The Establishment of the International Criminal Court: Institutionalising Expedience?

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Background

Although the idea to establish a permanent international criminal court can be traced back to 19th century, only in the last half of the century have there been serious attempts to materialise it. In 1948 the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Article 1 of that Convention characterises genocide as "a crime under international law", and Article 6 provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction..."

A Committee, established by the UN General Assembly, prepared a draft statute in 1951 and a revised draft statute in 1953. Due to the absence of the definition of aggression, the UN General Assembly postponed examining the draft statute. 2

The Rome Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (hereinafter: ICC). On the same day and in accordance with Article 125, the Statute was opened for signature in Rome until 17 October 1998 and then in New York, at the United Nations Headquarters, until 31 December 2000.

The ICC was created by a treaty, which means that it has a different legal basis than the existing ad hoc international criminal tribunals. 3

In that respect the ICC is consensual in character and it was important to obtain a certain number of ratifications of the Statute before it came into being. By the end of March 2003 there were 139 signatories and 89 parties to the Statute. There are 21 African States; 21 European (non EU States; 15 EU member States; 18 Latin America and the Caribbean States; 12 Asian and the Pacific States; 1 North American State; 1 the Middle East State. The Statute, in accordance with Article 126, came into force on 1 July 2002 upon the 60th ratification. 4

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3 Two other, ad hoc international criminal tribunals were created by the United Nations Security Council on the basis of Article 39 – the SC found that the violation of human rights in the former Yugoslavia and Rwanda constituted a threat to international peace and security and resorted to the creation of the tribunals in order to restore the peace among other aims it sought to achieve in accordance with Article 41 of the UN Charter. See UN Doc/ SC/Res/827, 1993 and UN Doc/SC/Res/955, 1994. Some argue that this invigorated role of the UN Security Council is inherently contradictory to the Rule of Law – see A. Bianchi, 'Ad-hocism and the Rule of Law' (2001) 13 E.J.I.L. p. 263.
4 For the regularly updated list of States Parties to the Statute see: http://www.icc-cpi.int/statesparties/allregions.php.
A description

The Statue of the ICC in its preamble states that the States Parties to this Statute are "conscious that all peoples are united by common bonds...and while recognising that...grave crimes threaten the peace, security and well-being of the world...are determined to put an end to impunity for the perpetrators of these crimes..." The States are..."determined to these ends, and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole."

Interestingly, this prominent part of the Statute reinstates the principle of national sovereignty, the very essence of which was often denied in the recent past. The determination is: "Emphasising in this connection that nothing in this Statute shall be taken as authorising any State Party to intervene in an armed conflict or in the internal affairs of any State" [emphasis added]. Expressing "respect for and the enforcement of international justice" the Preamble establishes the principle of complementarity, under which domestic criminal jurisdiction is superior to the jurisdiction of the ICC.

This is in contrast with the functioning of the two ad hoc international criminal tribunals that are based on the principle of the superiority of international criminal jurisdiction.

Jurisdiction of the ICC

According to Article 5 of the Rome Statute, the ICC will have jurisdiction with respect to the crime of genocide, war crimes and crimes against humanity. The crime of aggression is ingeniously included by determining that the ICC will have jurisdiction to try the crime of aggression once there is an agreed definition of aggression. There are several proposals on the definition of aggression that some UN member States have submitted to the Conference for consideration.

A positive feature of Article 7 of the Statute is a recognition that crimes against humanity may be committed not only in war, but in peacetime as well. This is however only a reflection of the law developed by the International Criminal Tribunal for the Former Yugoslavia (ICTY). Article 11 of the Statute limits ratio temporalis jurisdiction to crimes committed after the entry into force of the Statute.

Further limitation of the ICC's jurisdiction is contained in Article 12, titled preconditions to the exercise of jurisdiction, which provides that the ICC can only exercise jurisdiction with respect to crimes committed in States that are either parties to the Statute or accepted its jurisdiction.

Under Article 13 of the Statute the exercise of jurisdiction is triggered by referral of a situation to the Prosecutor of the ICC either by a State Party or the UN Security Council acting under Chapter VII of the Charter of the UN, or when the Prosecutor has initiated an investigation in respect of

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5 See infra 38.
7 Article 5 (2) of the Statute
the crimes for which the Court may exercise jurisdiction. However, the Court will determine that a case is inadmissible if it is being investigated by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation.\textsuperscript{10} This may happen for instance in the case of a total or substantial collapse or unavailability of a national judicial system.\textsuperscript{11}

The most important limitation on the ICC's jurisdiction is contained in Article 16, titled \textit{deferral of investigation or prosecution}. The Article states that

"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

Jurisdiction \textit{ratione personae} is limited to natural persons;\textsuperscript{12} therefore States and other collective bodies are not liable under the Statute.

\section*{Composition of the ICC}

Article 34 provides that the ICC shall be composed of the following organs: the Presidency; An Appeals Division, a Trial Division and a Pre-Trial Division; the Office of the Prosecutor and the Registry.

The ICC will have 18 judges.\textsuperscript{13} Article 36(3)(a) establishes the standard of competence of the judges. It states that the judges "shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices." Additionally, any candidate for election to the ICC "shall have established competence in criminal law and procedure, and the necessary relevant experience...or have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court."\textsuperscript{14} No two judges may be nationals of the same State.\textsuperscript{15} In the election of judges the States Parties will take into account the need, within the membership of the ICC, for "the representation of the principal legal systems of the world; equitable geographical representation; and a fair representation of female and male judges."\textsuperscript{16}

Under Article 36(6)(a) "the judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose."

\section*{Enforcement of the ICC's Decisions}

Part 10 of the Statute deals with enforcement of the ICC's rulings. Article 103 provides that a sentence of imprisonment shall be served in a State designated by the ICC from a list of States which have indicated to the ICC their willingness to accept sentenced persons. The Statute relies

\begin{itemize}
  \item \textsuperscript{10} Article 17 (1) (a).
  \item \textsuperscript{11} Article 17 para. 3.
  \item \textsuperscript{12} Article 25 (1).
  \item \textsuperscript{13} Article 36.
  \item \textsuperscript{14} Article 36 (3) (b).
  \item \textsuperscript{15} Article 36 (7).
  \item \textsuperscript{16} Article 36 (8).
\end{itemize}
on the principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence.\(^\text{17}\)

Article 105 provides that the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it. This is however subject to conditions which a member state may attach in accordance with Article 103.

**Financing of the ICC**

Articles 115 and 116 provide that all expenses of the ICC shall be paid from the funds, which will consist of assessed contributions made by States Parties and funds provided by the United Nations. Additionally, the Statute provides that the ICC may receive and utilise voluntary contributions from Governments, international organisations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

**An Assessment**

The present analysis challenges the tendency to glorify the creation of the ICC and unconditionally praising its contribution to the so-called international justice.\(^\text{18}\) Allott intuitively perceived the attitude. As he put it:

"Social actors who have no interest in the philosophy of their social action condemn themselves to be puppets - happy puppets if they see their strings as the very means of their freedom; dutiful puppets if they see strings as part of the natural and ineluctable order of things; humble puppets if they see puppet strings as necessary implying the existence of some unknowable puppet master; sad puppets if they see evident dependence not as a problem to be investigated but as a condition to be endured."\(^\text{19}\)

The present examination is directed by the author's perception of law in general - no reason to think of international law differently - as consisting of a set of rules expressing the current state of social values within the so-called international community and laying down definitive rules of behaviour, which are voluntarily adhered to by the addressee, not because of threat of sanction for disobedience, but because the rule has its "internal aspect."\(^\text{20}\) In other words, the binding

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\(^{17}\) Rule 201 states clarifiers that "Principles of equitable distribution for purposes of article 103, paragraph 3, shall include:
(a) The principle of equitable geographical distribution;
(b) The need to afford each State on the list an opportunity to receive sentenced persons;
(c) The number of sentenced persons already received by that State and other States of enforcement;
(d) Any other relevant factors.

\(^{18}\) See for instance the UN Secretary General speech at http://www.un.org/law/icc/general/overview.htm. Kofi Annan said: "In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished." Amnesty International expressed its view: "The struggle for international justice has taken a major stride forward" see at http://web.amnesty.org/web/web.nsf/pages/ICChome. For a stimulating discussion on the issue see I. Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 E.J.I.L. p. 561. The author also expresses scepticism in relation to the existence of "international justice".


character of law precedes its enforcement and it is to be found in our perception of legitimacy of the legal system.

In accordance with this vision of law, the author argues that the establishment of the ICC and the solutions adopted in its Statute may in fact be detrimental for the development of international criminal and humanitarian law. Put mildly, the solutions represent a setback for the law as being developed recently by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

Rather than establishing international jurisdiction over crimes committed by any person anywhere in the world hence confirming the genuineness of the claims that sovereignty is losing its relevance in this particular field of international cooperation, the Statute establishes firm exemptions from the jurisdiction. It in fact invigorates the traditional notion of sovereignty. This signifies the falsity of the claims that the whole world has been struck by a 'globalisation' enlightenment in which the traditional international law principles of sovereignty and consent have no role to play.

Secondly, exemptions from the jurisdiction over crimes whenever and by whomsoever committed, what in fact should be the very essence of the new court, are antagonistic not only to the Statute's Preamble, expressing that the States are "conscious that all peoples are united by common bonds… and determined to put an end to impunity for the perpetrators of [these] crimes" but also to any legal rule. Law is "a rule; not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform and universal."

The author is aware of the limits in making the argument that the ICC represents a setback to the development of the law. A black-letter approach lawyer would simply invoke the Vienna Convention on the Law of Treaties (1969) in defeating the argument. The Convention provides that States can be bound by a treaty (like the Rome Statute) only if they expressed their consent. The ICC is a treaty based court and in accordance with Article 124 a state may declare that it does not accept the ICC's jurisdiction for war crimes committed by its nationals or on its territory for a period of seven years from the entry into force of the Statute. The ICC is also based on the principle of complementarity, which means that only if the states concerned are unable or unwilling to prosecute for the crimes the ICC will intervene. The two ad hoc international criminal tribunals are based on the principle of superiority, overriding the states' concerned competences in determining individual criminal responsibility.

It is because of these features of the ICC Statute that the present author believes that the adopted solutions will nullify the developments of the law effectuated by the two ad hoc international criminal tribunals.

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23 See infra 39.
26 Article 9 of the Convention.
27 The Appeals Chamber in the Tadic case ruled that, although Article 2 of the Tribunal's Statute applies only in international armed conflicts, Article 3 (serious violations of international humanitarian law, but not grave breaches of the Geneva Conventions) applies to crimes "regardless of whether they are committed in internal or international armed conflicts."
International Criminal Court, Human Rights and the Principle of National Sovereignty

The establishment of the ICC may be seen by some as a major development of human rights law. International legal regulation of human rights is mainly a post Second World War phenomenon. Prior to the creation of the United Nations this field of legal regulation was almost exclusively placed within the domestic legal competences of the states. This is because the persons inhabiting the states were not seen as individuals but either as nationals or aliens and enjoyed "protection" by the states concerned on the basis of their relationship with the states.

It was only with the establishment of the United Nations that this exclusiveness and superiority of domestic legal protection of human rights was meaningfully undermined. Subsequently the UN Charter, in its principles and purposes, incorporated the protection of human rights. This was also reflected in the Universal Declaration of Human Rights and a number of regional human rights conventions.

What is often omitted in analyses is the fact the UN Charter also included and gave great prominence to another contradicting principle - the principle of national sovereignty. This concept implies the capacity of states to exclude any external influences from internal legal and political determination. The principle is reflected in the UN Charter in its principles and purposes and in many other organisations' foundational documents. The purpose of the principle is not of such a character that it can easily be dismissed. It functions to protect equality among states because it prevents more powerful states from exerting pressures on weaker members of the so-called international community. As Koskenniemi notices:

"...sovereign equality is not just another norm which may...be overruled by other considerations. Sovereign equality is a consequence of the view which holds that values are subjective. If values are subjective, then there is no [objective] justification to make a difference or to overrule sovereign choice. Any such attempt will immediately appear as unjustified coercion."
It appears that from an international socio-political point of view, the establishment of the ICC coincides with the increasingly frequent invocation of so-called globalisation in international relations. Invoking globalisation and interdependence has become rather fashionable and opportune method of overriding national sovereignty and internal strategies for dealing with contemporary issues of international character. As a commentator put it:

"So emotive are these terms that their invocation has become one of the standard rhetorical devices of those who wish to provide their political arguments with substantial reinforcement. Rarely, however, has political discourse included any attempt to define, or refine, the concept of interdependence or globalisation; the listener is assumed to have an automatic, and unquestioning, comprehension of all that is entailed by such ritual incantation."

One of the aspects and consequences of 'globalisation' implies overriding national competences in determining individual criminal responsibility. Enthusiasts would therefore see the establishment of the ICC as the eventual defeat of the traditional concept of sovereignty in relations among states.

It is true that the place of the individual in the international arena has been rapidly changing in the recent history. With the ending of the Cold War two contradictory developments both increasing the relevance of the individual in international law have been taking place. As a result of the collapse of the Soviet Union, benevolently also described as "the fall of the 'Iron Curtain'" a number of intractable and insoluble ethnic conflicts erupted. Armed confrontations, of a large scale it should be said, resulted in many civilian deaths and violations of international law and human rights. Cynics may conclude that, ironically, the first consequence of the end of the Cold War was gross violations of human rights. It was unfortunately in this respect that the individual gained relevance first - through violations of human rights. Responding to this development the United Nations and regional security organisations made efforts to protect the individual from the abuses. The organisation's involvement in the region of the former Yugoslavia by establishing the ICTY; institutional transformation of the Conference on Security and Cooperation in Europe are both indicative of this new approach.

As a result of the changed political environment with the end of the Cold War, some violators of human rights had lost their the Cold War times protector and that is why their actions became so prominent on the international plane. In this context the treatment of Iraqi Kurds by the Iraqi regime; the policy of ethnic cleansing in the Former Yugoslavia; deposing a democratically


35 The core issue is an (unquestioning) presumption that all fields of human activities are influenced, and eventually, shaped by global and uncontrollable processes in which distinct national characteristics have no role to play. As an immediate and practical consequence of this presumption the specific cultural, social, and historical characteristics of states are not sufficiently taken into account in determining the course of the current "integrative" processes in the world. See P. Hirst & G. Thompson, Globalisation in Question, London, 1999, 2nd ed., Polity Press MPG Books Bodmin.


elected president of Haiti should be examined. Those particular developments gave rise to new "rights" in international law.\textsuperscript{38}

Due to these developments in the recent past claims have been made that consent, as the basis of international obligation, has been seriously eroded.\textsuperscript{39}

The instances of international involvement in the conflicts mentioned above\textsuperscript{40} were of such character that some academics proclaimed that new rights in international law appeared. Most prominently, the right of humanitarian intervention\textsuperscript{41} and the right of democratic governance.\textsuperscript{42} These kinds of claims are made in order to indicate a humanitatisation of the so-called international community and the law within which it operates,\textsuperscript{43} which seems to be misleading and inaccurate. Curiously, the claimed humanitatisation of the law with the alleged new rules of international law did not apply to a number of situations meriting its applicability.\textsuperscript{44} It should also be noted that some instances of international involvement are in direct conflict the new "rights" of international law, such as deposing of a democratically elected president of the Republika Srpska in Bosnia and Herzegovina.\textsuperscript{45}

\textbf{Independence and Effectiveness of the ICC}

Independence of an international tribunal implies the ability of its members to maintain objective, neutral and impartial stance towards both the parties and the outcome of the dispute presented to the tribunal. One of the most prominent issues in relation to the functioning of the ICTY and ICTR was whether the Tribunals are free from political interference with their work. The question has, it must be said, a different dimension in relation to the \textit{ad hoc} Tribunals because they are both created by the UN Security Council hence some loss of their independence was inevitable. This is clearly reflected in the ICTY's response to the challenges on its supposedly independent functioning. The Tribunal explicitly admitted in fact that it is dependent on the UN Security Council. In the Tadic case\textsuperscript{46} the Trial Chamber concluded that it has to strictly follow the Council's dictates and in no way can question the legality or reasonableness of the Council's decisions.\textsuperscript{47}


\textsuperscript{40}UN Doc. SC/Res/770, 1992 (humanitarian assistance in Bosnia); UN Doc. SC/Res/794, 1992 (humanitarian relief operations in Somalia); UN Doc. SC/Res/816, 1993 (no fly-zone over Bosnia to prevent obstruction of the transfer of humanitarian aid); UN Doc. SC/Res/836, 1993 (authorising the use of force to protect Bosnian safe areas); UN Doc. SC/Res/929, 1994 (to protect civilians in the Rwandan civil war); UN Doc. SC/Res/940, 1994 (to restore democracy in Haiti).

\textsuperscript{41}Tesón, supra 38.

\textsuperscript{42}Franck, supra 38.

\textsuperscript{43}See T. Meron, 'International Criminalisation of Internal Atrocities' supra 27.

\textsuperscript{44}The so-called right of humanitarian intervention did not change the status of the largest stateless people in the world – the Kurds. The terrorist attacks against the US on 11 September 2001 led to "liberation" of the Afghanistani people from the notorious Taliban regime, not the inhumanity of the regime. The international community is still conspicuously silent in relation to the situation in Algeria where since 1992 100,000 have been killed.

\textsuperscript{45}The UN High Representative deposed the democratically elected president of the Republika Srpska - see at http://www.ohr.int/decisions/19990305a.htm.


\textsuperscript{47}Ibid. paras. 8 and 16.
In spite of a different legal basis, the ICC is also prone to political dependence, similar to the one that both *ad hoc* international criminal tribunals' experience. Under Article 16 of the Rome Statute:

"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

This is, in fact, an explicit political element in the ICC's judicial function. Arguably, the lack of independence is even more obvious than in relation to the *ad hoc* international criminal tribunals, where at least in their statutes this kind of political influence does not exist.

Effectiveness of an international criminal tribunal is related to the extent to which the body achieves its main objectives. In relation to the ICTY the UN Security Council in its Resolution 827, 1993 determined that the situation in the former Yugoslavia, especially in Bosnia and Herzegovina, constituted a threat to international peace and security and established the Tribunal in order to bring to justice the persons responsible for crimes committed in the region. The Council expressed its view that bringing the persons to justice would be fulfilled by the Tribunal, which in turn would contribute to the restoration of the peace.\(^{48}\) An almost verbatim expression was used when establishing the ICTR.\(^{49}\) The attitude was echoed by the UN Secretary General, who praising the first judgement of the ICTR in 1994, stated:

"I am sure that I speak for the entire international community when I express the hope that this judgement will contribute to the long-term process of national reconciliation in Rwanda. For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law."\(^{50}\)

**The Justice-brings-peace Argument**

The argument is therefore based on the proposition that without justice there cannot be peace. It is not an intention of this article to embark upon an invidious task of discussing the category of international justice, but it is, at least, clear that the phenomenon is not an easily identifiable one. Peace, on the other hand, is an externally observable occurrence and therefore the opposite is probably true when the functioning of the two *ad hoc* tribunals is examined – that there is no justice without peace. The argument apparently turns the logic on its head; it is conditioning the existence of a physically observable phenomenon (peace) with an indefinable category, in relation to the substance of which there is no unanimous agreement (justice).

The ICTY undeniably contributed to bringing about a peace in the region, but this does not necessarily imply that justice has been achieved. After all the Tribunal was created by the UN Security Council in order to bring peace in Bosnia and Herzegovina. But at the same time, it was only a part of the overall international efforts to bring peace and it would surely not, on its own, be sufficient for achieving this aim.

Invoking the so-called international justice is preferred by those who want to indicate the existence of supranational authoritative processes and other forms of external standards of moral evaluation of certain developments. What is 'just' to one person does not have to conform to a


\(^{50}\) See at http://www.ictr.org/ message from Kofi Annan, UN Secretary General [emphasis added].

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perception of the same phenomenon by another individual. For this reason this article argues that the primary aim of an international criminal tribunal should be to prosecute all those responsible for crimes. By doing this an international criminal tribunal can indirectly contribute to peace by sending a clear message to future violators that their violations of the law will not be tolerated, but this is still far from achieving justice. This is because justice should be left to the parties to a particular conflict to pursue, not to a disinterested third party to impose on the parties. Justice cannot be imposed on the parties to a conflict; peace on the other hand can. The justice-brings-peace argument, applied to the present analysis (effectiveness of the ICC), leads to some rather unpleasant conclusions. Following the logic that without justice there cannot be peace, the rejection by some states (notably the US) to be bound by the Statute can effectively be interpreted as a threat to the peace because justice cannot even be attempted in instances involving US citizens. Exempting itself from the jurisdiction of a body allegedly capable of ruling what is just, is both cynical and dangerous for international cooperation.

Instead of making the above conclusion the author simply suggests that trying those responsible for war crimes and achieving justice are separate issues. In spite of the functioning of the ICTY for almost a decade, the parties to the Yugoslav conflicts eventually expressed their vision of achieving reconciliation and justice among themselves. The United States Institute of Peace organised a Roundtable on Justice and Reconciliation in Bosnia and Herzegovina in Strasbourg in July 1997 at which justice and war crimes officials from each of the countries' ethnic groups recommended:

"Beyond prosecution, the establishment of a historical accounting of abuses suffered during the war can contribute to the process of healing and reconciliation…One joint truth commission should be established for Bosnia and Herzegovina, including appropriate membership from each ethnic group and an international chairperson, to provide a collective forum for victims on all sides of the conflict and to establish one consensus history regarding these painful matters."\(^{52}\)

Obviously, the parties themselves spoke up and demanded more active participation in determining the forms and institutionalisation of their reconciliation. Useful experience in bringing about reconciliation and creating an atmosphere in which the risk of future conflicts would be significantly reduced, the parties to the Yugoslav crisis can find in the Contadora Reconciliation that began in 1983 by Panama, Mexico, Venezuela, and Columbia. The initial goal of the process was to detach Central American conflicts from the larger United States-Soviet confrontation.\(^{53}\) Since its commencement, the Contadora activities were instrumental in ushering all aspects of peaceful dispute co-existence, national reconciliation, demilitarisation, democratisation, protection of human rights, and continuing regional consultation on matters of interest for regional stability.

Justice, as a perception of just, fair and moral, which is influenced and dependent on the observer's perspective and subjectivity, is arguably more related to reconciliation than to peace. Peace does not necessarily imply justice, as the post-war situation in Rwanda clearly shows,

\(^{51}\) The United States Institute of Peace is a non-governmental organisation committed to facilitating the Dayton Peace Agreements' implementation in Bosnia and Herzegovina at: http://www.usip.org.

\(^{52}\) Ibid. Bosnia in the Balkans, Fact sheet, Truth and Reconciliation Commission of Bosnia and Herzegovina (2000) Vol. 6, No. 4. I am indebted to the Institute for providing me with the material. More information could be found at: http://www.usip.org.


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where almost 1,000,000 Rwandans have been killed after the end of the civil war.\textsuperscript{54} This tragic development should at least spark some scepticism among the enthusiasts about the contribution of this ad hoc tribunal to both a peace and justice. On the other hand, according to its Statute, the Tribunal's jurisdiction is severely limited. Jurisdiction \textit{ratione tempore} includes crimes committed between 1 January and 31 December 1994;\textsuperscript{55} consequently, the recent crimes cannot be tried by the Tribunal.

Justice is an elusive category that depends on the perception of the parties concerned. For this reason, the parties to a dispute, whenever they enjoy freedom of determining the forms of their reconciliation, have chosen a truth and reconciliation commission rather than a judicial body to rule on this aspect of their future coexistence or cooperation. That is why the parties to such a conflict instruct a third party involved in resolving their dispute to base its decision on justice, fairness and reasonableness. In those situations, the parties retain and exercise greater control over their dispute.\textsuperscript{56} On the other hand, when parties to a dispute want a legally binding decision reflecting the parties' legal entitlements, not necessarily justice, they prefer a judicial means of resolving their dispute.

Consequently, it appears that the only way reconciliation could be achieved is to establish an account of what precisely happened that would be acceptable to all sides. Arguably, a truth and reconciliation commission, for the reasons suggested above, is better equipped to perform that task successfully. The commission would provide a forum in which victims, before all, would freely tell their stories and where a common history of the war would be documented. The respect for victims' accounts and the establishment of a common history are crucial issues for bringing about reconciliation, certainly a more effective way of reconciling the former warring factions than the prosecution of their representatives. The United States' Institute of Peace reported that the forthcoming Commission

"will draw on models developed in Chile, El Salvador, South Africa and elsewhere and adapt them as appropriate to the context of Bosnia and Herzegovina. In addition to its focus on victims, the Commission will also acknowledge those individuals who maintained their humanity and protected neighbours of their ethnic and religious groups from abuse. It will be independent and autonomous in its work… The Commission chairman will be selected from the international community."\textsuperscript{57}

There should be no conflict between the work of a truth and reconciliation commission and the Court's functioning. The Commission would concentrate on the experience of victims and also on examining many other factors that led to the violence, whilst the Court should try alleged crimes. Therefore, the work of the Commission would be much broader than that of the Court.\textsuperscript{58}

\textsuperscript{54} Not only that there have been revenge killings ever since the end of the civil war in Rwanda but the Rwandan and Burundian soldiers are regularly engaged in the military operations against the Democratic Republic of Congo. See at http://www.digitalcongo.net/fullstory.php?id=19685.

\textsuperscript{55} UN Doc. SC/Res/955, 1994.

\textsuperscript{56} See J.G. Merrills, \textit{International Dispute Settlement}, Cambridge, 1998, 3\textsuperscript{rd} ed., Cambridge University Press, 151. Methods of international dispute settlement, according to the author, could be divided on legal and diplomatic. Legal methods are arbitration and judicial means (the International Court of Justice), while diplomatic means include negotiation, inquiry, mediation and conciliation.


Based on experience of the functioning of similar arrangements employed in South Africa, Chile, and El Salvador, it is practicable to identify at least five particular advantages of having a truth and reconciliation commission for achieving peace and justice.  

First, the work of the commission would contribute to the establishment of a clear picture of what actually happened in a particular conflict. This is because the commission would be empowered to conduct a detailed investigation, to collect and receive evidence and information in order to determine relevant facts and to identify groups responsible for atrocities. The commission would fulfil this task more appropriately and more easily than the Court because those applying for amnesty would be obliged to fully disclose all relevant facts. As the Constitutional Court of South Africa in *Azanian Peoples Organisation v President of the Republic of South Africa* (AZAPO) held:

"The amnesties made available to individuals are indispensable if an essential object of the legislation is to be achieved, the object of eliciting the truth about atrocities committed in the past and the responsibility borne for them...The emergence of the truth, or a good deal of that at any rate, depends after all on no fear of the consequences continuing to daunt them from telling it, on their encouragement by the prospect of amnesties to reveal it instead."  

The commission would, in this particular aspect, more easily achieve one of the aims that the Court is supposed to achieve, namely preserving this memory.

Secondly, publication of all the facts relevant to the atrocities as a precondition for granting amnesty to applicants is crucial to building of a common history of the parties without which there is little prospect of achieving reconciliation.

Thirdly, the commission would be empowered to rule on suitable reparations for victims and their families, which would also be an important aspect of showing respect for the victims' suffering.

Fourth, the commission would be instrumental in promoting national unity by emphasising the need for mutual understanding rather than vengeance, an aspect indispensable to establishing a democratic society.

Fifth, reconciliation among former warring factions is an absolute imperative for developing sound democracy in a divided community. It looks logical that achieving a substantive reconciliation through the work of the commission by developing a common history is a more suitable way of creating conditions for establishing democracy in the region than pursuing, what is usually seen by the parties to a particular conflict, as politically charged trials. In other words, it is more practicable to achieve reconciliation through *restorative* (preferred by a truth and reconciliation commission) than *retributive* justice (pursued by an international criminal court).

As already suggested a truth and reconciliation commission is more concerned with preserving memory and developing a common history rather than punishing perpetrators of crimes, which is the main aim and purpose of an international criminal tribunal.

Crucially, truth commissions would be established by the parties to a conflict themselves thereby bridging the major problem inherently associated with the current ad hoc tribunals - its heavy dependence on the Security Council, and, more recently, on NATO, which waged war against Yugoslavia, inevitably placing political burdens on its work.

Dependence on the UN Security Council exists in the sense that the Council has created the Tribunal and may terminate it at any time it deems appropriate. The parties themselves do not play any role in the determination of the Tribunals' duration. Likewise, the Council appoints the Tribunals' prosecutors and its judges are selected by the UN General Assembly from a short list proposed by the Security Council.

Opponents of truth and reconciliation commissions argue that there are cases in which those who have suffered have no desire to forgive, forget, or reconcile. Others emphasise that the functioning of a truth and reconciliation commission is contrary to international law since the human rights provisions embedded in the international treaties must take precedence over the parties' desire to avoid retributive justice and grant amnesty to the perpetrators. According to Orentlicher reconciliation processes inherently violate domestic constitutional orders by avoiding the prosecution of those responsible for the crimes, and degrade the courts' role of being the guardians of the constitutions. Expressing his scepticism about appropriateness of truth and reconciliation processes in general, Scharf argues:

"truth commissions are a poor substitute for prosecutions. They do not have prosecutorial powers, such as the power to subpoena witnesses or punish perjury. They are inherently vulnerable to politically imposed limitations and manipulations: their structure, mandate, resources, access to information, willingness or ability to take on sensitive cases, and strength of final report are all largely determined by the political forces at play when they are created."

Conclusion

As suggested in this article the establishment of the ICC does not mark the erosion of the principle of national sovereignty. The principle in fact received a clear recognition and support by the Rome Statute in the form of giving preference to the principle of complementarity, according to which the ICC will only have jurisdiction if a State concerned is unwilling or unable genuinely to carry out the investigation or prosecution. The participating States relied on the principle of consent as well by determining that the ICC can exercise jurisdiction only with respect to crimes committed in states that are either parties to the Statute or accepted its jurisdiction.

From a purely legal point of view everything looks perfectly legal. Taking into account however the importance of the ICC it is to the highest possible degree cynical to express a desire not to be

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63 On 20 April 1999, the British Foreign Secretary, handing a dossier of spy materials to UN War Crimes investigators, stated: "It is a rare step to release intelligence material. We have taken it because we are determined that those responsible for turning Kosovo into a slaughterhouse should be brought to justice". (The Independent, 21 April 1999).
66 Scharf & Epps, supra 27, pp. 640-41.
67 Article 17 (1) (a).
68 Article 12 (2).
bound by its provisions. It is difficult not to agree with Chinkin's perception of the US stance towards the ICC. In her words:

"...the events in Kosovo...have highlighted the irony that [the US] is prepared to bomb in the name of human rights but not to join institutions to enforce them." 

One may question the relevance of having an international criminal court in circumstances where the most likely candidate for violating international humanitarian law is legally exempted from any investigation.

One can only speculate why the participating states opted for the principle of complementarity rather than superiority in the Rome Statute. The level of commitment demanded from some states to international criminal law, as demonstrated by the two ad hoc international criminal tribunals is much greater than the one adopted in the ICC's Statute. It seems plausible to suggest that

"establishing the International Criminal Tribunal for the Former Yugoslavia meant that the institution of state sovereignty was weakened a little for most of the world's states - but it was probably strengthened for five." 

The same may be said in relation to the establishment of the ICC. In practice it is almost unimaginable to see the citizens of the most powerful states appearing before the court. The important difference created by the establishment of the ICC is that the possibility of avoiding the jurisdiction is put at a firmer foundation. It is legitimised in a way by including a provision in the Statute which effectively protects the most powerful states from international criminal jurisdiction. Under Article 16 it is the UN Security Council that may defer the investigation. The functioning of a supranational judicial body capable of overriding domestic competences in determining individual criminal responsibility with a paradoxical exemption from prosecution on the basis of a UN Security Council's resolution provides the most powerful members of the international community with a legitimate excuse for pursuing their political interests internationally. The permanent five (three of which are particularly active in determining the Council's agenda) will surely use this body as a legal tool for implementing their political goals, in the same way as the ICTY helped NATO to win the war against Yugoslavia.

69 The Government of the United States of America informed the Secretary-General of the following: "This is to inform, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000" – see http://untreaty.un.org/ENGLISH/bible/englishintertabbible/partl/chapterXVIII/treaty10.asp.


71 One may question the relevance of having an international criminal court in circumstances where the most likely candidate for violating international humanitarian law is legally exempted from any investigation.


This author is of the opinion that there should not exist any tension between an effective protection of human rights and the principles of sovereignty and consent in international relations. In other words they can both co-exist. Ironically the establishment of the ICC confirms this perception, although the proponents of the court would abhor this conclusion.

The establishment of the ICC is not a step in the right direction; it is a step backwards because, as argued in this article, the most powerful states will be able to direct and influence the work of the ICC, in the same way as they can direct and influence the two ad hoc international tribunals, and protect themselves from the ICC's jurisdiction in an even more effective way than under the ICTY's Statute for instance. The ICC will therefore help the most powerful states to institutionalise and legalise political convenience by pressurising the Court for carrying out investigations against "pariah" states' nationals, whilst effectively shielded from any investigation by the court.

An indication of the ICC's lack of independence could be found in US Secretary of State statement that the Iraqi President Saddam Hussein can enjoy immunity from any persecution if he left the country - see 'Rumsfeld back plan to exile Saddam; the Independent 20 January 2003.

Note that the ICTY prosecutor at least tried to investigate allegations of crimes committed by NATO - see Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, see at http://www.un.org/icty/pressreal/nato061300.htm. See also See also P. Benvenuti, 'The ICTY's Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia' EDITORIAL COMMENTS: NATO'S KOSOVO INTERVENTION (1999) 93 A.J.I.L. p. 503; M. Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY' ibid., p. 531.