International Criminal Court – "…a major landmark for the international community and for the international justice" [1]

A critical comparative study of the Australian and U.S. legal and political views on international criminal justice and the impact of the ICC

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This essay will explore the establishment of the ICC, its jurisdiction, principles and its implications for the international criminal law arena. The ICC is the world's first permanent

criminal court and its creation reflects an amazing international consensus. The second part is dedicated to the major constraints and objections that the U.S. Congress encounters and expresses regarding the ICC jurisdiction. Its concerns regarding the jurisdiction over nationals of non-parties, the “politicized prosecution” [2] , the “lack of Due process guarantees,” [3] and the fear of usurpation of the role of the U.N. Security Council.

In the third part, the research paper will present the commonalities and differences between the American and Australian legal philosophy, legislative history; the impact of becoming a member on the country’s foreign policy, the engagement in international criminal investigations and prosecutions, and the country’s new role in the international community.

Part IV will describe the implications of the ICC for the United States and will provide information about the future role of the U.S. as an observer, the agreement with the U.N. Security Council, and the strategy for precluding ICC Prosecution of U.S. Troops and Officials.

Part V will emphasize on the membership benefits and the opportunity that it gives to the members to become leaders, in respect of the rule of law and human rights; the ICC role as an external guarantor that serious crimes against humanity will be punished.

I. Rome Statute of the International Criminal Court – History and Practice

Since every state possesses sovereignty and jurisdictional powers and since every state must consist of a collection of individual human beings, it is fundamental that a link between the two be legally established. This basic rule in our legal system is called the concept of nationality and the connecting link between the two is common territory. The legal principle “all crime is local” is a representation of the concepts of sovereignty and state authority over its citizens (respectively residents) to prosecute and punish them when they commit crimes under the Law of this state.

In the human history holding individuals responsible for criminal acts outside of the borders of their own country began with the emergence of piracy and war crimes. These crimes of universal jurisdiction developed in the International Customary Law and were implemented by signing respective treaties to the domestic legislation of the participating countries.

In 1949 and 1977, the United Nations widened its treaties for the appropriate standards of conduct for countries at war; the treatment of POWs, civilians and religious and medical personnel. These conventions were codified and represent the Geneva and Hague Law. This codification treated both international and non-international armed conflicts.

The World War II gave rise to the adoption of *ad hoc* tribunals for those who were accused of committing war crimes (the tribunals in Nuremberg and Tokyo).These trials were considered contentious because the only persons accused came from defeated enemy countries and they were tried by the victorious Allies. [4] The argument was that there is a legal issue given that the unlawful conduct was made criminal retrospectively, but the tribunal’s defense was that these conducts breached a higher law – the customary law established for centuries among civilizations.
[5]

After the conflicts in former Yugoslavia and Rwanda the UN Security Council adopted a resolution for the establishment of two *ad hoc* Tribunals trialing war criminals from the these

countries.

The establishment of the International Criminal Court began in 1998, in Rome when 120 States participating in the United Nations Diplomatic Conference of Plenipotentiaries adopted the Statute of the International Criminal Court (ICC) [6]. The ICC is the "first ever permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished. **The ICC will be complementary to national criminal jurisdictions** [7]".

(The Court does not have universal jurisdiction.)
The Statute entered into force on 1 July 2002, nevertheless a number of statutory measures and practical steps still have to be taken. As known the two *ad hoc* Tribunals for Yugoslavia and Rwanda were set up within the framework of the United Nations, in contrary the ICC will have been established as a completely new international institution.

The Court may only exercise jurisdiction if:

· The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;

· The crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or

· The United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

Part II of the Rome Statute talks about the court's jurisdiction over **genocide**, **crimes against humanity** and **war crimes**

. The Court prosecutes individuals accused of these crimes;
directly responsible for committing the crimes
by
aiding, abetting
or otherwise
assisting in the commission of a crime
.
Military commanders
or their
superiors
are also liable even if they were given orders, in the situations when they would have a reasonable knowledge of the facts and the consequences of their action as being inhumane, unlawful or enhancing elements of the above mentioned crimes.

Since its establishment, the Court had four situations referred to the Prosecutor. "Three State Parties (**Uganda**, **Democratic Republic of the Congo** and **Central African Republic**) have referred situations occurring on their territories to the Court, and the Security Council, acting under Chapter VII of the
United Nations Charter
, has referred a situation on the territory of a
non-State Party
(
Darfur
,
Sudan
)."
[8]

The Prosecutor began investigations in three situations – Uganda; Democratic Republic of the Congo and Darfur, Sudan. The **Court issued the first arrest warrants** with regard to the situation in **Uganda** on the 8th of July 2005 and relies on the

State's cooperation to began with arrests and be more efficient. The Prosecutor monitors situations in other countries, including Côte d'Ivoire, a non-State Party, which declared its acceptance of jurisdiction over crimes on its territory.
[9]

II. U.S. Objections to the Rome Statute

The United States has refused to engage in the missions and goals of the ICC, and withdrew its signature of the Statute under the approval given to it by the former President Bill Clinton. The US has refused as well to allow its defense forces to serve as UN “peacemakers” without an agreement that will exclude the liability of any member of the US forces regarding the ICC jurisdiction. The result was a following Security Council meeting that led to a decision that no action (investigation or prosecuting) could be initiated against any member of the peace keeping forces from a State not Party to the ICC Statute (U.S. citizen) for a period of one year, unless agreed otherwise. [10] The US started negotiating bilateral treaties with the States where US forces are based to ensure that its forces and representatives will not be prosecuted for “genocide”, “crimes against humanity” and “war crimes.” [11]

Marc Grossman, in his Remarks to the Center for Strategic and International Studies [12] , Washington D.C. (May 6, 2002), expressed the U.S. Objections to the Rome Statute, that we will comment and assess in this part of the research paper.

His first argument is that only nations that ratify treaties are bound to observe them; that the ICC wants to extent its jurisdiction to citizens of non-party nations, thus binding non-party nations. [13]
As recognized by some scholars in favor of the ICC provisions and principles, the ICC jurisdiction is over persons, not nations. Non-party are not obliged to promote its principles, nevertheless, they can cooperate or defend their own interests.
[14]
It is arguable though, that the policy decision and not the individual conduct are at stake. The threat of prosecution could restrain the conduct of U.S. officials in implementing U.S. foreign policy and consequently to impair U.S. sovereignty.
[15]

It is important to remind here, that international treaties and the customary international law already prohibit crimes covered by the Rome Statute; the Nuremberg Trials serve as a positive implementation of such collective jurisdiction [16] . The Court’s jurisdiction is first complementary and second certain prerequisites must be present, like the consent of the State on whose territory the crime occurred or the State of nationality of the accused.

[17]
The United States is a party to most of the treaties that form the basis of the international crimes defined in the Rome Statute, therefore, U.S. citizen are already subject to the enforcement of these rules.

Further, if the ICC cannot assert its jurisdiction over non- party States which are or promote "rogue regimes" the role of the ICC will become futile. The proposed solution from the United States was to create a mandatory role of the UN Security Council in deciding and enforcing when the ICC should assert its jurisdiction. This proposal was rejected by the countries involved and they expressed the opinion that this is a way to avoid certain prosecutions and allow others.

Another objection to the adoption of the ICC jurisdiction was the assumption by the US Government that the ICC's may allow some countries to bring "trumped-up charges" against American citizens, who, due to the prominent role played by the US in world affairs, will be subject to politicized prosecution. [18] It can be argued that the principle of "complementarity" adopted by the ICC will exclude such possibilities and provide an objective and fair process. The ICC is allowed to intervene only when the State in question
is unwilling (taking into consideration the principles of due process recognized by international law)
or
unable (total or substantial collapse or unavailability of the national judicial system)
[19]
to investigate the allegations itself. The U.S. position is that the ICC will be able to "second –guess" a valid determination by U.S. prosecutors to terminate an investigation or a case.
[20]

The ICC's Chief Prosecutor issued a letter recently regarding allegations urging action against the U.S. conduct during its occupation in Iraq "pursuing charges based on the legality of the decision to invade." [21] Prosecutor's determination was issued on the base of a lack of jurisdiction and the fact that the allegations were of "insufficient gravity to warrant an investigation". [22]

The U.S. sees another issue in the status and rights and duties of the Office of the Prosecutor. It considers it being "unaccountable" with "unchecked discretion", a fact that could lead to "politicized prosecutions." [23] We can argue that the independence of the Prosecutor is vital to ensure that he will be free from political control, fair and balanced. The ICC includes provisions which required that in case the Prosecutor decides to carry out a self-initiated prosecution (

proprio motu)
to seek
permission
from a pre-trial chamber. The Prosecutor is also subject to
removal procedure
by vote of the Assembly of States Parties.
[24]
The U.S. delegation at the Rome Conference insisted for a U.N. Security Council oversight over the Prosecutor's decisions, which undoubtedly would lead to even greater politicization of the Prosecutor and deterioration of the goals and principles of the ICC.

Next on the list of objection was the so called "usurpation of the Role of the U.N. Security Council", based on the fact that the ICC has the authority to define and punish the crime of "aggression", which is solely the prerogative of the Security Council of the United Nation under the UN Charter. [25] The ICC provision in this respect is an attempt to reach a consensus on this problem. Under the Statute, all States Parties will have the right to vote on a definition of aggression after the treaty has been in effect for seven years, which **defini**
tion should be in compliance with the U.N. Charter,
therefore
preserving the role of the U.N. Security Council.
[26]
The U.N. General Assembly adopted a resolution in 1974
[27]
, that defined aggression, but it has only been invoked once by the Security Council.
[28]

The last objection we will discuss here will be the alleged "Lack of Due Process Guarantees", and particularly the argument that the ICC will not offer accused Americans the due process or rights guaranteed under the U.S. Constitution, such as the right to a jury trial. [29] The procedural safeguards and principles applied by the ICC reflect the long history and established tradition of due process and the rule of law and respectful principles of Criminal law (
Nullum crimen sine lege
,
Nulla poena sine lege
, non-retroactivity
ratione personae
, exclusion of jurisdiction over persons under eighteen, etc.)
[30]
Jennifer Elsea compares the situation of Americans trialed overseas, where the foreign government is not bound to observe the U.S. Constitution and also give the example of the court-martial procedures and trials, which exempt from the requirement for a jury trial.

III. Australian path – “all need to participate” [31]

The Australian Minister of Foreign Affairs, Alexander Downer, in his welcoming speech in Canberra during the “International Criminal Court Regional Advocacy Seminar” reminds us of an old saying “it is only necessary for a good man to do nothing for the evil to triumph.” [32]

In Rome, Australia played an important and active role in chairing the “Group of Like-Minded Countries” and the Australian government showed its commitment to implement the principles and goals of the Rome Statute and passed The International Criminal Court Act 2002, which provides with the procedural, evidentiary and administrative structures of the ICC, that have to be established in each country in order to be fully put into practice.

Australian Chief of Defense Forces was a strong supporter of this endeavor and embraced the fact that the Rome Statute will be a major contribution to international peace, security and stability.

Australian Law Institute is also very aware of the benefits that Australia will gain as a leader in such area of International Law and believes in the commitment of its country to prosecute “the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes.” [33] The Institute expressed its concerns regarding the potential of an agreement with the United States under Article 98(2) of the Rome Statute, in 2002, and provides a determined legal argumentation against the alleged critics presented by the U.S. as conflicting with the objectives of the Rome Statute. President Bill O’Shea (Law Institute of Victoria) also talks about the valuable contribution of Australian lawyers in the structures of the ICC.

Politically, Australia was divided between those who feel threaten by a international institution like the ICC and the stipulations that Australian troops will be potential victims of “politicized courts” and those expressing the “Australian internationalist views held since the Federation” [34]
who believed in the European determination to combat impunity for the most serious crimes and

who lobbied for the inclusion of war crimes as an offence under the Australian Criminal Code in 1995. According to Mary Hiscock
[35]
all actions that are incriminated in the Rome Statute are crimes within Australian Law.

The role of the ICC to deter and to cultivate a culture of accountability for actions that were condemned long time ago by the international community, only confirm the moral and legal norms espoused by many generations. The Australian supporters believe in the ICC role to reduce and prevent the horror of the atrocities that occurred during armed conflicts and oppressive regimes; to integrate a proactive position of the world that will not end with some ineffective diplomatic means but rather punish the perpetrators and promote the Rule of law.

IV. Implications of the ICC for the United States as a Non-member

The United States had a significant role in the Preparatory Commission, established by the Rome Statute, but as non-member and observer can only participate in the debates during meetings of the Assembly of States Parties. It cannot nominate U.S. nationals to serve as judges and prosecutors or their removal, or to vote on the ICC's budget. It will not be able to vote on the definition of the crime of aggression and its inclusion as a crime into the Rome Statute. It cannot refer situations to the Prosecutor for investigation, but can participate as a permanent member of the U.N. Security Council in a request to the Prosecutor to adjourn an investigation or prosecution. [36]

The US adopted strategies to preclude ICC prosecution of its troops and officials. It enacted several domestic laws and concluded 100 bilateral agreements under article 98 of the Rome Statute for achieving protection for U.S. troops within and outside U.N. peacekeeping arrangements and status-of-force agreement.

The American Servicemembers' Protection Act (ASPA) prohibits the participation of U.S. peacekeeping or peace-enforcement contingents, established by the Security Council unless the President of the United States ensure and report to the Congress that the U.S. personnel is immune from prosecutions by the ICC; because there is a U.N. Resolution or because there is

an existing arrangement with the hosting country in place for the particular mission.

The U.N. Security Council issued Resolution 1422, which provided permanent immunity for U.S. troops and officials from the ICC jurisdiction, after the US vetoed the extension of peacekeeping operations in Bosnia.

For the operation in Liberia President Bush made appropriate certification to the Congress under ASPA § 2005 (22 U.S.C. § 7424) and the UN authorization for the operations in Liberia seems to provide permanent immunity to the U.S. participants, as well. [37] The U.S. military personnel participated in the U.N. Mission in Liberia (UNMIL) because in authorizing the multinational force to enforce the cease-fire, the Security Council decided that "the current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the ICC, shall be subject to exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out or related to the Multinational Force or UN stabilization forces in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State." [38]

In 2005 the U.N. Security Council adopted another Resolution 1593 which referred the situation in Darfur, Sudan to the ICC Prosecutor, at the time, Luis Moreno-Ocampo. Sudan is not a party to the ICC Statute and has not consented to allow ICC jurisdiction over its territory, therefore the UN Security Council was only able to report and refer the situation to the ICC. This was the first referral made by the U.N. Security Council, binding all U.N. members. The vote was adopted by 11 in favor, none against and 4 abstentions – the United States, China, Algeria and Brazil. [39]

The position of the United States in Darfur, unfortunately, did not change its principle objections against the jurisdiction of the ICC over non-members. In assessing the situation and admitting that genocide had taken place in Darfur, and insisting for a resolution that will once again protect U.S. nationals and other persons of non-party States outside Sudan from prosecution, the U.S. Administration wanted to enhance its reputation and support the international community and the promotion of human rights. Some consider that such policy of passive non-interference, including the work within the U.N. Security Council to refer cases to the ICC will better the image of the U.S.; nevertheless, the Administration continues to seek agreements under Article 98 with relevant countries and undermines the efforts of the ICC.

V. Membership benefits for Australia and the country's growing role in the Asian-Pacific region.

Unlike, the U.S., Australia wants to bring its unique perspective on law and justice and to boost its "international profile" [40] in contributing to the system of international criminal justice, by shaping its norms, establishing its structures and by representing its values. Australia believes that the Court's major role is to deter and intimidate conducts that represent a breach to peace and security, international humanitarian law and human rights.

Being one of the first to ratify and abide by the Statute rules, Australia gained the position of a leader in the region and is trying to encourage its neighbors to join the Court. Japan has signed the Statute, but China, Indonesia, Malaysia, Singapore and Papua New Guinea are still reluctant. Some scholars consider that the Australian government should use its relationship with Washington and influence the U.S. administration.

Another membership benefit for a country is the right to nominate a candidate for election as a Judge of the Court or a Prosecutor. The opportunity that such nominations presents is enormous. It creates a very positive international reputation and the prospect of influencing the legal philosophy and practice of the new established Court. Australia is keen to present impressive judicial and administrative appointments and to contribute to the development of international law, as it has done in the past in areas like the law of the sea, nuclear-free zones, environmental law, fisheries, etc.

Australia took a major step towards a "regional approach to recognizing the importance of human rights and international law" [41] and positions itself as a guarantor of the Rule of law, of peace and stability and confirms its belief in the international justice system.

Research paper resources

Online resources

1. Archive, International Criminal Court Regional Advocacy Seminar, The Hon. Alexander Downer, MP, Minister for Foreign Affairs, Australia

2. CRS Report for Congress, U.S. Policy Regarding the International Criminal Court, Jennifer K. Elsea, Legislative Attorney, American Law Division.

3. The International Criminal Court – What it means to Australia, Mary E. Hiscock, Professor Emeritus, Law School Bond University; Chair, International Law Section Law Council of Australia.

4. Marc Grossman, Under Secretary of Political Affairs, Remarks to the Center for Strategic and International studies, Washington D.C., May 6, 2002

5. CRS Report RL31437, International Criminal Court: Overview and Selected Legal Issues, by Jennifer Elsea.

http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf

http://www.icc-cpi.int/library/organs/presidency/ICC_Report_to_UN_2006_2007_English.pdf , http://www.icc-cpi.int/library/organs/presidency/PK_20071101_ENG.pdf

http://www.csis.org/media/csis/events/grossman.pdf

http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf

http://hrw.org/press/2002/09/icc0930.htm

http://www.afr.com/home/

http://www.foreignminister.gov.au/

http://www.iccnow.org/documents/BibliographyEng.pdf

http://www.austlii.edu.au/databases.html

http://www.aph.gov.au/

Books, Documents and Hard copies

1. Rome Statute of the International Criminal Court

2. SC Res. 1422, U.N. Doc. S/RES/1422 (2002)

3. G.A. Res. 3314, U.N.

4. Ruth Wedgwood, The United States and the International Criminal Court: The Irresolution of Rome, 64 Law& Contemp. Probs.193, 199 (2001).

5. Patrick Parkinson, Tradition and Change in Australian Law, 3rd edition, LBC Information Service, Sydney, 2004, ISBN 0 455 22161 8.

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[1] Archive, International Criminal Court Regional Advocacy Seminar, The Hon. Alexander Downer, MP, Minister for Foreign Affairs, Australia

[2] CRS Report for Congress, U.S. Policy Regarding the International Criminal Court, Jennifer K. Elsea, Legislative Attorney, American Law Division.

[3] Ibid

[4] The International Criminal Court – What it means to Australia, Mary E. Hiscock, Professor Emeritus, Law School Bond University; Chair, International Law Section Law Council of Australia.

[5] Ibid.

[6] http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf

[7] http://www.icc-cpi.int/about/ataglance/establishment.html , Article I, Part I. Establishment of the Court, Rome Statute.

[8] http://www.icc-cpi.int/about/ataglance/today.html

[9] http://www.icc-cpi.int/library/organs/presidency/ICC_Report_to_UN_2006_2007_English.pdf , http://www.icc-cpi.int/library/organs/presidency/PK_20071101_ENG.pdf

[10] SC Res. 1422, U.N. Doc. S/RES/1422 (2002)

[11] http://www.hrw.org/campaigns/icc/docs/art98analysis.htm ,

[12] http://www.csis.org/media/csis/events/grossman.pdf

[13] Ibid

[14] CRS Report for Congress, U.S. Policy Regarding the International Criminal Court, Jennifer K. Elsea, Legislative Attorney, American Law Division.

[15] Ruth Wedgwood, The United States and the International Criminal Court: The Irresolution of Rome, 64 Law& Contemp. Probs.193,199 (2001).

[16] Jordan Paust, The Reach of ICC Jurisdiction over Non-Signatory Nationals, 33 Vand. J. Transnat'l L.1 1, 3-4 (2000).

[17] Article 12 (2) Rome Statute of the International Criminal Court

[18] See *supra* note 2.

[19] Article 17(2) Rome Statute of the International Criminal Court

[20] See Marc Grossman, Under Secretary of Political Affairs, Remarks to the Center for Strategic and International studies, Washington D.C., May 6, 2002, *supra* note 10.

[21] http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf

[22] Ibid.

[23] See Grossman, *supra* note 10.

[24] Article 15, Rome Statute of the ICC.

[25] See Grossman, *supra* note 10.

[26] See CRS Report RL31437, International Criminal Court: Overview and Selected Legal Issues, by Jennifer Elsea.

[27] G.A. Res. 3314, U.N. Article 3.

[28] See CRS Report *supra* note 2.

[29] Ibid.

[30] Rome Statute of the ICC, Part 3

[31] See *supra* note 1.

[32] Ibid.

[33] Response of the President Bill O'Shea, Law Institute of Victoria, to The Hon Mr. Daryl Williams, Attorney-General, Parliament House, Canberra Act 2600.

[34] See *supra* note 4.

[35] Ibid.

[36] Article 16, Rome Statute of ICC.

[37] See *supra* note 2.

[38] SC Res. 1497, U.N. Doc S/RES/1497, Para 7 (August 2003).

[39] See *supra* note 2.

[40] See *supra* note 1.

[41] Ibid.