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Analysis of the Legitimacy of the International Criminal Court Within the Framework of the Universal Human Rights System

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Abstract

The main objective of this research is to analyze the legitimacy of the International Criminal Court in prosecuting crimes against international peace and security within the framework of the Universal Human Rights System, making it necessary to analyze the most relevant aspects of the aforementioned tribunal, as well as the conflicting positions regarding its work and perception by the international community, in an effort to critically reflect on the findings and data extracted from the sources consulted, regarding the current state of the situation and how the Criminal Court can strengthen its legitimacy. The research is descriptive in nature, using direct observation and analysis of texts, laws, and scientific articles for data collection, which led to the conclusion that the current perception of the International Criminal Court is largely negative, but without underestimating its ability to fulfill the objectives for which it was created.

Keywords: International Criminal Court; Human Rights; Legitimacy; International Criminal Law; Universal System for the Protection of Human Rights.

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1. Introduction

There is no doubt about the importance of the creation of the International Criminal Court and the entry into force of the Rome Statute in shaping international criminal law and, closely linked to this, the prosecution and punishment of the most serious crimes against international peace and security, such as war crimes, crimes against humanity, genocide, and the crime of aggression, as a valuable instrument within the framework of the universal system for the protection of human rights. Nevertheless, the International Criminal Court has been the subject of criticism that has called into question its legitimacy, particularly in recent times in view of its differentiated and slow response to the conflict between Israel and Palestine, compared to the Court's rapid response to the war between Russia and Ukraine.

Issues such as the few indictments brought before the Court, the ease with which countries can withdraw from the Court's jurisdiction (citing, for example, the abrupt withdrawal of Burundi in 2017 and the Philippines in 2019), the greater focus on cases from the African continent, and the non-membership of countries such as the United States, China, Russia, India, Israel, Turkey, Iran, and Egypt, have affected the perception of this international court, casting doubt on its usefulness, compounded by the alleged biased use of the Court for political purposes. Similar to the widespread perceptions of multilateral organizations such as the United Nations in the Universal System and the Inter-American Court of Human Rights in the Inter-American System, there is great mistrust and uncertainty regarding the work of these institutions and their true usefulness.

The truth is that, more than twenty years after its entry into force, the International Criminal Court faces unprecedented challenges in the current context, characterized by polarization and tensions between world powers that highlight the need for a robust and efficient international criminal court that complements the domestic criminal justice systems of the countries that are parties to the Rome Statute. That is why this essay proposes to analyze the legitimacy of the International Criminal Court in the face of current global challenges from a critical point of view, reviewing the main assessments that have been made of this judicial body since the Rome Statute came into force, in order to offer a series of conclusions and recommendations to strengthen it in the face of future challenges to the defense of human rights against the most heinous crimes against international peace and security.

The type of research that frames this essay is descriptive, in that it analyzes the legitimacy of the International Criminal Court through a critical study framed in the current global context, referring directly to concepts, theories, and discussions on the subject matter, in order to offer conclusions and recommendations as a valid contribution to legal sciences, particularly in the lines of research in Criminal Law and Human Rights, addressing criteria from both branches of study, and with the aim of serving as a basis for future research related to the topic.

It is worth noting that, as a descriptive study, the present research and its findings relies on doctrinal analysis and critical assessment of existing data, rather than generating empirical data; hence, the conclusions regarding subjective legitimacy are inferred from scholarly critiques and official statements rather than direct measurement. Plus, given the inherent geopolitical nature of international criminal justice, it was challenging to isolate purely legal factors from political influences when assessing the Court's efficacy, and these limitations, in sum, imply that the findings should be viewed within the context of the ever changing dynamic of international relations.

2. Background

On the central theme of this research, there is a profuse international bibliography referring directly to the legitimacy of the International Criminal Court, citing, for example, an article entitled: "The future of the International Criminal Court: Criticism, legalism, and strengthening its legitimacy" [1] published in the *International Criminal Law Review*, which shows that criticism of the Court is linked to unfounded expectations placed on this judicial body and to a conception of what the Criminal Court can and cannot do, making it necessary to adjust the expectations of those who doubt its legitimacy. The author mentions that among the challenges facing the International Criminal Court is that "...there is a discrepancy between what victims hope to find in terms of justice and what the Court is able to offer; the accession to the Rome Statute, the ICC's founding treaty, has come almost to a standstill (...) year after year, tensions between African and 'Western' states intensify during the annual Assembly of States Parties (asp) diplomatic conventions" [1:593]; indicating that the loss of legitimacy is worrying, since without it, the exercise of justice become futile.

The Court's criticism is frequently derived from misconceptions of its capabilities, necessitating an adjustment in the expectations of those who question its legitimacy. This critique forms a central focus of the present analysis, particularly as it relates to key operational challenges, such as the standstill in accessions to the Rome Statute and the ongoing geopolitical tensions between African and "Western" states.

Another article related to the central theme of this essay is the research entitled: "The International Criminal Court: Current Challenges and Prospects for Future Success" [2] published in the *Case Western Reserve Journal of International Law*, which states, among other things, that "...the ICC was originally viewed as an enormous success for the field of international criminal law, and for the proposition that those who commit atrocity crimes should face individual criminal responsibility..." [2:468] but contrasting this argument by saying that the initial enthusiasm had faded in recent years due to the Court's poor record of convictions, constant conflicts between judges, as well as the controversial relationship with world powers such as the United States of America. It cites the criticism expressed by the United Kingdom delegation at the 17th Assembly of States Parties to the ICC, specially referring that after 20 years and one and a half billion euros spent, only three convictions for crimes under the court's jurisdiction had been achieved at that time.

The author's observations directly inform the present analysis's assessment of the ICC's functional legitimacy, particularly when contrasting the Court's high operational cost versus its low output. The cited author underscores the criticism that, after two decades and significant expenditure, the Court's tangible achievements have been minimal. Furthermore, the focus on the internal legal uncertainty caused by judicial division allows the present study to analyze how these structural issues erode confidence in the ICC's judicial consistency.

Other similar investigation is the article entitled "20 Years of the International Criminal Court: A Critical Assessment" [3] published in the German magazine *Deutsche Richterzeitung*, which analyzes the results produced by the International Criminal Court since its creation, criticizing the slowness of the proceedings within it, which can last more than ten years, as well as the extreme dependence on the voluntary cooperation of States in order to carry out its work, which, combined with the lack of its own executive bodies for, for example, the execution of

arrest warrants and its financing, affects the achievement of the objectives set and the expectations that were had of this judicial body from the outset, calling into question its independence.

These findings establish a key pillar for the present article's argument: the ICC's independence, and, consequently, its ability to fulfill its mandate within the Universal Human Rights System, is profoundly compromised by its reliance on the political will and financial support of States Parties; plus, the specific lack of self-contained executive bodies further frames the discussion on the limits of the Court's functional sovereignty in the face of state non-cooperation.

3. The creation of the International Criminal Court

It is a fact that, to date, there is no universal international criminal code, and domestic criminal laws vary greatly from country to country, including differences in what is considered a crime, as well as penalties and the trial process. However, after the ravages of World War II, the way was paved for the creation of an international regulatory framework to prosecute and punish the most serious crimes against humanity, particularly after the creation of the United Nations and the start of the Nuremberg trials. According to experts [4:3] "...the Nuremberg trials to prosecute Nazi leaders after World War II and the Holocaust helped overcome theoretical objections to an international criminal court on the basis of national sovereignty (...) however, the practical realities of establishing a permanent court proved insurmountable in the postwar period...".

The truth is that the Genocide Convention of 1948 already referred to an international criminal court, which was ratified in the mandate addressed to the International Law Commission under the United Nations General Assembly, through Resolution 260B (III) of December 9, 1948, in which it was invited to study the possibility of establishing a permanent court, which was considered *prima facie* desirable and feasible, and the structure of the court began to be outlined, but negotiations were paralyzed during the Cold War, which limited the possibilities of reaching a consensus. These negotiations bore fruit in the 1990s, when there was growing interest in international treaties and organizations [5], and it was agreed to hold an International Conference in Rome in 1998 to finalize efforts to create the International Criminal Court.

4. The historic adoption of the Rome Statute

After more than a month of negotiations in Rome, the participating delegations managed to draft the final text of what would become the Statute of the International Criminal Court, but this task was not entirely straightforward. Civil society participating in the negotiations through non-governmental organizations, strongly opposed the idea that the nascent court should be subordinate to the United Nations Security Council [4]. Finally, the text was approved with 120 votes in favor, 7 against, and 21 abstentions, establishing the Court's jurisdiction to prosecute crimes considered the most serious for humanity: genocide, crimes against humanity, war crimes, and the crime of aggression. The text of the Statute [6] consists of 13 sections and 128 articles, covering the substantive and procedural aspects of the functioning of the International Criminal Court, highlighting the definition of each of the crimes mentioned and specifying the possible behaviors that fall within their scope.

It has been said that the Rome Statute is "substantially longer and more complex than any of its predecessor

instruments in other international criminal tribunals..." and this complexity made its ratification somewhat difficult for some countries [4:25]. With the accession of at least sixty countries required for the Statute to enter into force, this was achieved on July 1, 2002, and this international judicial body began to function formally.

5. Facts and figures on the work of the International Criminal Court

In order to properly analyze the implications of the legitimacy of the International Criminal Court in the current global context, it is necessary to begin with the figures that inform us about the results obtained by this international judicial body since its creation, taking as a reference the data provided by the ICC's own official website [7], which indicates that to date, 31 cases have been brought before the Court, with one or more persons under investigation; the judges of the Court have issued 46 arrest warrants, achieving, with the cooperation of States, the arrest of 21 individuals, while 17 individuals under investigation remain at large; charges against 7 individuals have been dropped due to their death, 9 summon orders have been issued, and 10 convictions and 4 acquittals have been handed down.

Based in The Hague, in the Netherlands, the International Criminal Court currently has 18 judges, all of different nationalities, from States Parties to the Rome Statute, who are elected for a term of nine years. To date, 123 countries are parties to the Rome Statute; some forty countries never signed the treaty, including China, Ethiopia, India, Indonesia, Iraq, North Korea, Saudi Arabia, and Turkey; and several dozen more signed the statute but never ratified it, as is the case with Egypt, Iran, Israel, Russia, Sudan, Syria, and the United States.

These results leave much to be desired, considering that the International Criminal Court has been in operation for more than 20 years, thus calling into question its usefulness and, with it, its legitimacy to continue functioning.

6. Conflicting positions regarding the legitimacy of the International Criminal Court

Based on the data analyzed in the previous point, it would not be entirely fair to criticize the Court for not convicting all those investigated, given that the Court must in any case operate under the principles of presumption of innocence and due process. However, as some experts have stated [2], the low number of cases brought to the Court by the prosecutor and the weakness of those cases are worthy of criticism, and even moreso considering the fact that the presentation of said cases costs are over the hundred million a year.

Another point against the Court's work, is that "ICC judges have been divided in their application of the law, resulting in inconsistent judgements and contributing toward uncertainty in the definition and development of legal norms in the field of international criminal law" [2:472]; this uncertainty does not help the International Criminal Court to be taken seriously as a universal reference point in the prosecution of the most serious cases for humanity, which is confirmed by law experts when referring to the difficulties in interpreting criminal law and human rights violations in certain cases, which may be clouded by circumstances external to the Court.

It has been said that "...in the specific case of crimes against human rights, as a phenomenon of extreme violence, rooted in a country's historical context and the product of dysfunctional social contexts, the interpretation of applicable criminal law is very complex (...) in addition, some factors in the cases under investigation may lead

to interpretations that tend toward a more restrictive application of criminal law, departing from the traditions of interpretation of international human rights law" [8:49]. We are therefore witnessing the potential use of international criminal law as a manifestation of enemy criminal law, where the end justifies the means and, in the face of possible impunity for the acts, punishment must be sought at any cost. This, of course, goes against current trends in criminal law, particularly in our adversarial court systems, which guarantee human rights even for the most heinous criminals.

On the other hand, another aspect that negatively affects the current legitimacy of the International Criminal Court is that there are several states within the United Nations, including some of the most populous in the world, that have not taken part in the Rome Statute; in other words, a significant number of people are being left outside the jurisdiction of the Court, which undermines its own legitimacy. If we take into account the number of countries that are parties to the Rome Statute, 124 in total, it is clear that since its entry into force there are still a large number of states that refuse to join, under various pretexts, which contradicts its "universal" character.

As if that were not enough, at the 2018 United Nations General Assembly, several countries expressed their rejection or opposition to the work of the International Criminal Court, including the Philippine delegation, which announced its withdrawal from the Court due to the so-called "politicization" of human rights, while representatives from Sudan strongly criticized the perception that the Court acts as an arm of the United Nations, and finally, the Canadian delegation emphasized the importance of the Court being able to act without obstruction, beyond power, politics, and geopolitics [9].

Also, the problem of the enormous expectations placed on the Court has been one of the main challenges to overcome. Some authors [1:598] have argued that the proponents of the International Criminal Court created "unrealistically high expectations of what a court in The Hague can do in terms of addressing atrocity crimes throughout the world and ending impunity for them" and those false expectations can be reflected in a very clear example: if it is already utopian to promise to end impunity and bring justice in the domestic legal systems, at the international level this becomes even more unattainable.

All these criticisms faced by the International Criminal Court, which overshadow its work, not only affect its objective legitimacy, that is, its ability to adapt its actions to positive criteria for action, but also its subjective legitimacy, or in other words, the perception that relevant audiences have of the Court's function and purposes. Thus, if states are the main financiers of the Court, if they do not perceive it as legitimate, they will be less likely to support it, both financially and in terms of assistance, which would result in it having less chance of fulfilling its mandate to end impunity for the most serious crimes against humanity [10].

7. Opportunities for the Court to legitimize itself in the face of current conflicts

Despite growing criticism of its legitimacy, there is no doubt that the International Criminal Court has the potential to contribute to the promotion of respect for and enforcement of human rights and international peace and security. This has been put to the test with the recent conflicts between Russia and Ukraine, and Israel and Palestine, which have once again turned the world's attention to the work of the court in The Hague. In this regard, following the

Russian invasion, "...a record 43 states referred the situation in Ukraine to the International Criminal Court for investigation and, ultimately, prosecution" [10:15], reflecting growing alarm among countries over the escalating atrocities in the conflict and, on the other hand, the value placed on the Court by the parties as a tool to ensure justice for crimes against international peace and security. Likewise, the appeal by the Office of the Prosecutor of the Court for increased funding was positively received by States [10], reflecting the positive perception of the Hague Tribunal in conflicts such as the one mentioned.

This leads us to consider that, to the extent that the International Criminal Court has greater support from the States Parties, it will strengthen its legitimacy, precisely because of the financial dependence of the Hague tribunal and the cooperation of the States. The other side of the coin, however, is stark, considering that "...unwillingness to support the Court has contributed to the institution's shortcomings and its relatively inefficient conviction record..." [10:17]. Thus, observing how the conflict between Russia and Ukraine has been monitored and the support received from member states, not only through direct funding but also through collaboration with the process, gives us an example of what should continue to happen in future cases, lest there be delays in achieving justice or denial of justice to the direct detriment of the victims of these crimes.

However, beyond the current debates, it is necessary to reconceptualize "...international criminal justice as inherently political" [1:614], taking criticism seriously and become open to address the shortcomings and challenges of the ICC. On this basis, the aims of the International Criminal Court must be developed holistically in accordance with the context, adapting to the needs of those affected and with the aim of assisting communities that are victims of atrocities against their human rights.

8. Conclusions

After this brief discussion, it can be said that the legitimacy of the International Criminal Court is a highly polarized topic, depending on one's point of view: a pessimist would say that the International Criminal Court only has a symbolic effect in the fight against impunity for the most serious crimes against humanity, and should be abolished because it has not fulfilled the objectives for which it was created, beyond being a bureaucratic body with high operating costs that do not translate into the results expected since its creation. On the other hand, an optimist would say that despite the visible flaws and shortcomings of the International Criminal Court, it has enormous potential, and its maintenance ensures that present and future human rights violations can be effectively prosecuted and punished in a manner complementary to the States Parties. Whichever way one looks at it, there is no doubt that the cooperation of the international community is essential for its objectives to be achieved.

In this regard, and beyond the assistance of the States Parties in strengthening the legitimacy of the Court, the continuity of the functions of this judicial body must emphasize the effective handling of a greater number of cases, the strategic selection by prosecutors of cases with a visible prognosis of conviction, and a necessary dialogue among judges to reach a minimum consensus on substantive law. In this way, the legitimacy of the Court will be enhanced, both objectively and subjectively, which will ultimately provide greater confidence in the face of the challenges that the global context presents today and will bring in the future. To the extent that the States Parties to the International Criminal Court and decision-makers perceive this court as an institution linked to its

founding mandate to end impunity for crimes against international peace and security, the necessary financial, technical, and procedural support from States would provide a greater chance of success in cases brought before the Court.

Analysis of the Court's operational data over two decades post-entry into force of the Rome Statute reveals a significant disparity between its substantial institutional scale and its tangible achievements, which directly undermines its functional legitimacy. This gap fuels widespread academic criticism, particularly when contrasting the Court's high operating costs with the notably low output of only ten convictions to date. The problem goes beyond financial matters, since the Court is extremely dependent on voluntary State cooperation for its core functions, compromising its independence and efficacy, and challenging the principle of effective remedy. Moreover, the perception of the Court's moral authority and adherence to legal principles is also challenged by inconsistencies in its judicial application and the complexity of its mandate.

More than 22 years after its creation, several challenges remain, but the future success of the International Criminal Court and its position as one of the most powerful tools of the Universal System for the Protection of Human Rights, faithfully fulfilling the mandate for which it was created, will depend on the political will of the States Parties. There's no doubt about the Court's potential as a tool against impunity, but a shift towards internal accountability and external engagement is urgent, addressing criticisms not as mere attacks, but as essential feedback and an opportunity to align the ICC's actions with the core values of the Universal Human Rights System.

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