# Some Features of the International Criminal Court

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# *Some Features of the International Criminal Court*

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## 1. Introduction

The International Criminal Court (ICC) became a full legal entity on July 1st, 2002, being 60 days after the 60th ratification[2] of the Rome Statute of the International Criminal Court (Rome Statute) that was adopted by a meeting of plenipotentiaries in that city. It was the culmination of decades of work by the United Nations (particularly the International Law Commission), non-governmental organisations, certain states and individuals[3].

It was preceded by the Nuremberg Tribunal 1945, the Tokyo Tribunal 1946, the International Tribunal for the Former Yugoslavia 1993, and the International Criminal Tribunal for Rwanda 1994. All these tribunals were concerned with prosecuting those who have committed "core" international crimes, which for our purposes can be defined as: war crimes, genocide, crimes against humanity, and crimes against the peace or waging a war of aggression.

The ICC, both in form and substance, reflects many of the characteristics of these earlier tribunals.

As of the 10th of August, 2005, there are 139 signatories and 99 states party to the Statute of Rome. Of the "great powers", France, Germany, and the United Kingdom are state parties, but China, Japan, the Russian federation, and the United States[4] are not even signatories[5]. Placing aside Japan, one notes that the three non-cooperating states are those with the largest military capacity in their regions (in the cases of China and the Russian Federation) and the world hegemonic power in the instance of the United States.

I am of the view that this is not mere coincidence. By adopting the Treaty of Rome a state undertakes a number of onerous obligations. It must harmonise its domestic laws with the Rome Statute and it must give up a degree of state autonomy in the process. Upon reflection the amount of state autonomy which is relinquished is quite small and is only entirely lost in very unique circumstances.

The ICC has jurisdiction over the "core" international crimes[6], but can only exercise that jurisdiction if certain triggering preconditions are met and if the state that would usually try the case domestically is either unable or unwilling to do so (doctrine of complementarity).

The triggers are contained in Art. 13 of the Rome Statute whereby the ICC can hear cases brought before it on the initiative of the Prosecutor, or the initiative of a state party which has been reviewed by the Prosecutor, or the initiative of the Security Council pursuant to its Chapter VII jurisdiction under the U.N. Charter, which has also been reviewed by the Prosecutor.

These triggers in my view are very secure in terms of ensuring that cases are not brought to the ICC for political or other improper purposes. In each instance the Prosecutor exercises oversight control and the ICC has residual oversight over the practice of the Prosecutor. As well, pursuant to Article 16 of the Rome Statute, the Security Council by resolution can prevent an investigation from proceeding for 12 months (renewable) when exercising its Chapter VII jurisdiction.

Add to the mix the doctrine of complementarity contained in Art. 17 of the Rome Statute and the protections for both individual nationals who might be affected and national sovereignty itself is very slight. Under this doctrine the ICC will defer in every case to the jurisdiction of the appropriate domestic courts, unless they are unable or unwilling to assume it. Why then have China, the Russian Federation and the United States opted out of the ICC?

In Russia's case the answer is not obvious. There has been inter-ministerial work undertaken to submit a ratification bill to the Dumas prior to 2002, but nothing has since happened.

In China's case the publicly expressed concerns seem to be focused on the trigger mechanisms and the doctrine of complementarity[7]. In both instances I feel that the expressed reservations may mask the real reasons for not acceding to the Rome Statute. As an emerging military "superpower", China has much in common with the United States in its wariness towards the ICC. In both cases these states have powerful military establishments that have developed their own military judicial systems that they will not easily give up any part of.

These military establishments have the capacity, in both countries, to influence government policy in this respect.

In both countries, too, there is a deep cultural belief that the validity of their own judicial institutions, and the idea that their nationals could be compelled to appear before a "foreign/international" court is one that would not resonate well with the general population.

Beneath these reasons, again in both countries, is the fact that military powers that engage in conflict are inevitably going to run afoul of the Rome Statute to a greater of lesser degree. Complaints will be made to the Prosecutor that may be politically motivated and these will cause considerable embarrassment to the state whose nationals are under enquiry.

No other state has gone to the lengths that the United States has to ensure its sole criminal jurisdiction over its own military personnel. It has enacted legislation that restricts foreign aid to countries that have not entered into Bilateral International Agreements with it excluding those countries' cooperation with the ICC in cases relating to U.S. servicemen[8].

At the end of the day, I am unpersuaded that both China's and the United states' policy of not ratifying the Rome Statute is not based upon political self-interest rather than any defensible principle.

2. The Rome Statute and the Crime of Torture

Under the Convention Against Torture 1984,[9] to which China is a party, the Crime of Torture is defined in Art. 1 as being:

> 1. For the purposes of this Convention, the term "torture" means any act by which severe pain of suffering, whether physical of mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental

to lawful sanctions.

> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

You can see that this definition raises a number of issues, two of which are relevant to our examination of torture as a crime within the jurisdiction of the ICC. The first feature is that torture under the CAT is purpose driven and the second is that a single instance will suffice to constitute it.

The Rome Statute, on the other hand, does not create an international crime of torture, as such. Instead torture can constitute the international crime against humanity where the requirements of Art. 7(1)(f) and 2(e) of the Rome Statute are met.

Like all crimes against humanity within the jurisdiction of the ICC, it must be established that the acts constituting torture are "part of a widespread or systematic attack directed against any civilian population with knowledge of that attack"[10]. Torture is defined as "…the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising from, or inherent in or incidental to lawful sanctions."[11]

So, under the Rome Statute, the crime against humanity based upon torture is in some respects wider in reach and in other respects narrower in range than that contained in the CAT. It is wider because it is not purpose driven and, on its face at least, may embrace groups that have no connection with the government in any real sense at all.

But it is narrower in that it requires the torture to occur in the context of an attack directed against a civilian population that has to be widespread or systematic.

None of the emphasised qualifiers apply under the CAT. Whether or not historical suppression of minority groups over time is an attack, must wait for the ICC to determine. But the requirement of the widespread or systematic attack is very restrictive. The requirement of "widespread" literally refers to a multiplicity of instances. But does this require a multiplicity over time or is it enough if many tortures occur on one occasion?

Systematic torture is that which occurs as part of planning or is carried out in an ordered fashion[12]. This implies that this type of torture will usually emanate from government authority or groups associated with government.[13]

The CAT also refers to systematic torture in Art. 20, but only to trigger the investigative jurisdiction of the Committee Against Torture.

Finally, under the Rome Statute, the Torture must be directed at a civilian population. If aimed at military personnel during an armed conflict[14], then the ICC would exercise its war crimes jurisdiction under Art. 8 of the Rome Statute. But the CAT is not restricted in this way.

These differences between the CAT and the Rome Statute are a reflection of the inherent characteristics of each. They each have the goal of preventing torture and ensuring that torturers obtain no impunity. Whereas the CAT is solely devoted to this goal, torture plays a small but important part in the wider goals of the Rome Statute.

The Rome Statute is specifically concerned with determining individual criminal responsibility for the crimes that it covers and reflects all the features of domestic criminal code in this respect. Whereas the CAT is, at root, an international human rights treaty, designed to require states to prevent torture, to prosecute torturers domestically, to cooperate with other states in prosecution of torturers, to compensate and rehabilitate torture victims, and to educate and re-educate relevant government functionaries.

The other crucial difference between the two treaties is that the Rome Statute creates a court with the power to acquit or convict the accused, and with the power to make orders that are binding up on the state parties. But the CAT creates a committee of experts who make findings, draw conclusion and make recommendations to the state parties.

## 3. Conclusions

(a) Despite the non-inclusion of the three great military powers, China, the Russian Federation, and the United States, in the Rome Treaty, the majority of states are members or have indicated an intention to become members[15]. This process is probably irreversible, and as more states join the Rome Statute, the three “great

powers" will become increasingly isolated and be subject to criticism by growing numbers of member states and commentators.

(b) The present United States practice of relating economic and military support for member states of the Treaty of Rome to Bilateral International Agreements will create considerable resentment among those states that engage in them, as well as those that reject them.

(c) The combined effect of the Rome Treaty and the CAT is to create an almost seamless system of torture repression and removal of impunity for alleged torturers[16].

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[2] Rome Statute, Art. 26

[3] For a detailed account of the history see Bassiouni, The Statute of the International Criminal Court – A Documentary History, Transnational Publisher Inc., (N.Y., 1998), 1-35

[4] This is somewhat inaccurate, since the U.S.S. did sign the Rome Treaty but subsequently withdrew its signature.

[5] In Japan's case the difficult process of harmonising its domestic laws with the Rome Statute's obligations seems to be the reason for its situation. Government declarations indicate an intention to accede in the near future.

[6] The crime of "aggression" is as yet still undefined, but will be defined in a meeting of the Assembly of State Parties, by July 1st, 2009: Rome Statute, Art. 123

[7] Statement by Mr. Duan Jielong (for China) at the 52nd session of the U.N. General Assembly, Sixth Committee, 21str October, 1997

[8] These Bilateral International Agreements are provided for in Art. 98 of the Rome Statute. The United States has over 90 of these agreements in place.

[9] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. A/39/15, December 10th, 1984, at pp 197-201; hereafter CAT

[10] Rome Statute, Art. 7

[11] *Ibid*, Art. 7(2)(e)

[12] The "final solution: of the Nazi regime in Germany, which involved the eradication of the Jews in Europe, would be an illustration.

[13] An argument could be made that non-governmental groups, such as criminal and political gangs could also carry out these crimes. Again, the ICC will have to rule on this.

[14] But what of an attack upon military personnel not during an armed conflict? For example, where a large group of terrorists attack a military base, seize military personnel and torture them. Them, having made their point the terrorists flee beyond the state.

[15] There are currently 99 ratification and 139 signatories: www.iccnow.org/countryinfo/worldsigsandratifications.html

[16] This is particularly so, when one observes that torture is a crime at customary international law in the same way that piracy and slavery are: the English House of Lords, by a majority in *R. v. Bow Street Metropolitan Stipendiary Magistrate and Other, Ex Parte Pinochet (No. 3)* [1991] 2 W.L.R. 827, took this view. There are also regional human rights treaties prohibiting torture and providing remedies etc.