

To what Extent Have Politics Restricted the ICC's Effectiveness?

Written by Domenico Carofiglio

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DOMENICO CAROFIGLIO, DEC 20 2015

‘To show that justice has its practical and ideological limits is not to slight it... [Law] is not an answer to politics, neither is it isolated from political purposes and struggles. Above all, it is not something that it is “there” or “not there”’(Shklar, 1986, p.122, 143)

It could be argued that every trial has its own political dimension. This is not to say that justice is a political tool, but rather that justice does not operate in a vacuum. Such a consideration is all the more relevant in international trials whereby judgments upon war crimes and genocide end up in distinguishing friends from enemies, and good from evil (Nouwen and Warner, 2001). In doing so, international legal bodies such as the International Criminal Court (hereafter ICC) cannot disentangle themselves from the political dimension of the lived realities they engage with and, the influences and restraints exerted by the international community and its components. By no means should such a view discourage the legal value of the ICC as the International Court par excellence.

This essay will challenge the typical labelling of the ICC either as a political tool of the international community or as an independent legal body by proposing a twofold view of the Court. On the one hand, it is proposed that at a structural level, the ICC is surprisingly detached from political implications brought about its link to the ‘quintessential political body: the Security Council’ (Arbour, 2011); structural refers to the ICC as a practical manifestation of the Rome Statute which is indeed a turning point in terms of international law and its dependence on the UN Security Council (SC). On the other hand, it is maintained that from an operational perspective, the ICC is independent from states and the SC, yet they have considerable influence on the ICC’s performance (Ainley, 2011). It is manifest that the line between politics and law is indeed blurred when it comes to the ICC, nonetheless this essay will distinguish two levels of the ICC – structural and operational – to assess the extent to which politics has restricted its effectiveness. The findings will demonstrate that: (a) the ICC is, in structural terms, more insulated from political power than is generally believed; whereas (b) on an operational level, the Court is often prey to power politics which restrains its agency. This twofold analysis allows an understanding of how politics’ power restricts the ICC’s effectiveness with an appreciation, however, of the potential value of the organization. The structure of the Court can potentially alter the degree of control exerted by politics, thus the relevance of analysing its substantive law. In sum, as Ainley bluntly advances, the ICC ‘is neither an apolitical expression of global consensus, staffed by saints, nor a court of victor’s justice controlled by the US’ (2011, p.331).

The essay is divided in two sections. The first is dedicated to the structure of the ICC with particular focus on its founding document, which is the Rome Statute (hereafter Statute). By analysing a selection of articles from the Statute, the influence of politics is tested against the ICC and its relations with (I) the SC and (II) the US; advocates of the ICC political nature firmly point at its subordination to the former and its subjugation to the latter. The second section will examine a series of case studies with regards to the ICC’s operational effectiveness and how that is influenced by politics. This essay will touch upon the political implications brought about by the ICC investigating in (I) Sudan, (II) Uganda, and (III) Libya.

The structure of the ICC and the Rome Statute: justice over politics

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In an interview, Schabas (2009) notes that

African states were keen supporters of the Court in the early years. Now, they seem to be turning against the Court [...] At the same time, the United States is [recently] warming up to the Court

and concludes that the support of African states for the ICC was preferable to the actual rapprochement of the US to it. Beyond his personal considerations, Schabas' argument is emblematic of a particular shift in the perception of the Court as a dependent legal and judicial body. Whereas in the phrasing of the Statute, the ICC could sound undeniably more independent from political influences and thus appealing to the sympathy of many African states blaming the P5's hegemony; when the Court began to operate, old political mores resurfaced as winners with warm welcome of the US. This section will look at the very substance of the ICC stemming from its primary legal source, which is the Statute. Ainley (2011) reports the opinion of many when the ICC was established that the Court would accelerate 'the move away from power politics [...] towards the realisation of common ethical goals' (p.311). By analysing the relation of the Court with the UNSC and the US as regulated by the Statute, it is demonstrated how the ICC, at least on paper, is indeed more insulated from political power than is generally maintained (Ainley, 2011).

A historical overview of the process leading to the establishment of the ICC is beyond the scope of this essay, it is however sufficient to mention that before the entry into force of the Court in 2002, and the adoption of the Rome Statute in 1998, a draft statute was produced in 1994 by the International Law Commission (ILC) and presented to the UN General Assembly (GA). A comparative analysis of the 1994 final draft statute and the Rome Statute sheds light on the complicated role of the ICC alongside political bodies such as the SC and the US. The latter's rejection of the Court ultimately stem from the tension between the SC and the ICC. As Schabas suggests, Art.16 of the ILC final draft would view the SC as the 'gatekeeper to the Court' (2004, p.716). This would have meant that the SC could veto the ICC to begin investigation of any situation considered a threat to international peace and security under Chap.7 of the UN Charter. Instead, the same article in the Rome Statute states that approval by the SC is not a *sine qua non* for commencing investigation or prosecution; yet the SC retains deferral power by ensuing UNSC resolutions. As Ainley (2011) and Schabas (2004) assert, whether the SC is still able to affect the operation of the Court, it has indeed much less 'leeway' than the P5, and chiefly the US, would long for.

Not only is the ICC to some extent unrestrained in its jurisdiction as enshrined by the Statute, its actual independence has been proven in many instances when the Court refrained from halting investigations in pursuit of justice at the expense of peace, in contrast to the SC's pressures (Ainley, 2011; Clark, 2008; Simpson, 2008; Kersten, n.d.). Another crucial development in detaching international justice from power politics is the possibility for the ICC Prosecutor to commence investigations *proprio motu* (Art.15). Despite the deferral power of the SC, the Prosecutor does not need authorisation from the SC or a state party if she/he verifies that a specific situation requires ICC's investigation. It is true that the prosecutorial power is subject to control, but the source of such control is judicial, through the Pre-Trial Chamber, and not political (Schabas, 2004). Both articles 15 and 16 would carry forward the thesis that in structural terms the ICC is indeed less subject to political manipulation by the SC than its detractors generally sustain. The Statute ultimately testifies to a generalised post-Cold War "malaise", as Schabas (2004) argues, with regards to the SC's monopoly on judicial matters. The ICC is in fact an institution which is separate from the SC, yet it exerts an authority which was formerly attributed to the SC in the form of the ad-hoc tribunals (*ibid.*). The challenge posed by the ICC to the UN system, and chiefly the SC, results in the extraordinary accomplishment of the Court which currently counts on 123 state members, but it also 'accounts for the antagonism of the US' (*ibid.*, p. 720) as the next paragraph will show.

As suggested above, much of the antipathy of the US towards the ICC stems from the relation of the Court with the SC. However, it is often contended that Washington merely rejects the jurisdiction of the ICC over its own citizens (Bishai, 2008; Dietz, 2004; Philips, 1999). This would be proven by the American Service-members' Protection Act of 2002 (ASPA) which was recently nicknamed "The Hague Invasion Act" (Sutherland, 2002) insofar as it allows the US to use all necessary means to free American citizens detained or imprisoned by the ICC, including invasion of the Dutch city hosting ICC tribunals. Moreover, Washington has secured protection over US nationals from the ICC through a series of bilateral immunity agreements (BIAs) whereby signing states agree not to surrender American citizens to the Court (Georgetown Law Library, n.d.). Along these lines, another rationale for Washington's rejection

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is that eventual ICC's trial of US citizens would not include a jury, thus breaching the US constitution.

These considerations are certainly relevant but they do not fully explain why the US actually endorsed the 1994 ILC draft, whereas it refused to ratify the Rome Statute. Moreover, US nationals were already potentially subject to non-US courts such as the ICTs for Yugoslavia and Rwanda. As Schabas remarks, the hostility of the US to the ICC is 'all about the Security Council' (2004, p.701). As the comparative analysis above reports, what resulted from the ILC draft was a Court very much subordinate to the SC with the blessing of Washington. This does not hold true for the actual Statute whereby the prosecutorial power and ICC investigations are partially limited by the deferrals of the SC, yet the 'ICC does not operate under the functional supervision of the UNSC, and is thus further removed from the will of sovereign states' (Bloomfield, 2003,n.d.). It then appears evident that the very source of the US's hostility stems from the eventual detachment of the Court from the SC (Goldsmith, 2003; Scheffer, 1999; Wedgwood, 1999). The concern for the structural insulation of the Court from the SC's political power is due to Washington's fear that the ICC can be potentially outmaneuvered by any state targeting the US in its political agenda (Borek, 1995).

The considerations hitherto made with regards to the structure of the ICC, stemming from the Statute, bring forward the following conclusions: (a) the relation of the Court with the SC as regulated by Articles 15 and 16 of the Rome Statute indicates that the ICC is significantly removed from the political influence of the SC; (b) the hostility of the US to the ICC was triggered by the critical changes from the ILC draft, providing a criminal court that would 'fit neatly within the Charter of the UN [and thus] subordinate to the SC' (Schabas, 2004); whereas the Rome Statute allows for a more independent Court. To sum, point (a) refers to the structural independence of the ICC given by the Statute; point (b) suggests that such independence is threatening the power of control by political bodies such as the US, which in turns adopts countermeasures such as the "Hague Invasion Act" and bilateral immunity agreements. Insofar as the Statute provides for, the effectiveness of the ICC is surprisingly unaffected by any sort of political pressure. In operational terms the reality is quite different and the following paragraphs will show how.

The ICC in operation: between justice and politics

Before going into details of case studies, there is a general argument about the operational capacity of the ICC and its relation to politics. Prior to the ICC, international tribunals were often criticised for being a pure political manipulation in so far as judges at Nuremberg, for example, were exerting jurisdiction despite the absence of a precise body of law to refer to; due to this lack, shielding perpetrators of crimes amongst the Allies was indeed possible, and criticisms to this politicisation of the tribunal were frequent. The substantive law derived from the Rome Statute grants the ICC's legitimate jurisdiction, escaping political bias against it; this solves the issue first raised to the Nuremberg Tribunal and subsequently ad-hoc tribunals of *nullum crimen, nulla poena sine praevia lege poenali* (von Feurback 1813 cited in Pople, 1989). As Cherif Bassiouni, great advocate of the ICC, commented, at the conclusion of the Rome Conference, 'the ICC reminds governments that *realpolitik*, which sacrifices justice at the altar of political settlements, is no longer accepted' (cited in Gaynor and Morris, 2008, p.121). However, in her book "Legalism: law, Morals, and political trials", Shklar affirms that it must be acknowledged that

law is a form of political action and [...] like any form of political belief and behaviour it is a matter of degrees, of more or less, and of nuances (1986, p.143).

Despite the potential insulation of the Court from political power thanks to the Statute structure (as explained in the previous section), the political significance of such a tribunal seems inescapable when the Court is in operation, and the following case studies will explore this justice-politics interaction.

With regards to the situation in Sudan, the then Prosecutor Moreno-Ocampo manifested his concerns for the on-going peace talks in Sudan; however he made clear that he would implement the law regardless of any political implications the process could bring about (Charbonneau, 2008). Despite the goodwill of the Prosecutor to abstain from considering political factors in the pursuit of pure justice, the ICC ended up being a political weapon in the struggles between Al-Bashir's government and the rebels; in that context, the Court became 'implicated in the distinction, and thus construction, of friends (allies) and enemies' (Nouwen and Werner, 2011, p.246). For Carl Schmitt (1996) the capacity to make a distinction between friends and enemies is the core of the political in so far as

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the enemy is the other that could eventually be fought by the collectivity; the German philosopher argues that the political is not in the armed struggle but rather in the eventuality that the collectivity could turn into armed struggle, 'in the mode of behaviour which is determined by this possibility' (ibid., p.35). By issuing arrest warrants for the Sudanese head of state and accusing the whole Sudanese bureaucratic and military apparatus of being stained with Darfuri blood, the ICC designated the state as *hostes humani generis* and thus ended up being political despite having legal purposes.

In the context of the on-going atrocities in the Darfur region of Sudan and after a series of UN Resolutions to halt violence, the SC eventually referred the case to the ICC[1]. It was the first time a non-party state to the Statute would incur the jurisdiction of the Court without its invitation (Thompson-Flores,2010). What this case demonstrates is that the ICC inevitably enters into a political dimension when it prosecutes Al-Bashir and Sudanese government officials, thus favouring the Darfuri rebel movements. The latter proclaimed themselves to be partners of the ICC against the 'génocidaires' (Nouwen and Werner, 2011, p.956). To go back to Schmitt's argument, in this instance, the political dimension of the Court is not in the ICC siding with one party or the other but rather in the Court's labelling of Al-Bashir and his officials as enemies of mankind, thus indirectly favouring the rebels; 'by paying lip-service to fashionable international concepts, the [rebels'] leaders also secured international legitimacy' (ibid., p.957). The political manipulation of the Court is demonstrated by the fact that as soon as these leaders realised that the ICC could not exert any power on the Sudanese government nor were they strong enough to do so, they eventually forgot about the importance of justice (ibid). In 2010, when unsure whether Chad would keep providing military support, the JEM agreed with Al-Bashir for the

issuance of a general amnesty for the civil and military members of the Justice and Equality Movement [...] and the release of the war prisoners and convicted persons from both sides (Doha, Agreement Govern. of Sudan-JEM, 2010, art.2).

Moreover, as many sustained the Court could easily be accused of being a 'political battlefield' where the US and its allies fight their non-western enemies (Nouwen and Werner 2011); thus politics appears to restrict the ICC's legal effectiveness. The case of Sudan, however, shows that politics is not an external agent which restricts the ICC's efficiency; political implications are already part of the game when the Court is in action. Regardless of the will of the Prosecutor to stay away from politics, the ICC inevitably enters a political dimension when it makes a distinction 'between friends and enemies' (Nouwen and Werner, 2011,p. 942) and this is something which is inevitable. To conclude, it is unfeasible to assess whether politics restricts the Court's effectiveness insofar as

a sound normative assessment of the Court should be based on an acknowledgment and understanding of the political aspects of the ICC [...] defining away the ICC's political dimensions eventually undermines the Court by making it look either hypocritical or utopian (ibid,p.946).

With respects to the second case study, in the context of Uganda, the ICC had a similar role in distinguishing between friends and enemies; however, in this instance, the enemies were the rebels. In 2003, the Ugandan President referred Uganda to the ICC. This move suited both the Court and President Museveni in so far as it would be the first state referral for the ICC and an opportunity for the Ugandan government to further weaken the Lord's Resistance Army (LRA). The ICC stepping in by invitation of the government could only favour Museveni. The operations of the ICC, supported solely by the government, would end up rendering justice to Museveni's side while turning the 'LRA from enemies of the Ugandan government into enemies of international community as a whole' (Nouwen and Werner, 2010, p.949).

Once again, the ICC would make a political distinction between enemies (the LRA) and allies (Museveni's government) in legal terms. The politicisation of the discourse in Uganda was even clearer when the government decided to begin national proceedings in the hope of convincing LRA to sign a peace agreement; as a reaction, the Prosecutor publicly condemned the consequent peace talks affirming that they would allow LRA to carry forward its criminal goals (Moreno-Ocampo, 2008). What transpires is the political use of the ICC at convenience of the Ugandan government and vice versa. Indeed, the political calculations of the Prosecutor were equally quite obvious. Mr Moreno-Ocampo knew that by admitting the Ugandan case before the Court, he would not incur the protest of a

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state unwilling to cede its jurisdiction; more importantly, the US would not create obstacles because the 'internationally ostracised' LRA was already on the US's terrorist list and US nationals in the country were shielded by bilateral immunity agreements (Nouwen and Werner, 2010). Ultimately, the Prosecutor would embark on an uncomplicated investigation with high chance of success. The case of Uganda demonstrates another intrinsically political aspect of the Court. When admitting a case the ICC is necessarily relying either on the government of the host country or the SC due to the lack of its own police or standing military and generally for safety and security purposes. This adds weight to the political burden that the Court has to carry. This operational limit of the Court, in the case of Uganda, clearly shows how politics restricts its effectiveness: 'in the eyes of the victims of grave crimes, until the ICC undertakes the difficult task of addressing government atrocities, the Court won't have truly arrived' (Clark, 2008, p.44). Similar to Sudan however, the case of Uganda shows that regardless of the attempt to keep politics away from the Court 'its potential to be used in political struggles is inherent in its core business, adjudicating on international crimes' and that 'does not necessarily mean it betrays justice or the rule of law' (Nouwen and Werner, 2010, p.964).

Whereas the previous cases showed how there are intrinsic political implications when the Court operates, the case of Libya epitomizes the politicisation of the Court by the SC as external agent. When the SC needed to further legitimise the intervention in legal terms, it referred the case of Libya to the ICC. However, as soon as the

court had served the political goals of these states, namely to marginalise and isolate Gaddafi and to legitimise the intervention itself, support for the Court's mandate dwindled (Kersten, n.d., p.28).

The referral made by the SC did restrict the ICC's effectiveness. With UN Resolution 1970[2], the major stakeholders in the UN, chiefly the US, ensured that the Libya situation would be brought before the Court specifying however that their military personnel and political elites would be shielded by its jurisdiction (Dunne and Gifkins, 2011); even worse, Resolution 1970 reports that the SC 'decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011' (UN, 2011). As Kersten (n.d.) notes this time restriction would effectively shield many Western states from investigation about their affairs and relations with Gaddafi and his officials. The specific requirements of Resolution 1970 highlight how SC referrals can be very dangerous given the inevitable political nature they stem from.

In short, it can be learnt that the SC's referrals can easily end up with the SC's major stakeholders manipulating the Court for their own political purposes, thus limiting ICC's effectiveness. But even in this case, the matter stands in an intrinsic political dimension of the Court when it is in operation rather than an external political influence as the SC. To simplify it, if one imagines the Prosecutor commencing investigation in Libya *proprio motu*, she/he would eventually be compelled to ask for the support of Gaddafi, which was of course highly unfeasible, or the help of other states to conduct proceedings, and arrests. Hence, Kersten (n.d.) concludes that it is implausible to think that the Prosecutor would investigate and prosecute Western personnel if able to do so only through the support of mainly Western states. As Ainley argues, the Court is in fact obliged and 'incentivised to treat those states upon whom it relies most heavily with undue lenience or favour' (2011, p.322). These inevitable political implications arising at the operational level of the Court do not seem to distract it from its very objective which is to pursue justice. In the end, what was crucial was the prosecution of those who had the greatest responsibility in war crimes, on the basis of gravity as selection criterion (OTP, 2005) which means that Gaddafi and his elite had to be judged; foreign actors, despite involved, were not clearly the main perpetrators. The truth is that SC referral of Libya was a political operation *ab initio*, given that the states referring became those who claimed, at the end of the conflict, that what happened to Gaddafi 'was up to the Libyan people' (Watt and Taylor, 2011); thus, they would dismiss the jurisdiction of the Court altogether. Either as external agents or as inherent implications, politics did restrict ICC's effectiveness in the case of Libya. However, it should not be forgotten that the structure of the Court, derived from the Rome Statute would allow the Prosecutor to reject referrals (Kersten, n.d.). However, it is also true that 'without SC referrals, the Court would not have some serious international crimes under its jurisdiction' (ibid.). It is a question of political nuances and trade-offs that surrounds the Court rather than a choice between politics and justice as next paragraph synthesise.

In conclusion, politics is inevitably part of the game when the Court operates: (1) the neutrality of the ICC lends itself to being an instrument 'for the labeling and neutralisation of enemies of a particular political group' as happened in

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Sudan (Nouwen and Werner, 2010, p.963) ; (II) for the fact that the Court operates in the context of ongoing conflict, as in Uganda, it can be easily exploited by the “good” side to defeat the enemy; (III) the necessity of the Court to rely on the cooperation of states, chiefly the major stakeholders in the UN, makes the ICC easy prey for the SC's political calculations. All of this leads to the thesis that politics indeed restricts the ICC's effectiveness, but as explained, these are politically inherent implications of the Court's operational capacity that can be acknowledged and adjusted through the Rome Statute but not avoided.

The ICC: between justice and politics

In light of the arguments hitherto made, it appears naïve, at least, to see the ICC as an apolitical body or a legal surrogate of the SC and/or the US. For the time being, the Court is still heavily influenced by political bodies such as the SC or states themselves, as shown by the three case studies. Nonetheless, the ICC is a relatively young institution whose structure, the Rome Statute, can substantially alter the degree of political control, as the first section demonstrated. By acknowledging that political implications are inherent in the Court's operations, it appears unfeasible to assess whether politics truly restricts its effectiveness. To recognise these political dimensions does not mean to detract from the legal and judicial value of the ICC. As Morgenthau (1929) once asserted:

The 'legal' and the 'political' are not at all an adequate pair of concepts that could enter into a determinate contrast. The conceptual counterpart of the political is formed by the non-political but not by the concept of 'legal question' which, for its part, can be both political and non-political.

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