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The Independent Prosecutor and the Success of the Global Ratification Campaign

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INTRODUCTION

Peter Katzenstein, one of the most renown scholars of international relations remarked recently that there might in fact be a reason why certain phenomena are not investigated, and so positing the 'why no one asked this particular question yet?' may not in itself warrant investigation.[2] One particularly new, innovative, permanent and yet controversial institution established merely thirteen years ago that would warrant investigation – namely the International Criminal Court (ICC) – has, to date, received unjustifiably quite a scant attention in the field of political science, but more particularly in international relations.[3] One might be able to point to the nature of the work of the institution – bringing individuals to justice whom have committed the most heinous crimes – as a deterrent for scholars; academic discussion regarding this institution seem to fit well in legal discussion as opposed to discussion regarding international relations or politics in particular. Yet if one takes a look at the process by which the ICC was established, along with its structure, operation, as well as the number – and variety – of states that have joined the Court, one is but hard pressed to begin an inquiry.

So, then why do states join the International Criminal Court (ICC) and what does the work of the Court – the work of the Prosecutor in particular – reveal about motivations to join? In others words, has the work of the independent Prosecutor thus far impacted state accession to the Court? Are motivations to join fuelled by international – or regional – considerations, or are they motivated and impacted by the domestic political and social considerations?

Thus far, investigations into why states join the ICC are focused on variables which provide 'across regimes' investigations and explanations. What would complement these investigations would be investigations into why individual states joined; or investigations into domestic political and social conditions for joining the ICC. By focusing on institutional sub-features – even though negotiated 'wholesale' in Rome[4] – might further provide nuanced insight into the motivation of states to join. Therefore, it will be argued in this essay that investigations into why states joined the ICC via institutional sub-features may reveal dynamics – albeit unintended – which may, among possible others, help accentuate domestic political and social conditions which underpin certain states to accede.

The forthcoming discussion will begin with a short background sketch of the ICC and the Prosecutor, which will be followed by the literature review. Following the review, a brief note on definitions and measurement will discuss a proper way to measure state accession to the ICC. In the fourth section, light will be shed on the timing of the accessions and which states joined after the work of the Prosecutor began. Finally, the analysis will discuss the lessons learned by taking the particular line of investigation.

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[2] Katzenstein, Peter. "Bridge Building in International Relations Scholarship." Roundtable. International Studies Association . Fairmont Queen Elizabeth Hotel, Montreal. 18 Mar 2011. Address.

[3] Professor Beth Simmonds and Aliston Danner, in a recent publication addressing why states join the ICC, posit that "thus far few social scientists have given this innovative institution close scrutiny." (Simmons and Danner, 226)

[4] Washburn, John L. *Why did states establish an independent Prosecutor for the ICC?* . Personal Interview by Laszlo Sarkany. 29 Apr 2011.

BACKGROUND

At the outset, it is worth to look more closely at the ICC, the international context it was developed in, and its particular design features in order to lay the groundwork for the study at hand. Taking a step back, one of the most discussed features of the international realm of the 1990s – discussed within the academe as well as within public policy circles – was the phenomenon of an increasing number of intra-state conflicts as opposed to inter-state conflicts. Quite naturally this new dynamic was attributed to the end of the Cold War, and the end of the bipolar strategic and ideological 'standoff' between the United States (US) and the Soviet Union (SU). What was also observed was that there seemed to be an accumulation of a number of so-called 'failing' or 'failed' states where the central authority of a government has not only been challenged but also been diminished in certain respects. In parallel to this phenomenon, more and more attention was paid to human rights violations within states. Leaders, and most importantly individuals, who were responsible for mass violations of human rights were publicly identified and acknowledged across the globe as well as within particular sovereign states. It became clear that certain states and their leadership either could not hold certain individuals accountable for crimes committed during war, or were not willing to do so. The bloody civil wars in the former Yugoslavia and Rwanda were glaring examples of this need for the international community to 'step in and step up' in bringing individuals to justice who would otherwise walk free.[5]

On the ideational and conceptual front, the notions of expanded conceptions of security – in such forms as humanitarian intervention and human security – were further brought to the fore, and continued to gain relevance. What these proposals signaled however was a certain 'diminishing of the state', or at the very least a challenge to the deeply engrained concept of state sovereignty, and with it, state capacity, to deal with the most heinous of crimes humanity was forced to face and endure. Overall, states as well as the United Nations were more often than not confronted with situations that needed a remedy which necessarily challenged age-old practices underpinned by the sanctity of state sovereignty.

It is in such geopolitical, ideational and conceptual contexts that the journey towards a permanent international criminal court was reignited[6] with much hope. Even though proposals to establish a permanent international criminal court reach back to the end of the 19th century[7] and to the founder of the International Committee of the Red Cross (ICRC) Gustav Moinier, recent proposals to establish such a Court originate from a proposal in the General Assembly of the United Nations, by A.N.R. Robertson, the former President of Trinidad and Tobago, whom in

[5] In general in the 1990s instruments of past injustices committed ranged from internal as well as external instruments. Internal or domestic instruments ranged from truth commissions such as those in South Africa, El Salvador and Guatemala, to hybrid courts set up by the United Nations and the 'host' state such was the case in Cambodia, Sierra Leone and Liberia. Purely international instruments, which are in fact the subjects of this work are those related to the conflict in former Yugoslavia and Rwanda, namely the International Criminal Tribunal for the former Yugoslavia (ICTY) as well as the International Criminal Tribunal for Rwanda (ICTR).

[6] As Marc Weller explains, "The drafting of the Statue of the International Criminal Court took literally half a century." (Weller, 694) As it can be seen below, the idea however of an international criminal court goes much further back in time.

[7] M. Cheriff Bassiouni explains that in fact the trial of Peter von Hagenbach in 1474 counts perhaps as the first instance of 'international criminal justice.' He explains that in the "Breisach trial … 26 judges of the Holy Roman Empire presided over the case of Peter von Hagenbach who was accused of committing 'crimes against the laws of nature and God in the sacking and pillaging of the city of Breisach." (Bassiouni in Cassese, et.al., 132)

1989 called for an international criminal court to aid with the prosecution of drug traffickers in the Caribbean.[8]

The institution itself is one of the most innovative yet also one of the most controversial international institutions that came to see the light of day at the end of the 20th century. It is a permanent international criminal court which is responsible for prosecuting individuals who have committed crimes against humanity, war crimes or genocide[9] in conflicts which are deemed "the most serious crimes of international concern." (Rome Statute, Article 1) It is also 'complementary to national criminal jurisdictions," so the Court is restricted to operate in conflicts where the state is either incapacitated or is unwilling to prosecute. (Rome Statute, Article 1) One of its central institutional design features is an independent Prosecutor whom is not only the most public figure of the Court but is also responsible for initiating investigations based on evidence brought before him or her.[10] In terms of jurisdiction, the reach of the Court is not restricted to only signatory states, or states which have signed the Rome Statute. As the Statute outlines, the Court has jurisdiction if the crime committed occurred within "the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel of aircraft, the State of registration of that vessel or aircraft; b) the State of which the person accused the of the crime is a national." (Rome Statute, Article 12) Therefore national of non-party states may also be brought in front of the Court if they have committed crimes on a territory of a signatory state.

Organizationally, the ICC is comprised of four main organs: the presidency, the judiciary, the office of the prosecutor, and the registry. The office of the Presidency is entrusted with the overall administration of the Court, except for the Office of the Prosecutor. The Presidency is headed by three judges who are elected by their fellow jurists at the Court for a term of three years. The presiding judge of the Court is assisted by a first vice-president and a second vice-president.[11] The role of the Judiciary consists of the judges of the Court – eighteen in total – whom serve in one of three judicial divisions: Pre-Trial, Trial and Appeals division. The office of the Registry "is responsible for the non-judicial aspects of the administration and servicing of the Court." This organ is headed by a Registrar who is under the supervision of the President of the Court.[12] The Registrar is elected by the judges of the Court for a five year term. Lastly, the Court also contains three other so-called 'semi-autonomous' offices which fall under the administration of the Registry, yet these offices operate autonomously. These are the Office of Public Counsel for Victims, Office of Public Counsel for Defense, and the Trust Funds office as

[8] Even though during the Cold War there were numerous proposals to establish a permanent international criminal court, these proposals did not come to fruition. As MacFarlene and Khong explain, there were two particular reasons why during this time period proposals for an international criminal court did not develop into full blown institutions. As the authors explain, "decolonization was accompanied by a strong articulation of the principle of nonintervention, and structural bipolarity impeded action within the jurisdiction of states outside the spheres of influence of the two superpowers." (MacFarlene and Khong, 165)

[9] _ The Statute also enumerates 'crimes of aggression', but it also states that "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted" for these types of crimes, which should be "consistent with the relevant provisions of the Charter of the United Nations." (Rome Statute, Article 5, Section 2)

[10] As Article 13 of the Rome Statute, the prosecutor may initiate investigations referred to him by state parties, by the "Security Council acting under Chapter VII of the Charter of the United Nations", and stemming from his/her own investigations. (Rome Statute, Article 13)

[11] The International Criminal Court: The Presidency. http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Presidency/The+Presidency.htm. [accessed January 31, 2011].

[12] International Criminal Court: Registry. http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/. [accessed January 31, 2011].

well. The Office of the Prosecutor (OTP) is an autonomous and independent organ of the Court. It is not administered by the Presidency of the Court nor any other international organ, including the United Nations nor the United Nations Security Council. The OTP is headed by the Prosecutor. The Prosecutor is elected for a non-renewable nine years by the Assembly of State Parties.[13] He is assisted by the Deputy Prosecutor who is in charge of the three sub-divisions within the OTP: the Prosecution division, the Jurisdiction Complementarity and Cooperation Division, and the Investigation Division. The latter two divisions are headed by a Director and a Head respectively.

The OTP, but the Prosecutor him/herself, may initiate investigations based on three types of modalities: a) referrals from state parties to the Rome Statute, or referral from the UNSC; b) communications from individuals who are referring to one of the three crimes – genocide, crimes against humanity, war crimes – under the jurisdiction of the Court.[14] Thus far there are five states from where cases are being heard at the Court.[15] These are Northern Uganda, Central African Republic, the Democratic Republic of the Congo, Darfur and Kenya.[16] The former three cases have been referred to the Court by state parties. The fourth case has been referred to the Court by the UNSC. At the present time, the Prosecutor has been granted authorization to "investigate *proprio motu*" ('on his/her accord') the situation referred to him from Kenya. In addition to the active cases and investigations described above, the Prosecutor is also involved with the "preliminary analysis" of situations referred to him regarding Afghanistan, Columbia, Georgia, Palestine, Ivory Coast, Guinea, Nigeria, Honduras and the Republic of Korea.[17]

As described by the Rome Statute, the Prosecutor has "the power to initiate proprio motu (on his/her own initiative) an investigation with respect to four core crimes. Once the Prosecutor decided that there is a reasonable basis for proceeding with an investigation, he or she must submit a request to the Pre-Trial Chamber for authorization." (Roberge, 3) As the author explains, "if the Pre-Trial Chamber authorizes an investigation the Prosecutor has to notify all State Parties and states concerned. Within one month of receipt of notification a State may inform the Prosecutor that it is investigating or prosecuting the case and the national level and that the Prosecutor should therefore defer the proceedings to the State's authority. The Prosecutor may, however, decided to seek a ruling of the Court on a question of jurisdiction and admissibility." (Roberge, 3)

Overall, the OTP along with the Prosecutor, are an independent organ of the Court. The Prosecutor and its office are fully independent from the other organs of the Court. This is a truly unique circumstance. No other office within the international realm enjoys such wider-reaching independence. Yet, as it was indicated above, scholarly works within international relations on the subject are scarce. The task in the next section of the essay then will be to provide a sketch

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[13] At the present, Mr. Luis Moreno-Ocampo of Argentina is serving as the Prosecutor of the ICC. He holds this office until December 2012, when the 'Assembly of State Parties' to the RS will elect a new Prosecutor.

[14] International Criminal Court. Office of the Prosecutor. http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/. [accessed January 31st, 2011].

[15] These states are the Central African Republic, Sudan, Kenya, Uganda and the Democratic Republic of the Congo.

[16] At the present time, the Prosecutor is also pursuing cases against the Lybian leader Moammar Ghadaffi and his associates.

[17] Office of the Prosecutor. OTP Weekly Press Briefing, 8-14 February 2011 – Issue #74. http://www.icc-cpi.int/NR/rdonlyres/2A9D7B75-CFAA-4E58-AACC-5E39E976382E/282995/OTPWeeklyBriefing814February2011Issue74.pdf [Accessed March 2nd, 2011]

of the existing scholarly literature, and point to ways in which it may be supplemented with the discussion in the analysis section of this essay.

LITERATURE REVIEW

The explanatory literature regarding the ICC – weather addressing the reasons why the Court was established, why certain institution features were adopted, or even why states are joining the Court – is very much in its infancy. On the other hand, several distinguished scholars have attempted to explain the Court as a whole, its features or why states have acceded to the Court. The forthcoming discussion then will begin with an exposition of the literature attempting to explain why states joined the ICC. This discussion will be followed by the explanatory literature regarding why the Court was established in the first place. The last discussion in this section will shed light on the international relations theoretic explanations of the existence of the Court.

Michael J. Struett and Steven B. Weldon provide perhaps the most comprehensive attempt to explain why states ratify the RS. They present their research, arguments and findings in a paper entitled, *"Why do states join the International Criminal Court: A Typology,"* presented at the International Studies Association annual meeting on March 1st, 2007. In this essay, the authors use quantitative and qualitative measures to determine why states ratified the ICC, and what factors contributed to their accessions. The measures used are percentage of military spending in states' gross domestic product (GDP), how long a particular states were embattled in internal conflicts, a measure of civil and political rights using data from Freedom House, the number of so-called 'veto players' in a particular region, membership in international organizations, and – in order to test for the impact of NGOs – if the 'Coalition for the International Criminal Court' has held a meeting in a particular country prior to ratification. (Struett and Weldon, 20 – 27) Using a variety of statistical methods, the authors find that democracy seems to be the strongest indicator of accession to the Court, followed by membership in international organizations. States that have experienced internal conflict in the past 20 years – and were forced to deal with the consequences of the violence or were required to help end the violence – were also more likely to accede. NGO involvement also contributed to accessions as well. On the other hand however, states which were involved in internal strife in the past 35 years were not eager to join, nor states where a large part of the GDP was spend on military expenditures. (Struett and Weldon, 32-34)

Basing their work on rational choice, Professors Beth Simmons and Allison Danner, in their work entitled *"Credible Commitments and the International Criminal Court,"* argue that "the ICC is a mechanism to assist states in self-binding." (Simmons and Danner, 225) In order to investigate why states join the ICC – and hence why they ratify the RS – the authors use 'credible commitment theory' which posits that "actors have difficulty reaching cooperative solutions in their mutual relationships because they are unable to commit themselves credibly in advance to act in agreed or specified ways." (Ibid., 232) Overall, "credible commitments theory emphasizes the need to raise the cost of defection ex post." (Ibid.) The ICC, as a case study, fits here quite well because joining the Court offers 'credible commitments' to "any opposition group or even the general public" within the domestic political and social sphere. (Ibid., 234) As the authors explain, "joining the ICC greatly enhances the risk for states of future punishment of their senior leaders… This exposure to prosecution by an independent international institution acts as an implicit promise by governments that they will foreswear particularly heinous military options, and it endows that promise with a credibility that such governments would otherwise

lack." (Ibid.) The authors admit that this particular theory applies well to cases "with a recent history of civil wars, but weak domestic institutions of accountability." (Ibid., 235) The authors admit that the "theory does not make strong predictions about the attitudes of stats without civil wars in their past," and in "peaceful but unaccountable autocracies." (Ibid.) Using quantitative methods in order to test the two "major explanatory variables: civil war and accountability," the authors find that "along with countries whose nationals were least likely even to be vulnerable to the Court's jurisdiction (and for whom sovereignty costs were therefore likely to be very low), the least credible but more vulnerable governments were found to be among the earliest ratifiers." (Ibid., 252 – 253) On the other hand, "potentially vulnerable states with credible alternative means to hold leaders accountable do not" readily join." (Ibid., 225)

Caroline Fehl provides an excellent discussion about not only how rationalist versus constructivist theories explain the establishment of the ICC, but also what impact the establishment of the Court had on global governance in general. Fehl provides an excellent comparison of the causal relevance of norms in rationalist as well as constructivist thought and concludes that it is with wedding the two accounts that the establishment of the ICC can be explained. Fehl's task is ambitious: to explain via rationalism and constructivism both the establishment of the ICC as well as the particular institutional design of the Rome Statute and the ICC in general. In her conception, first, as states were faced with the need to prosecute perpetrators, it proved to be too costly for states to do it themselves: "the ICC solves this problem of centralizing prosecutions." (Fehl, 382) As the author explains further, "the ICC lowers the transaction costs incurred in a system of ad hoc tribunals established by the UN Security Council." (Ibid.) Constructivism, on the other hand, "emphasizes the constitute effect of human rights norms, which have come to define the identity of 'the community of liberal states' and have strengthened demand for the prosecution of atrocities." (Ibid.) Further, constructivism also sheds light on the fact that the ICC was to be "more legitimate", and not only more cost effective. (Ibid.) In terms of the institutional design of the ICC, according to Fehl, rationalist perspectives fall short. Rather, in her conception, constructivism fairs better as "the persuasive lobbying activities of NGOs as norm entrepreneurs were influential factor in deciding the design trade-off in favour of an independent Court. NGO influence, in turn, depended on states' openness to both the involvement of NGOs in the negotiations and the positions advocated by them. This openness seems to be part of a newly evolving norm of international treaty-making, the 'new diplomacy' approach." (Fehl, 383)

Jay Goodliffe and Darren Hawkins provide a more systemic explanation for the adoption of the Rome Statute. The authors argue that by taking into consideration direct benefits and costs, geography, identity and NGOs, "during the negotiations, governments adopted the position of the international partners whom they depend for a diverse set of goods that includes trade, security, and foreign policy success in international organizations." (Goodliffe and Hawkins, 977) In essence then "governments support (or fail to support) international institutions because they care deeply about the potential reaction of the international partners of whom they depend for a diverse set of goods…" (Ibid., 978)

Eric K. Leonard's work entitled *"Contesting Global Governance: International Relations Theory and the ICC"* does an excellent job not only outlining what theoretical perspectives explain the ICC the best, but also what impact as ideational factors are explicitly included in the final calculus. In his conception, multivariate regime theory best explains the establishment of the ICC. In this conception, one can not only account for the causal relevance of a multitude to

variables such as states, NGOs as well as IGOs, but also of institutions as norm- and behaviour regulating variables as well.

A DEFINITIONAL DISCUSSION

The discussion in this section will focus on how one may be able to measure 'joining' the Court. There seem to be three particular ways to measure 'joining': a) by signing the RS; b) by ratifying the RS; and c) by signing the 'Agreement on the Privileges and Immunities of the International Criminal Court' (APIC).

The first possible way to measure accession is to evaluate when and who signed the Statute. This particular act involves depositing the signed statute to the UN headquarters, by a particular state wishing to join. By signing the Statute, a particular state is not however, deemed a so-called 'State Party' yet. At this stage, a state does not have legal obligations to cooperate with the Court. In order to become a State Party and thus be bound by the Statute, a particular state would have to ratify the RS, meaning that a particular state would have to adopt the RS and make is a part of its legal canon. A third possible way to 'measure' if states have joined the Court is by considering if signing the APIC warrants 'joining'. This Agreement, "effective since 22 July 2004, has been created to enable officers and staff of the ICC to enjoy certain privileges and immunities that are necessary for them to independently and unconditionally perform their tasks."[18]

Overall, ratifying the statute seems to be the best possible way to measure accession as ratification requires a certain 'domestication' of the RS by making it a part of national criminal legal code. In some sense however, one may posit that signing the APIC would provide additional affirmations that a state is willing to work and cooperate with the ICC. Agreeing to cooperate with the OTP and the ICC in general are additional assurances with respect to a commitment to the ICC. Yet, they are just that: *additional* assurances. At the minimum, states are bound by the RS when they ratify it. States' territory and citizens are bound by the RS when a state ratifies the RS; further cooperating arrangements may ease the work of the OPT and the ICC in particular, but they are not necessary.

According to the website of the Coalition for the International Criminal Court (CICC), a total of 139 states signed the RS as of November 2nd, 2010. Out of these states, 114 states have ratified the RS. There are 42 states in Europe/CIS[19] which ratified the RS, followed by 31 African states, and 26 states in the 'Americas', which includes north, central, south America, as well as the Caribbean. The 'Asia/Pacific Islands' region contains 14 states which ratified the RS. Interestingly enough, only one state in the 'North Africa/Middle East' ratified the RS: the Kingdom of Jordan. Out of the 114 state which ratified the RS, 64 have signed APICs, as of May 4th, 2011. (CICC)

[18] *Conference on Implementing Legislation of the Rome Statute of the International Criminal Court (ICC) in African Indian Ocean countries*. Parliamentarians for Global Action / Action Mondiale des Parlementaires, 26 Feb 2010. Web. 15 Apr 2011. <http://www.pgaction.org/uploadedfiles/Background%20Doc%20PGA%20ICC%20Conf%20Comoros%202010_EN.pdf>.

[19] In this essay, the labels used by the CICC are used to refer to territorial groupings of states.

WHO ACCEEDED TO THE COURT, WHEN, AND WHY?

Thus far it was established that to measure accession to the ICC, one may use 'ratifications' as a benchmark. In this case then, in order to test if the work of the Prosecutor has had an impact on states joining the ICC, one must establish first, which states joined when, and then – naturally – the reason these states joined. The forthcoming discussion therefore will shed light on the number and type of states that acceded to the ICC after the work of the Prosecutor has begun. The discussion then will evaluate why three particular states joined at a particular time period.

At the outset it must be mentioned that the present Prosecutor of the ICC, Mr. Luis Moreno-Ocampo was elected on April 22nd, 2003 and began his work on June 23rd, 2003. The very first arrest warrants – unsealed on October 13th, 2005 – were issued for members of the Ugandan Lord's Resistance Army. This particular date seems to be a quite cogent benchmark as it demarcates the beginning of the 'tangible' work of the Prosecutor, not only in terms of pursuing particular cases but also making these cases – and situations, rather – public. Once the arrest warrant is made public, the Prosecutor publicly signals that he or she was willing and was granted authority to pursue certain cases.

Turning the discussion back to the timing of the accessions, they are are quite interesting. There were four African states that joined after October 13th, 2005, which included Chad, Comoros, Madagascar and the Seychelles islands. There were also five North and South American / Caribbean states that joined; these included Chile, St. Kitts and Nevis, St. Lucia, Suriname and Mexico. There were two states acceding to the Court from Asia – Bangladesh and Japan. Finally, two European states joined after 2006: Montenegro and the Czech Republic.

Out of the total of twelve states joining after the first arrest warrant was issues by the Prosecutor, three cases seem quite interesting. These cases are Chad – as this state borders the embattled Sudan; the Czech Republic – the very last state in the European Union to join, but also a state which was very active during the early stages of the negotiations which lead to the establishment of the ICC; and finally, Chile – another active member of the early negotiations, but also a state which experienced mass atrocities in the past and has wrangled with bringing the very first former head of state to justice, General Augusto Pinochet. Chile was also the very last South American states to join as well. The task at hand then is to look deeper within these states and first, discern why they joined the ICC so late, and second, what the reasons for their accessions were.

The case of Chad comes perhaps the closest to affirming a connection – albeit indirect – between accession to the Court and the work of the Prosecutor. Chad joined the ICC on November 1st, 2006.[20] Chad is located in central Africa, but more importantly, is bordered by the Sudanese province of Darfur, which is not only ravaged by civil war, but is also an administrative region of a state whose President – President Al-Bashir – is the first sitting head of state indicted by the ICC.[21] According to the NGO, "Citizens for Global Solutions", the

[20] *Conference on Implementing Legislation of the Rome Statute of the International Criminal Court (ICC) in African Indian Ocean countries*. Parliamentarians for Global Action / Action Mondiale des Parlementaires, 26 Feb 2010. Web. 15 Apr 2011. <http://www.pgaction.org/uploadedfiles/Background%20Doc%20PGA%20ICC%20Conf%20Comoros%202010_EN.pdf>.

[21] "Global Solutions." *Chad joins the ICC: Analysis and Implications for the Darfur Crisis*. Citizens for Global Solutions, n.d. Web. 15 Apr 2011. <http://archive1.globalsolutions.org/programs/law_justice/icc/resources/Chad_ICC_Briefing_Paper.pdf>.

accession of Chad took place in the midst of security considerations given the country's close proximity to Sudan. As the briefing paper published by this NGO indicates, "Chad shares its eastern border with Sudan's Darfur province, and since the crisis began in January 2003, has experienced a high influx of Darfurian refugees in its border villages." (Ibid.) In addition, there were "almost daily attacks by Janjaweed against Darfurian refugees and ethnic black Chadians on Chadian territory. Key news agencies and human rights groups have confirmed that Janjaweed militias have repeatedly attacked countless Chadian villages on the Chad-Sudan border since December 2005." (Ibid.) Due to the influx of Sudanese refugees into Chadian territory, the OTP has been present in Chad for some time prior to this country acceding to the ICC. (Ibid.)

From the above discussion, it is evident that considerations for the accession of Chad to the ICC were the outside threats from the spill over of the conflict from Sudan. This dynamic tends then to point to two particular phenomenon: first – and confirming some of the thinking present in the literature regarding why states join the ICC – that at least some states join due to potential or real outside threats. The second consideration here is that there seems to be a link here – albeit indirect – between the reasons why Chad joined and the work of the Prosecutor.

The cases of Chile and the Czech Republic show a different dynamic. These two countries experienced not only regime changes in the near past, but were also required to bring to justice individuals who were not only complicit in the crimes committed in the past but were also committed mass atrocities as the case of General Augusto Pinochet of Chile reveals. Therefore, domestic political considerations seemed to have played a larger role in joining, but also for delaying accessions as well.

The Czech Republic – along with other Eastern European states – experienced a certain regime change at the beginning of the 1990s and the collapse of the Soviet Union. Following the regime change, the state also proposed the so-called 'lustration laws' which prevented members of the communist regime to participate in politics in the 'democratic era'.

The Czech Republic was the very last member of the European Union – and naturally the last member of the former 'Eastern bloc', other than the Ukraine and Belarus – which joined the ICC. However, the Czech Republic was also involved quite actively at the outset of the process of establishing the Court. As Marlies Glasius points out, the Czech Republic – along with Chile – were advocating during the PrepComm meetings the involvement of victims in the work of the ICC. In particular the Czech Republic was promoting information provision to the Prosecutor of the ICC from any source, including victims of crimes within the jurisdiction of the Court: "individuals, victims, and/or NGOs should be able to trigger a procedure" with the help of the prosecutor. (Glasius, 49)

Why did the Czech Republic join the ICC so late then? There seems to be two plausible explanations. First, and as commentators indicate, the 'ebbs and flows' of Czech political life seem to have held the process back. Some, as Professor Bill Cohn of the University of New York in Prague suggest, the ratification was delayed because of 'tactical manoeuvre to avoid taking a stand on the issues of the day."[22] When the Czech Republic signed the RS, it was also involved in the negotiations with the EU in order to join the Union: "the ratification was not a priority for both chambers of the Czech Parliament prior to the Czech Republic's preparations to

[22] Jun, Dominik. "Czech Republic recognizes International Criminal Court." *Radio Prague*. Radio Praha, 30 Oct 2008. Web. 15 Apr 2011. <http://www.radio.cz/en/section/curraffrs/czech-republic-recognizes-international-criminal-court>.

and undertaking of the European Union's (EU) Presidency in the first half of 2009."[23] As the League of Human Rights (LIGA) briefing explains, "the Senate passed the ratification bill in June 2008 and the Chamber of Deputies did so in November 2008 by a constitutionally prescribed 3/5 majority. An unexpected development took place on 8 July 2009, when the current Czech President, Václav Klaus, approved the ratification bill thus successfully completing the ratification process." (Ibid.) As it is apparent from the empirical evidence, the ratification of the RS was not a high priority for the Czech Republic. Ratification was also placed second to EU accession and deliberating on that particular subject. Overall however, the decision to join or not to the ICC has its firm roots within Czech domestic political life.

Second – and this is consistent with the experience of other states acceding to the Court – the legal and technical work of adopting the RS into Czech law was quite labourious. As Professor Travnickova explains and argues, the real reason why the RS was not ratified was due to constitutional issues and debates present within Czech domestic political life. There seem to have been three particular issues present in the Czech Republic relating to the ratification: first, it needed to be determined if the Constitution can be amended in order to 'domesticate' the RS. Second, the questions seemed to have been, how should the RS be 'domesticated' – as a part of the constitution or as an international treaty? Finally, and right after the Czech President vetoed the ratification of the RS, what role and discretionary powers does the Czech President have in the ratification? (Travnickova, 214 – 216) In her conclusion – and consistent with the empirical research – it is evident that "The shifts [between the three issues explained above] were caused by impetuses coming from the domestic milieu," and not from "the establishment of the Court and its cases nor the appeals made by NGOs that gave rise to the debate that took place. The debate was fuelled by the amendment to the Constitution and the decision of the President not to ratify the Statute. (Travnickova, 216)

Lastly, turning the discussion now to Chile, the country's relations with the ICC began with signing of the Rome Statute on September 11th, 1998. Yet it took another eleven years for this state to ratify the statute. Why the long delay? A precursory analysis points to legal – but more importantly constitutional – issues surrounding the ratification, and also the political will and opportunity to complete the necessary steps to ratify the RS.

Chile is the last state in South America to ratify the statute and join the ICC.[24] The ratification took place on June 10th and 17th 2009 when "with a wide majority of 28 votes in favour, 1 vote against and 1 abstention, the Senate of Chile ratifie[d] the Rome Statute,"[25] and seven days later, "the Chilean Chamber of Deputies passed the Act of Ratification of the Rome Statute with 79 votes in favour, 9 against and 1 abstention, thereby completing the legal rocess."[26] The reasons given for the delay in ratification were a number of legal and

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[23] "International Federation for Human Rights." *The Czech Republic becomes a party to the ICC Statute: The European Union is now a full supporter of the ICC*. FIDH, 22 Jul 2009. Web. 15 Apr 2011. <http://www.fidh.org/IMG/article_PDF/article_a6778.pdf>.

[24] Bouwknegt, Thijs. "Radio Netherlands Worldwide." *Chile Joins the International Criminal Court*. Radio Netherlands, 30 Jun 2009. Web. 15 Apr 2011. <http://www.rnw.nl/international-justice/article/chile-joins-international-criminal-court>.

[25] "Parliamentarians for Global Action." *Chile becomes 109th State Party to Rome Statute of ICC*. Parliamentarians for Global Action , 01 Jul 2009. Web. 15 Apr 2011. <http://www.pgaction.org/Chile.html>.

[26] *Chile: Ratification of Rome statute positive step, justice must follow* . Amnesty International , 18 Jun 2009. Web. 15 Apr 2011. <http://www.amnesty.org/en/for-media/press-releases/chile-ratification-rome-statute-positive-step-justice-must-follow-200906>.

constitutional hurdles."[27] Yet, if one takes – once again, even only – a precursory glance at the timeline of the ratification process in Chile, an interesting phenomenon emerges, which – although outside the scope of this essay – may reveal a number of important domestic political and social dynamics. The NGO, Parliamentarians for Global Action, notes that a ratification bill was proposed on January 22nd, 2002 by the Chamber of Deputies of Chile, the lower house of government. Two months later, in March 2002, "a group of MPs of the Chamber of Deputies challenge the constitutionality of the Bill, and the Constitutional Court issues an advisory opinion that identifies certain areas of incompatibility between the ICC Statute and the Chilean Constitution."[28] The following month, "following the Constitutional Court decision, then Sen. Viera Gallo and Sen. Jaime Naranjo Ortiz present[ed] a draft constitutional amendment and draft bill on implementation within the Constitutional Committee of the Senate. After preliminary approvals these proposals were blocked due to lack of consensus with the opposition."(Ibid.)

The PGA reports no activity on the issue between 2002 and 2008, when the ratification process began and successfully ended in June 2009. A myriad of questions – no entirely addressed in the existing literature – surface upon this realization: why did the opposition veto the constitutional amendment, why was there a six year delay, by what processes was the debate reignited, and why was the process successful in 2009? A strong comparative analysis supplementing the 'across regimes' analyses would at the very least provide a preliminary explanation.

ANALYSIS

Before one may embark on a satisfactory analysis, it is prudent to sum up the discussion thus far. The aim in this section then is to provide a brief summation, and then provide an evaluation of not only the connection between accessions and the work of the Prosecutor of the ICC, but also the merits – or de-merits – of this type of an approach.

The aim of this essay was to essentially investigate if there is a connection between the motivation of states to join the Court and the work of the Prosecutor. Following a brief overview of the Court – its structure, organs and functions in particular – a discussion about the way in which accessions can be found followed. There are at least three potential ways to measure joining the Court: by signing and depositing the RS at the United Nations, by ratifying the RS whereby making it a part of domestic law, and by signing the 'Agreement on the Privileges and Immunities of the International Criminal Court' (APIC). It was established that using dates of ratifications after the very first arrest warrant was unsealed – October 13th, 2005 – was a satisfactory measure.

After a very brief discussion of three particular 'late joiners' to the Court – Chad, the Czech Republic and Chile – it was determined that there could be, but only an indirect connection between why certain states join the ICC and the work of the Prosecutor thus far. The case of Chad comes closest to affirming a connection as this state seem to have joined the ICC out of security considerations due to the country's proximity to Sudan. In addition, due to the

[27] Bouwknegt, Thijs. "Radio Netherlands Worldwide." *Chile Joins the International Criminal Court*. Radio Netherlands, 30 Jun 2009. Web. 15 Apr 2011. <http://www.rnw.nl/international-justice/article/chile-joins-international-criminal-court>.

[28] "Parliamentarians for Global Action." *Chile becomes 109th State Party to Rome Statute of ICC*. Parliamentarians for Global Action , 01 Jul 2009. Web. 15 Apr 2011. <http://www.pgaction.org/Chile.html>.

influx of refugees into Chad from the neighbouring Darfur province, the Office of the Prosecutor has been present in Chad for some time prior to Chad's accession to the ICC.

In the case of the Czech Republic and Chile, a connection could not have been found at this point. According to observers, in the case of the Czech Republic, party politics, legal obstacles as well as political culture prevented it to join. Outside pressure – on the other hand, and in the form of the Czech Republic's accession to the European Union – seems to have provided positive pressure to join the Court. Overall, for the most part, domestic political, social and legal conditions were more relevant in the timing of this country's accession to the ICC.

In the case of Chile, domestic political, social and legal conditions and dynamics seems to have played a substantial role in acceding to the ICC. Chile is a very interesting case as it was also forced to deal with mass atrocities committed by the military during the leadership of General Augusto Pinochet. Not only were there political consideration at play during Chile's 'absence' from the Court, but the state and the society were forced to 'heal the nation' as well from the atrocities committed in the past.

As mentioned above, certain published as well as unpublished work investigating why states ratified the ICC further seems to suggest that an investigation of domestic political, social and legal conditions is quite purposeful for detailed analyses of the reasons for accession. Struett and Weldon suggest – following a more 'across regimes' type of an analysis – that "closer analysis, including the development of detailed case studies, may help us account for the counter-intuitive ratification of the ICC statute by states in conflict prone areas like Afghanistan, Burundi, Guinea, the Democratic Republic of the Congo, and others." (Struett and Weldon, 27-28 2006) As it was evident from the work of Simmons and Danner, once again, domestic political and social conditions seem to be very telling in attempting to discern why states join the ICC. Also, as Fehl seems to suggest, an analysis involving domestic political factors motivating states to join the ICC would be quite beneficial for a more thorough explanation.

The work of Simmons and Danner seem to underscore this last point. As mentioned above, in their work they argue "that states that are both the least and most vulnerable to the possibility of an ICC case affecting their citizens have committed most readily to the ICC…" (Simmons and Danner, 225) In the case of the latter group, states may use the Court as an outside mechanism to 'tie their hands' to commitments they have made and hence use the Court as an outside assurance, signalling to their opponents as well as their domestic constituents that they will honour commitments they have made. As the authors explain, "the fact that a government cannot at lost cost rescind or reverse this commitment reasonably enhances the perception that this government is interested in ratcheting down the violence and moving towards a peaceful resolution of the conflict." (Ibid., 234)

This rational choice-based explanation certainly seem to be very cogent and fitting. However, unless one opens the 'Pandora's box', not only of the state, but also state intentions, the narrative is not nearly complete. States – and especially embattled states, or states experiencing intra-state war – can in fact 'bind' themselves to international mechanisms, instruments or institutions to show that they are law-abiding, but can also at the same time create 'back door' agreements and deals with paramilitary groups to continue the violence. It is very well known – at the very least in the recent Yugoslav conflict – that the lines between the official military and paramilitary groups is not always clear, and in fact is blurred more often than not. Leaderships may signal that they have no connection to paramilitary groups and that their aim is the peaceful settlement of a conflict. Yet, the very banal dynamics of war however seems to

suggest that in order for a leadership to survive, it may pay more homage to 'Janus' as opposed to appearing as a participant with clear and positive intentions.

Given the existing literature and thinking on why states accede to the ICC, how may one be able to approach this certain blending of approaches? One particular way in which the task can be approached is through investigating the role democracy as a regime type plays as a source and motivating factor of accessions. The common thread in the existing literature is that democracies are more likely to join and are more likely to advocate accessions. Simmons and Danner, as well as Struett and Weldon seem to suggest this line of reasoning. Hence, one may be able to question if states join in hopes of becoming 'rule of law' abiding and respecting states, a practice that parallels democratic governance and respect for human rights?

Very recently, the interim government of Tunisia, after ousting President Ben Ali, signalled to the international community that it will ratify the Rome Statute. As the 'Coalition for the International Criminal Court' website explains, "during a press conference after the first cabinet meeting of the interim government in Tunisia on 2 February 2011, Mr. Taieb Baccouch, Minister of Education and Interim Government Spokesperson, indicated that the interim government was prepared to adhere to many important international human rights treaties, including the Rome Statute. Dr. Amor Boubarki, of Amnesty International – Tunisia explains, "[I]t is a priority for the government and its commitment is serious because it decided to ratify the Rome Statute just in its second meeting,"[29]

On the other hand, the ICC – but the independent Prosecutor in particular – exhibit democratic or democratizing propensities as well. By instituting an independent Prosecutor, states – intentionally or not – seem to have institutionalized three key democratic practices as well: a) access to key decisions makers by victims and the general public, by allowing anyone to refer a situation to the Prosecutor; b) providing institutional checks and balances vie the role the Pre-Trial Chamber which is the last check on the Prosecutor before he or she can proceed with a particular case; and c) mitigating barriers to access to decision-makers by providing a provision in the RS which does not allow the United Nations Security Council (UNSC) to block a case – the UNSC may only ask for a 12 month stay of the proceeding of particular cases.

Ultimately then, the domestic sources of motivations to join – and even establish – such a Court is evident. This propensity is most evident when one investigates the effect of democracy on accessions. The causal arrow may point towards the ICC where states want to be viewed as 'rule of law' respecting states. Yet the arrow may point the other direction as well: joining the Court may have democratizing effects because certain practices inherent in the work of the Court are synonymous with democratic governance.

CONCLUSION

From the discussions above it is very clear that there is little connection between the work of the Prosecutor and the motivation of states to join the Court. The strongest evidence seems to come from the experience of Chad, which borders Sudan. One may assert that Chad joined due to

[29] CICC. "Tunisia Expresses Intent to Ratify the Rome Statute: First Steps of Interim Government Include Commitment to Human Rights." Online. http://www.iccnow.org/documents/PR_Tunisia_Accession_Developments_7Feb2011.pdf [Accessed February 7th, 2011]

security considerations; it wanted to be protected from the overspill of conflict into Chadian territory. Conclusive evidence one way or another is still very much wanting, however.

On another, and more important note, by looking at the accession through this lens – no matter how thin it is – the investigation did provide insights into very important dynamics. Reasons to join was ascribed to domestic political, social and legal factors. This certain accentuation of looking 'inside' countries as a general strategy does seem to resonate with the perspectives of some scholars who advocate this particular line of inquiry. Finally, and at the very least, wedding states' motivation to join the ICC and the Court's particular design features provides more questions, and frees up more opportunities for a variety of lines of inquiry.

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