THE OBJECTIONS OF LARGER NATIONS TO THE INTERNATIONAL CRIMINAL COURT

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The present article addresses the principal objections to the International Criminal Court (ICC) by the world’s larger nations, i.e., China, India, Iran, the Russian Federation, and the United States of America. In order to avoid unnecessary repetition, as certain countries maintain the same or similar objections, the author has chosen to categorize these challenges to the ICC by topic, identifying which countries hold the views expressed.

The purpose of this paper is to outline the major objections of these influential nations and to provide a response to these fears, whether it be to rebut the claims in whole or in part or to point out their merit. Because there is presently no systematic scholarly treatment of these collective objections, the author hopes that the instant piece will help to fill a lacuna in the legal literature that will bring greater understanding to the nature of the ICC and to the concerns of some of the globe’s most influential nations.¹

SOVEREIGNTY

Rome Statute Imposes Obligations on Non-States Parties

One of the major objections to the ICC by China,² India,³ and the United States⁴ is that the Rome Statute of the International Criminal Court (Rome Statute or

¹ This paper is based upon a presentation given by the author at a conference entitled “International Criminal Justice: Contemporary Trends and Future Prospects,” held in Moscow on 6 February 2009 and hosted by the Institute of Law and Public Policy. At the conference, the author was approached by representatives from a number of non-governmental organizations who encouraged the author to publish an article on the topic because it had not been adequately addressed in the literature.


³ Statement of Dilip Lahiri, Explanation of India’s Vote on the Adoption of the Statute of the International Criminal Court, in THE INTERNATIONAL CRIMINAL COURT: GLOBAL POLITICS AND THE QUEST FOR JUSTICE 42, 43-44 (William Driscoll et al. eds., 2004) (“Before it tries its first
Statute)\(^5\) imposes obligations on non-States Parties and therefore violates Article 34 of the Vienna Convention on the Law of Treaties,\(^6\) which provides that “[a] treaty does not create either obligations or rights for a third State without its consent.”\(^7\) Instead, according to China\(^8\) and India,\(^9\) the Rome Statute should contain an opt-in mechanism, which would permit States to accept ICC jurisdiction for a certain duration or for particular conduct.\(^10\)

The argument that the Rome Statute imposes obligations on non-States Parties without their consent, however, is not well taken. The Rome Statute applies only to individuals, not to States.\(^11\) Article 1 of the Statute clearly sets forth that the ICC “shall have the power to exercise jurisdiction over persons for the most serious crimes of international concern...”\(^12\) Furthermore, Article 12 allows States to voluntarily accept or reject the jurisdiction of the ICC.\(^13\) In addition, Part 9 of the Statute, which addresses cooperation and assistance, imposes obligations only on States Parties.\(^14\) In particular, Article 86 of the Statute instructs that “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”\(^15\)

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7 Id.
10 Id.
11 Diane F. Orentlicher, Politics by Other Means: The Law of the International Criminal Court, 32 Cornell Int’l L.J. 489, 491 (1999) (noting that “the ICC was established to enforce a body of law whose very essence is its direct application to individuals—not States”).
12 Rome Statute, supra note 5, art. 1 (emphasis added). See Orentlicher, supra note 11, at 490 (“Thus, while Article 12 has potential implications for nationals of non-State Parties, it does not impose corresponding obligations upon those States.”).
13 Lu & Wang, supra note 2, at 612 (“In accordance with Article 12 of the Rome Statute, a non-State party may accept the jurisdiction of the ICC. This leaves to that country’s government the choice of whether to accept the Court’s jurisdiction. Therefore, the jurisdiction of the ICC under the Rome Statute is based on voluntary acceptance both by States Parties and non-States Parties.”).
14 Id. (pointing out that, in accordance with Part 9, “the Court has no right to require non-States Parties to cooperate: there are no obligations for non-States Parties”).
15 Rome Statute, supra note 5, art. 86 (emphasis added).
Thus, this objection is without merit.

ICC’s Scrutiny of National Judicial Systems Violates State Sovereignty

China\textsuperscript{16} and India\textsuperscript{17} complain that the ICC’s complementarity regime violates State sovereignty because it permits the ICC to judge whether a State is able or willing to try its own nationals, thereby “becoming a supra-national organ.”\textsuperscript{18} This objection has a certain degree of appeal.

Article 17 of the Rome Statute provides that a case is inadmissible where, \textit{inter alia}, “[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution” or “[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.”\textsuperscript{19}

Subsection (2) of Article 17 states as follows:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.\textsuperscript{20}

Finally, subsection (3) declares that “[i]n order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”\textsuperscript{21}

\textsuperscript{16} Lu & Wang, \textit{supra} note 2, at 611, 613.
\textsuperscript{17} Ramanathan, \textit{supra} note 9, at 633.
\textsuperscript{18} Lu & Wang, \textit{supra} note 2, at 613.
\textsuperscript{19} Rome Statute, \textit{supra} note 5, arts. 17(1)(a), (b).
\textsuperscript{20} Id. art. 17(2).
\textsuperscript{21} Id. art. 17(3).
There is no doubt that the complementarity principle contained in the Rome Statute is designed to encourage national legal systems to exercise jurisdiction, as opposed to promoting the ICC to assert jurisdiction. In addition, to counter the claim that the scrutiny of domestic legal systems envisioned by Article 17 transgresses State sovereignty, supporters of the ICC correctly point out that, during the drafting process, the terminology in subsections (2) and (3), respectively, was strengthened, viz., the phrase “undue delay” was changed to “unjustified delay” and the phrase “partial collapse” was heightened to “substantial collapse.”

Moreover, it has been remarked that in the extradition context, the requested state may consider whether the offense at issue carries the death penalty in the requesting state and deny the request unless the proper assurances are obtained, thereby constituting a judicial evaluation of sorts. On the other hand, the rule of non-inquiry is also an important aspect of extradition law. Yet, the analogy to extradition law may not be the most persuasive, as there appears to be a substantive difference between the horizontal assessment that might occur in the extradition context, where the countries may have voluntarily entered into a bilateral extradition agreement, and the vertical scrutiny that is called for under Article 17.

To remedy this potential for abuse in the ICC’s judicial oversight of domestic legal systems, China “stressed the point that unjustified delay or partiality in trials of the core crimes covered by the Rome Statute should be qualified by the condition that only when such occur in nonconformity with national rules of procedure, in addition to the condition contained in the Statute, may the court determine that ‘a State’... is unwilling to carry out investigation or prosecution.” India, for its part, was very concerned that, under the criteria for review established in Article 17, “all nations must constantly prove the viability of their judicial structures or find these overridden by the ICC.” Especially with regard to determining “unwillingness,” there is a legitimate fear that the ICC, unhappy with a particular domestic decision or outcome, could, based upon political pressures, usurp the sovereign prerogatives of an individual nation when making an assessment under Article 17: “[I]f the ICC gets to invalidate national trials by deciding what constitutes an

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22 M. Cherif Bassiouni, *Explanatory Note on the ICC Statute*, 71 REVUE INTERNATIONALE DE DROIT PÉNAL 1, 5 (2000) (“National criminal jurisdiction always has priority over the ICC, and in only two situations can the ICC exercise its jurisdiction [Article 17]...”).
23 Lu & Wang, supra note 2, at 613.
24 Id. at 613-14.
26 Bing Bing, supra note 8, at 91.
27 Ramanathan, supra note 9, at 633.
'effective' or 'ineffective' trial, the international court will exercise a kind of judicial review power over national criminal justice systems. In other words, the ICC will have de facto supreme judicial oversight.”

Accordingly, to the extent that Article 17 permits the ICC to exercise judicial review over domestic courts, this objection is not wholly without merit.

Incompatibility with National Constitution

One of the major impediments to ratification of the Rome Statute by the Russian Federation is the ICC’s incompatibility with the Russian Constitution: “[T]he judicial system, as established by the Constitution and several Federal Constitutional Laws (organic laws), provides no slot for an international court that may complement and even, under the most adverse circumstances, substitute for national courts.”

Proposals to cure this constitutional deficiency have ranged from amending the Russian Constitution to “the passing of a Federal Constitutional Law, similar to the laws on cooperation with the ICC passed by several parties to the Statute.” The largest impediment, however, is not legal but seems to be a lack of political desire.

EFFECT UPON CITIZENS OF NON-STATES PARTIES

Nationals of Non-States Parties Exposed to ICC Prosecution

One of the principal objections to the ICC lodged by the United States was its concern that its citizens, especially in light of its numerous peacekeeping missions throughout the world, would be exposed to prosecution before the ICC. In this regard, the United States presented its “Iraq hypothetical,” in which it envisioned that, based upon an Iraqi referral, U.S. nationals would be exposed to prosecution, while Iraqis would not face like prosecution:

[W]ith only the consent of a Saddam Hussein, even if Iraq does not join the treaty, the treaty text purports to provide the court with jurisdiction over American or other troops involved in international humanitarian action in northern Iraq, but the court could not on its own prosecute Saddam for massacring his own people.

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30 Id. at 625.
31 Id.
Under this hypothetical, where neither the United States nor Iraq were States Parties, Iraq, under Article 12(3) of the Rome Statute, could still, according to the United States, subject U.S. military personnel to prosecution while avoiding scrutiny of Iraqi conduct during the conflict. In particular, Article 12(3) provides, in pertinent part: “If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”

Although it is very unlikely that such a hypothetical scenario would materialize in practice, because of the imprecision of the use of the phrase “crime in question,” as opposed to “situation in question,” employed in Article 12(3), this ambiguity was subsequently clarified by Rule 44(2) of the Rules of Procedure and Evidence, which provides:

When a State lodges or declares to the Registrar its intent to lodge a declaration with the Registrar pursuant to article 12, para. 3, or when the Registrar acts pursuant to para. (a) above, the Registrar shall inform the State concerned that the declaration under article 12, para. 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred

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33 Id. ("Section 3, Article 12 particularly annoyed the United States. This enabled non-party states to accept the jurisdiction of the Court on an ad hoc basis and for the purpose of investigating a particular case by lodging a declaration to that effect with the Court’s registrar.").

34 Michael D. Mysak, *Judging the Giant: An Examination of American Opposition to the Rome Statute of the International Criminal Court*, 63 SASKATCHEWAN L. REV. 275, 281 (2000) (“Since Iraq triggered the complaint, they would likely agree to the Court exercising such jurisdiction. Iraqi accused, though, would not face trial as Iraq would deny jurisdiction over its own soldiers on both grounds contained in Article 12(2). Thus, given this absurd result of ‘hero’ becomes criminally accused, the Americans oppose Article 12(2) in its current form.").

35 Rome Statute, supra note 5, art. 12(3).

36 Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 538, 611 (Antonio Cassese et al. eds., 2002) (“The problem by now is largely known as risk of ‘asymmetric liability.’ It means that if the term ‘crime in question’ is understood to mean ‘a specific incident’ or ‘a single crime’, a non-State Party can face some kind of ‘asymmetric liability.’ It may find one or more of its nationals exposed to the Court’s jurisdiction following an ad hoc consent by, for example, a hostile non-State Party on whose territory the specific incident, is alleged to have taken place.... It has been argued by many that the term ‘crime in question’ should therefore be interpreted more in the sense of ‘situation in question’ (in which one or more of such crimes appears to have been committed).").
to in article 5 of relevance to the situation and the provisions of Part 9 of the Statute, and any rules thereunder concerning States Parties, shall apply.\(^{37}\)

Therefore, with the adoption of Rule 44, the ‘concerns of some States, regarding this ‘risk of asymmetric liability’, as voiced in particular by the United States, have thus been effectively laid to rest.’\(^{38}\) In addition, by investigating or prosecuting a case involving its own nationals, the United States would render a case inadmissible, pursuant to Article 17(1)(a) of the Statute.\(^{39}\)

**ICC May Obtain Jurisdiction Without Consent of State of Nationality**

Another major concern of the United States involves the consent regime established by Article 12 of the Rome Statute, which provides:

In the case of article 13, paragraph (a) or (c) [referrals by States Parties or investigations initiated by the Prosecutor, respectively], the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.\(^{40}\)

The United States asserts that such a disjunctive jurisdictional regime (which permits the exercise of jurisdiction with the consent of either the State where the crime took place or the State of nationality) is inconsistent with the principle of sovereign consent because it would permit the prosecution of U.S. nationals before the ICC based solely on the consent of the nation on whose territory the conduct occurred, without U.S. approval.\(^{41}\) Instead, the United States argues that the consent of the State of nationality should be required, in addition to the territorial State.\(^{42}\)


\(^{38}\) Id.

\(^{39}\) Rome Statute, supra note 5, art. 17(1)(a) (declaring that the ICC shall determine a case is inadmissible where “[t]he case is being investigated or prosecuted by a State which has jurisdiction over it ...”). See Mysak, supra note 34, at 283 (“[T]he Americans can avoid a prosecution before the ICC by running their own trial on the issue.”).

\(^{40}\) Rome Statute, supra note 5, art. 12(2).

\(^{41}\) RALPH, supra note 4, at 130 (“The United States opposed this compromise because an American citizen can conceivably be investigated and prosecuted by the Court if his or her alleged crime took place on the territory of a state party, despite the fact that the US government has withheld consent from the Treaty of Rome.”).

\(^{42}\) Kaul, supra note 36, at 600.
The U.S. position on this point, however, is very weak. First of all, it has long been established that, based upon the principle of territorial jurisdiction, the nation on whose territory a crime took place had the right to try the accused, regardless of whether that individual was a citizen or not.\textsuperscript{43} A U.S. citizen who commits a crime on foreign soil may be tried and convicted by the prosecutors in that country regardless of whether the United States consents. Furthermore, under the Lotus rule, there does not appear to be any principle that prohibits a State from delegating its right to prosecute to an international body, such as the ICC.\textsuperscript{44} Thirdly, under the Korean proposal, jurisdiction would have been permitted if the custodial State alone had consented.\textsuperscript{45} Finally, if the consent of the State of nationality were always required, it would effectively render the ICC impotent vis-
à-vis any attempted prosecution of a national of a non-State Party.

\textit{Lack of Jury Trial}

Commentators in both the Russian Federation\textsuperscript{46} and in the United States\textsuperscript{47} have expressed concern that their citizens, if prosecuted in front of the ICC, would be deprived of the essential constitutional protection of a jury trial. Additionally, those in the Russian Federation would be deprived of the important right to seek a pardon and/or the prospect of amnesty.\textsuperscript{48}

This objection, however, is not well founded. If a U.S. citizen, for example, committed a crime in a foreign country, he or she would not be entitled to a jury trial if that nation did not provide for jury trials under its domestic law. Similarly, a defendant has no entitlement to such a procedural protection before an international tribunal. Moreover, as remarked by one writer: “A foreign venue is not likely to be more protective than the international court. No crimes committed abroad are covered by the United States Constitution. Members of the military have never been entitled to a trial by jury but are subject to Courts Martial in a military trial. Juries are often unreliable and are not used in most countries. It is not unreasonable, unfair, or a violation of ‘due process’ for the ICC to accept a

\begin{itemize}
\item \textsuperscript{43} Bassiouni, \textit{supra} note 22, at 8 (“It is clearly established in international law that whenever a crime is committed on the territory of a given state, it can prosecute the perpetrator even when that person is a non-national.”).
\item \textsuperscript{44} Kaul, \textit{supra} note 36, at 609 (“\textit{T}here is no rule of international law prohibiting the territorial State from voluntarily delegating to a new collective judicial mechanism as the ICC its sovereign authority to prosecute perpetrators of the most serious crimes of concern to the international community as a whole.”).
\item \textsuperscript{45} \textit{Id.} at 599-600; \textit{id.} at 613 (“\textit{T}he most serious deficit of Article 12 itself is the omission of the custodial State in the list of nations that could provide a jurisdictional link for the ICC. A provision in line with the Korean proposal would have avoided an important loophole.”).
\item \textsuperscript{46} See Tuzmukhamedov, \textit{supra} note 29, at 623.
\item \textsuperscript{47} RALPH, \textit{supra} note 4, at 135-36 (discussing jury trial deprivation argument).
\item \textsuperscript{48} Tuzmukhamedov, \textit{supra} note 29, at 623.
\end{itemize}
compromise that includes such an impressive list of human rights protections for the accused.\textsuperscript{49}

\textbf{SECURITY COUNCIL}

In its formal statement declining to sign the Rome Statute, India pointed out, \textit{inter alia}, several respects in which the Statute assigned to the Security Council roles that allegedly violate international law.\textsuperscript{50} First of all, India asserted that the Statute granted the Security Council the power to refer.\textsuperscript{51} Secondly, the Rome Statute gave the Security Council the power to block or defer.\textsuperscript{52}

A. Referral

With respect to the former, India noted that because the Security Council already possessed the power to set up its own international criminal tribunals, the power to refer cases to the ICC was unnecessary.\textsuperscript{53} Thus, India concluded:

\begin{quote}
The Security Council does not need to refer cases, unless the right given to it is predicated on two assumptions. First, that the Council's referral would be more binding on the Court than other referrals; this would clearly be an attempt to influence justice. Second, it would imply that some members of the Council do not plan to accede to the ICC, will not accept the obligations imposed by the Statute, but want the privilege to refer cases to it. This too is unacceptable.\textsuperscript{54}
\end{quote}

Initially, a Security Council referral is no more binding than any other referral: “A ‘referral’ by the Security Council, a state party, or a non-state party are all at the same level. Thus, the Security Council’s referral is not in any way to be understood as an obligation on the ICC Prosecutor to proceed with a prosecution. All three sources of referrals merely bring to the ICC Prosecutor’s attention facts with might prompt an investigation.”\textsuperscript{55} Although there may be more truth to India’s remark about certain Security Council members wishing to avail themselves of the privilege of making referrals to the ICC without shouldering the burdens that attach with becoming a State Party, it should be remembered that Security Council referrals are strictly limited to those situations falling under Chapter VII\textsuperscript{56}

\begin{footnotes}
\item[50] Statement of Lahiri, supra note 3, at 43.
\item[51] \textit{Id.}
\item[52] \textit{Id.}
\item[53] \textit{Id.} (“We have been told that the Council must have a role built into the Statute because it had set up the ad hoc tribunals for the former Yugoslavia and for Rwanda, and has therefore established its right to do so. Those were decisions of a dubious legality.”).
\item[54] \textit{Id.}
\item[55] Bassiouni, supra note 22, at 18.
\item[56] Rome Statute, supra note 5, at Article 13(b).
\end{footnotes}
and that, even then, the prosecutor may choose to decline to investigate and/or prosecute based upon the referral.

B. Deferral

As to India’s objection regarding the Security Council’s power to block or defer under Article 16 of the Rome Statute, it explains:

On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. The moment this argument is conceded, the Conference accepts the proposition that justice could undermine international peace and security.

India is undoubtedly correct that the deferral mechanism device does undermine the concept of justice to a certain extent, but it also reflects the reality that political settlements are often necessary to save lives. Deferrals, however, are not permanent under Article 16 -- only lasting 12 months -- and in no way imply that subsequent prosecutions are barred. Furthermore, the possibility for the adoption of a deferral in the first instance, and even more so for its renewal, is made more difficult by the fact that it requires a nine-vote majority, with the concurrence of all five permanent Security Council members, pursuant to Article 27(3) of the Charter of the United Nations. Therefore, “a more realistic American worry with the current Statute is that there are five members on the Security Council who have a vote. Thus, if either China, Russia, the U.K., or France decides that an American sponsored resolution to block an ICC prosecution is undesirable, that nation could simply exercise its veto and prevent the resolution from passing -- allowing the Court to continue with its work against American objections.”

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57 Id. art. 16 (“No investigation or prosecution may be commenced or proceed with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”).
58 Statement of Lahiri, supra note 3, at 43.
59 William A. Schabas, United States Hostility to the International Criminal Court: It’s All About the Security Council, 15 EUR. J. INT’L L. 701, 716 (2004) (“The Charter’s requirement of a nine-vote majority and the concurrence of the five permanent members seemed an adequate guarantee that this power to defer prosecutions could not be easily abused.”).
60 United Nations Charter, 26 June 1945, art. 27(3), 59 Stat. 1031 (“Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members...”).
61 Mysak, supra note 34, at 291.
The Security Council Should Have a Larger Role in the ICC

Another major obstacle for the United States’ acceptance of the Rome Statute is that the Security Council does not play a great-enough role in regulating the ICC. In short, the United States, for obvious reasons, “wanted a SC[-]-controlled ICC.”62 If the Security Council had the ability to initiate and veto all ICC actions, a permanent Security Council member, such as the United States, who chose not to become a State Party, would be able to control the ICC without incurring any reciprocal obligations, as it could always veto an action aimed at its own citizens: “If the statute provided the Security Council with absolute veto power in the ICC, as the United States wanted, the effect would be that U.S. soldiers and officials would in fact be treated differently than nationals of other countries; while being able to initiate investigations worldwide, the United States, as a permanent member of the Security Council, would essentially be immune from the ICC’s jurisdiction.”63 Said another way, “What the United States is truly concerned about is that it has lost the ability it had as a permanent member of the Security Council to determine when and where international criminal justice is done.”64

In sum, if the Security Council had a greater role as envisioned by the United States, the ICC would cease to be an independent judicial body.

PROSECUTOR

India65 and the United States,66 and to a lesser degree China,67 have expressed concerns over the Prosecutor’s *pro proprio motu* powers to initiate investigations and the potential for politically motivated prosecutions. More specifically, Article 15(1) provides that “[t]he Prosecutor may initiate investigations *pro proprio motu* on the basis of information on crimes within the jurisdiction of the Court.”68

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64 RALPH, supra note 4, at 111. See Schabas, supra note 59, at 716 (“If a permanent member of the Security Council can effectively block prosecutions, then the United States is in control.”).

65 See Ramanathan, supra note 9, at 632.

66 RALPH, supra note 4, at 136 (noting that “US rhetoric on the ICC has expressed disquiet at the possibility of ‘politiced’ and ‘anti-American’ prosecutions”).

67 Lu & Wang, supra note 2, at 612-13 (enunciating China’s concerns as being that the Prosecutor’s power “may make it difficult for the ICC to concentrate on dealing with the most serious crimes, and may make the Court open to political influence so that it cannot act in a manner that is independent and fair”).

68 Rome Statute, supra note 5, art. 15(1).
Although the potential for politically motivated prosecutions by an independent prosecutor is always present, such fears are mitigated under the Rome Statute because the Prosecutor’s *proprio motu* powers are limited to the initiation of investigations, and the Statute provides an explicit check by the Pre-Trial Chamber against unfounded proceedings:

If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.69

Thus, where there is not a reasonable basis to proceed, the Prosecutor is precluded from continuing with the investigation, unless he or she is able to subsequently produce new facts or evidence as to the same situation.70 Additionally, improper actions by the Prosecutor could be deferred by the Security Council under Article 16.71 Moreover, the Assembly of States Parties acts as a monitor over the conduct of the Prosecutor.72

WAR CRIMES

Both China73 and India74 are troubled over the inclusion in the Rome Statute’s definition of “war crimes” of acts occurring in “an armed conflict not of an international character.” It is China’s position that “war crimes in internal armed conflict should be dealt with by national courts”;75 additionally, China contends that the Rome Statute’s definition goes beyond customary international law.76 The practical concern here is obvious, viz., that the ICC might interfere with the internal affairs of these nations by scrutinizing their handling of serious domestic conflicts.77 India’s fears on this point are very specific: “The ICC, it is expected, will be used for embarrassing India by attempts to make a case out of the

69 Id. art. 15(4).
70 Id. art. 15(5).
71 Id. art. 16.
72 Id. art. 112(2)(b) (providing that the Assembly shall “[p]rovide management oversight to… the Prosecutor…”). See RALPH, supra note 4, at 136.
73 Bing Bing, supra note 8, at 95-96.
74 Ramanathan, supra note 9, at 631.
75 Bing Bing, supra note 8, at 95.
76 Id.; Lu & Wang, supra note 2, at 611.
77 Bing Bing, supra note 8, at 96 (“The view could be bluntly put in terms of possible interference with the internal affairs of China.”).
violence in Kashmir." As to China, the recurring violence in Tibet immediately comes to mind, as well as, more recently, in Xinjiang.

With respect to acts occurring during internal, as opposed to international, armed conflict, Article 8(c) of the Rome Statute provides that war crimes encompass, "[i]n the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949." Moreover, Article 8(e) of the Statute expands upon Article 8(c) by including in the definition of war crimes "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law..."

Although it is now understood that individual criminal responsibility attaches to humanitarian law violations in an internal armed conflict, it is still doubtful whether grave breaches can be committed outside the context of an international armed conflict, given the peculiar enforcement regime associated with them. In fact, in the Tadić case, the International Criminal Tribunal for the former Yugoslavia (ICTY) held that Article 2 of the ICTY Statute, which relates to prosecution of grave breaches of the Geneva Conventions of 12 August 1949, "only applies to offences committed within the context of international armed conflicts."

In any event, Article 124 of the Rome Statute still provides that "a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory."

**CRIMES AGAINST HUMANITY**

One of the grounds upon which China has opposed the ICC is the failure of the Rome Statute to link crimes against humanity with war. Otherwise, China argues, because crimes against humanity are most-often linked with human rights violations, the ICC may evolve into a general human rights court, thereby potentially interfering with purely domestic concerns: "[T]here are fears that if the range of the definition of crimes against humanity is drawn too widely, the ICC

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78 Ramanathan, supra note 9, at 631.
79 Rome Statute, supra note 5, art. 8(c).
80 Id. art. 8(e).
81 See Lindsay Moir, Grave Breaches and Internal Armed Conflicts, 7 J. INT'L CRIM. JUST. 763, 765-67, 785-87 (2009).
83 Rome Statute, supra note 5, art. 124.
84 Lu & Wang, supra note 2, at 611-12.
could be used to attack the Chinese government in its conduct of internal affairs."\(^{85}\) Iran has expressed similar fears that, on this ground, “the Shari‘a could be questioned."\(^{86}\)

Although it is correct that crimes against humanity were originally linked to armed conflict at Nuremberg,\(^ {87}\) at the International Military Tribunal for the Far East,\(^ {88}\) and in the Statute of the ICTY,\(^ {89}\) the link was not present in Article II(1)(c) of Control Council Law No. 10,\(^ {90}\) which was promulgated 1945, and was omitted from the Statute of the International Criminal Tribunal for Rwanda.\(^ {91}\)

The fear that the ICC might become a human rights court is checked by two other provisions of the Rome Statute, i.e., Articles 5 and 22. In particular, Article 5(1) limits the ICC’s jurisdictional mandate to “the most serious crimes of concern to the international community as a whole.”\(^ {92}\) Additionally, Article 22(2), which incorporates the rule of lenity, provides that “[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”\(^ {93}\) Furthermore, the crimes listed in Article 7 must be perpetrated “as part of a widespread or systematic attack directed against any civilian population.”\(^ {94}\)

Yet, there is no question that “many of the crimes listed are also matters concerning human rights.”\(^ {95}\) Thus, admittedly, the potential for interference with the conduct of a State’s internal affairs due to the broad range of conduct included is present. Iran’s concerns about how the Shari‘a will be construed provide an excellent example: “[T]he penalties arising out of the application of the Shari‘a, such as whipping, stoning and the sectioning of limbs... are regarded by international lawyers as torture and sometimes inhumane acts.”\(^ {96}\) Moreover, a

\(^{85}\) Id. at 616.


\(^{87}\) Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 Aug. 1945, Charter of the International Military Tribunal, art. 6(c), 82 U.N.T.S. 279.

\(^{88}\) Special Proclamation: Establishment of an International Military Tribunal for the Far East, 19 Jan. 1946, art. 5(c), T.I.A.S. No. 1589.


\(^{91}\) Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 Dec. 1945, art. II(1)(c).

\(^{92}\) Rome Statute, supra note 5, art. 5(1).

\(^{93}\) Id. art. 22(2).

\(^{94}\) Id. art. 7(1).

\(^{95}\) Lu & Wang, supra note 2, at 617.

\(^{96}\) Abtahi, supra note 86, at 644.
number of the crimes enumerated in Article 7 seem particularly susceptible to
impermissible elasticity in this regard, including "persecution,"97 certain gender-
related matters,98 and the vague "[o]ther inhumane acts of a similar character
intentionally causing great suffering, or serious injury to body or to mental or
physical health."99

AGGRESSION

Both China and the United States take issue with inclusion of the crime of
aggression in the Rome Statute. China, for its part, contends that giving the ICC
the power to exercise jurisdiction over aggression serves to weaken the Security
Council.100 Yet, the Russian Federation, another permanent member of the
Security Council, has "stated outright that it is their understanding that the powers
of the Security Council with respect to aggression are unaffected by the
Statute."101

The United States, on the other hand, contends that aggression is solely a matter
for the Security Council, which alone is empowered to maintain international
peace and security.102 Although Article 39 of the U.N. Charter clearly leaves this
determination up to the Security Council,103 Article 5(2) of the Rome Statute
provides that, if and when the crime of aggression is satisfactorily defined, any
 provision relating to this offense “shall be consistent with the relevant provisions
of the Charter of the United Nations.”104

Moreover, in the event that aggression is defined for purposes of Article 5, Article
121(5) of the Statute provides that any State Party that does not agree with the
definition, as it would arguably constitute an amendment to the Statute, is not
bound thereby:105 “Any amendment to articles 5, 6, 7, and 8 of this Statute shall
enter into force for those States which have accepted the amendment one year
after the deposit of their instruments of ratification or acceptance.”106 Furthermore,
the Security Council can maintain control over this aspect of international law by

97 Rome Statute, supra note 5, art. 7(1)(h).
98 Id. art. 7(1)(g).
99 Id. art. 7(1)(k).
100 Lu & Wang, supra note 2, at 612.
101 Mysak, supra note 34, at 290.
102 Id. at 289.
the existence of any threat to the peace, breach of the peace or act of aggression...”).
104 Rome Statute, supra note 5, art. 5(2).
105 Mysak, supra note 34, at 290 (“[S]ince defining aggression would, presumably, involve
a change to Article 5 (inasmuch as Article 5(2) would have to be removed), any State Party
that disagreed with the amendment would not be bound.”).
106 Rome Statute, supra note 5, art. 121(5) (emphasis added).
simply exerting its deferral power and, thereby, indefinitely blocking a prosecution it deems ill-advised or otherwise in contravention of its authority.\textsuperscript{107}

These considerations aside, however, it is true that any criminal prosecutions based on “aggression” before the ICC or any other international tribunal are highly problematic, are ripe for abuse, and are subject to strong politicization.

**NATURE OF THE COURT**

*Rome Statute Based Upon Universal Jurisdiction*

Opponents of the ICC from India\textsuperscript{108} and the United States\textsuperscript{109} contend that the ICC’s jurisdiction is predicated upon universality and thus represents an immediate threat to State sovereignty. This, however, is a common misconception.

The ICC’s jurisdiction is primarily based upon the principle of territoriality,\textsuperscript{110} as well as active personality,\textsuperscript{111} “and not on a theory of universality of criminal jurisdiction.”\textsuperscript{112} Instead, the only aspect of the Rome Statute that could be said to be based upon universality is a referral by the United Nations Security Council pursuant to Article 13(b).\textsuperscript{113}

**Paucity of Muslim Judges on ICC**

Iran’s second major concern with the ICC is that, due to the scarcity of Muslim judges at the Court, a two-fold problem arises under the *Shari’a*: “On the one hand, it is feared that non-Muslim Judges may not be familiar with or sensitive to the *Shari’a* principles and that, consequently, justice may not be carried out as it should be. On the other hand, there is the theological issue of principle, which is posed in the case where a Muslim is judged by non-Muslim Judges.”\textsuperscript{114}

Article 36(8)(a)(i) of the Rome Statute provides for the nomination and election of judges from the principal legal systems of the world, and Article 36(8)(a)(ii)

\textsuperscript{107} Mysak, *supra* note 34, at 290.

\textsuperscript{108} Statement of Lahiri, *supra* note 3, at 44 (remarking that “the purists resurrected and forced into the Statute the concept of universal or inherent jurisdiction, which too makes a mockery of the distinction between States Parties and those who choose not to be bound by a treaty”).

\textsuperscript{109} See, e.g., David B. Rivkin, Jr. & Darin R. Bartram, *When Justice For All Isn’t Fair, in The International Criminal Court: Global Politics and the Quest for Justice* 88, 92 (William Driscoll et al. eds., 2004) (“Stripped of its universal jurisdiction mantle, the ICC may either just collapse under its own weight or be recast as an organization of states that have abdicated to each other portions of their sovereignty.”).

\textsuperscript{110} See Rome Statute, *supra* note 5, art. 12(2)(a).

\textsuperscript{111} Id. art. 12(2)(b).

\textsuperscript{112} Bassiouni, *supra* note 22, at 8.

\textsuperscript{113} Id.

\textsuperscript{114} Abtahi, *supra* note 86, at 646.
provides for an “[e]quitable geographic representation.” 115 Thus, the answer to Iran’s concern, as suggested by a commentator, is quite simple, the more Islamic countries that ratify the Rome Statute, the greater the probability that Muslim judges will hear cases before the ICC. 116

CONCLUSION

From the aforementioned survey of principal objections to the ICC by some of the world’s largest nations, as well as from the corresponding responses, it can be seen that the vast majority of fears and concerns are unfounded. The Rome Statute is a treaty, and thus there is no obligation for States to ratify it unless they deem it in their best interest to do so. Yet, it is hoped that this analysis will help to dispel many of the misconceptions circulated about the ICC, the scope of its jurisdiction, and its relationship with States and their citizens. Only then can these influential States truly begin to view the Court through an objective lens.

SUMMARY

This article addresses the principal objections to the International Criminal Court (ICC) by some of the world’s larger nations, i.e., China, India, Iran, the Russian Federation, and the United States of America.

The purpose of the paper is to outline the major objections of these influential nations and to provide a response to their fears, whether it be to rebut the claims in whole or in part or to point out their merit. The author has arranged these concerns under the following subject categories: sovereignty, effects upon citizens of non-States Parties, Security Council, Prosecutor, war crimes, crimes against humanity, aggression, and the nature of the Court. After surveying and analyzing the principal objections to the ICC, the author concludes that the vast majority of fears are unfounded, while certain concerns are valid.

SOMMAIRE

Cet article aborde les principales objections faites à la Cour pénale internationale (CPI) par certaines des grandes nations du monde, à savoir, la Chine, l’Inde, l’Iran, la Fédération de Russie et les États-Unis d’Amérique.

Le but de cet article est d’exposer les principales objections de ces nations influentes et d’apporter une réponse à leurs craintes, que ce soit en réfutant les allégations en tout ou en parties, ou en signalant leur mérite. L’auteur a classé ces préoccupations sous les catégories suivantes : la souveraineté, les effets sur les citoyens d’États non parties, le Conseil de sécurité, le Procureur, les crimes de guerre, les crimes contre l’humanité, l’agression, et la nature de la Cour. Après avoir relevé et analysé les principales objections à l’encontre de la CPI, l’auteur conclut que si la grande majorité des craintes sont infondées, certaines le sont malgré tout.

115 Rome Statute, supra note 5, arts. 36(8)(a)(i), (a)(ii).
116 Abtahi, supra note 86, at 646.
RESUMEN
La presente contribución aborda las principales objeciones formuladas a la Corte Penal Internacional (CPI) por algunas de las naciones más grandes del mundo, es concreto, China, India, Irán, la Federación de Rusia y los Estados Unidos de América.

El propósito del trabajo es resumir las principales objeciones de estas influentes naciones y proporcionar una respuesta a sus temores, ya sea para refutar las alegaciones en todo o en parte, o señalar sus virtudes. El autor ha organizado estas preocupaciones en las categorías siguientes: soberanía, efectos sobre los ciudadanos de Estados no Partes, Consejo de Seguridad, Fiscal, crímenes de guerra, crímenes contra la humanidad, agresión y naturaleza de la Corte.

Después de examinar y analizar las principales objeciones a la CPI, el autor concluye que la gran mayoría de los temores son infundados, si bien son ciertas algunas preocupaciones.