clear, uncontroversial—indeed *jus cogens*—precepts of existing international law. Genocide, war crimes, and crimes against humanity are crimes. Nobody debates that, so there is no democratic or undemocratic decision-making to discuss.

Here, though, the reasoning fails. It is true that the prohibitions of genocide, war crimes, and crimes against humanity are unquestionable. But applying that law will turn out to be far more complex, and politically fraught, than are the definitions of the core prohibitions. There will be questions, large and small, about the content and interpretation of the law, notwithstanding the excellent delineation of the Elements of Crimes that was produced by the ICC Preparatory Commission.¹² For example, relative to the war crime of excessive incidental death, injury, or damage:¹³ are countries with the resources to use precision-guided munitions obliged to use those weapons, in order to minimize collateral damage, rather than using the much less expensive ordinary kinetic weapons? Relative to that same war crime of excessive incidental death, injury, or damage: are belligerents who have not invested in—or cannot afford—night-vision goggles prohibited from fighting at night, because excessive collateral damage could be avoided with the goggles? Relative to the crime of genocide:¹⁴ what is the mens rea required for command

12. Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized Draft Text of the Elements of Crimes, adopted 2 Nov. 2000, UN Doc. PCNICC/2000/1/Add. 2.

13. *Id.* art. 8(2)(b)(iv).

14. *Id.* art. 6.

responsibility for genocide? Where the commander knows of his subordinate's genocidal intent, but does not entertain that *mens rea* himself, does he have the necessary *mens rea* for a conviction for genocide? Relative to the war crime of attacking civilian objects:¹⁵ what is the status of "dual use" targeting—where the target is an object, such as a bridge, or television station, or electrical grid, that is partially in military use and partially in civilian use?

These are not thin questions. Each involves areas where the law is indeterminate and the politics are weighty. These questions do not require anything like the "mere" "application of the law to the facts." These issues implicate enormous political, and even moral, issues and controversies. The questions go to the size of military budgets, determining how much of a country's domestic fisc must be spent for a given degree of military strength; to basic issues of North/South politics; to the question of which countries can afford to fight with which allies in coalitions; and to what will be the cost of warfare, including humanitarian interventions.

And that only describes the situation as it stands *now*. The ICC's subject-matter jurisdiction is going to get broader, not narrower. The ICC treaty stands open to amendment, modification, extension, and the definition and redefinition of existing and future crimes. This is contemplated explicitly in the document itself.

For instance, the Rome Treaty provides that the crime of aggression will come within the ICC's active jurisdiction in the future, when the Assembly of States Parties have amended the Treaty to define "aggression."¹⁶ That matter is specified to be among the topics of a review conference to be convened seven years after the treaty comes into effect.¹⁷

Beyond the crime of aggression, the Final Act of the Rome Conference, in Resolution E, states that the Rome Conference

15. *Id.* art. 8(2)(b)(ii).

16. See ICC Treaty, *supra* note 1.

17. See *id.* arts. 5, 123.

Affirm[s] that the Statute of the ICC provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court, [and] [r]ecommends that a Review Conference . . . consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.¹⁸

These foreseen and other, unforeseen alterations and expansions of the ICC's domain would all occur with no representation of the nationals of non-party states.

The ICC will be a feature and an organ of global governance, as it makes and applies international law and policy. If ICC jurisdiction over non-party nationals means that the ICC is, to that extent, undemocratic, the problem is not *de minimus*.

The ICC Treaty, insofar as it provides for jurisdiction over non-party nationals, displaces the state as the conduit of democratic representation, and provides no alternative mechanism for democratic governance. Advocates of ICC jurisdiction over non-party nationals might be tempted to suggest that the solution to this democratic dilemma is for all states to become parties to the ICC treaty and, consequently, to participate in the Assembly of States Parties. But this suggestion would not address the fundamental, underlying problem of consent. Insofar as the states parties govern the court through voting in the Assembly of States Parties, the ICC involves a form of governance by majority rule. The offer to non-party states cannot be: you enter into this new, majority-rule form of decision making with us—or, if you do not, then we will simply govern you without your consent or representation. A system based on the consent of the governed requires that consent be meaningful, that is, that it be optional, that there be the alternative of not consenting.

The possibility of majority-rule in any form at the

18. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution E, adopted July 17, 1998, UN Doc. A/CONF.183/10.