ANALYSIS WORLD

Catching the Big Fish: Examining the Efficacy of International Criminal Justice

While powerhouse countries throw their weight around on the field of international justice, it is worth looking at how effective the ICC has been in achieving its goals of holding those guilty of international crimes to account.

Russia and China Veto the resolution that would have referred the Syria situation to the ICC. Photo: UN Photo/Evan Schneider

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This is the second in a series of articles on the International Criminal Court (ICC). The Rom
entered into force on July 1, 200
20th year. To mark the occasion,
series of articles evaluating its performance over the past two decades. Read the first part here.

July 17 of each year is commemorated as the International Criminal Justice Day, marking the day on which the Rome Statute establishing the International Criminal Court (ICC) was adopted. The ICC was established with a vision of countering the impunity that was enjoyed, particularly by powerful actors and leaders responsible for the commission of the most serious crimes under international law. Though they perpetrated grave crimes against a large number of civilians, they were able to escape the clutches of domestic law with impunity due to their power, position and clout.

The ICC was intended to counter the same and hold individuals responsible, irrespective of their positions or how powerful they were within their countries. Examining the work of the ICC since its functioning in 2002, it is important to ask if that vision of "catching the big fish" has been fulfilled.

US efforts at staying above the law

The United States tops the list of rogue states that have shielded their nationals from the ICC's reach while doing lip service to the rule of law and their commitment to justice. In 2000, the Clinton administration had signed the ICC statute but it needed to be ratified by the Senate. In May 2002, under the Bush administration, the US withdrew its signature to the ICC statute and announced that it has no intention of becoming a party to it.

However, that does not insulate US nationals from being hauled up by the ICC if they commit ICC crimes on the territory of a state party to the statute, or are arrested by any other state and handed over to the ICC for trial. In order to reduce such a possibility, the US Congress passed the American Service Members' Protection Act in 2002, empowering the government to stop financial aid to the ICC's state parties who surrender American nationals to the ICC. The Act also allows the US President to "use all means necessary" to free Americans detained by the ICC.

Thereafter, the US arm-wrestled and bullied countries into entering Bilateral Immunity Agreements (BIAs) with it, threatening them with the withdrawal of its foreign aid and assistance if they did not do so. The BIAs are also referred to as Article 98 agreements; the US has entered into such agreements with more than 38 countries (including India), with an undertaking that those countries would not surrender suspects who are US nationals to the ICC for possible prosecution.

The legal validity of such agreements is suspect, especially in relation to ICC's state parties, as they violate the core principles of the ICC statute and the state parties' legal obligations against the same.

When the docks were cleared for an ICC investigation into the Afghan situation in March, 2020
that an investigation against its r
Investigation Agency (CIA) offi
erstwhile ICC prosecutor, Fatou Bensouda, had told the chamber of judges that she intended to investigate the role of the CIA in committing heinous crimes through its aggressive interrogation techniques, not only in Afghanistan, but also in its secret detention camps in Poland, Romania and Lithuania.

The Trump administration issued Executive Order 13928 dated June 11, 2020, which imposed sanctions on ICC officials who are investigating the complicity of US nationals. The executive order further authorized US officials to block the assets of ICC employees and prevent ICC personnel from entering the US through visa restrictions. The order laid out the US perspective on the ICC investigation – that it threatened to infringe upon its sovereignty and impede its "critical national security and foreign policy work."

The Biden administration revoked the executive order through Executive Order 14022 dated April 1, 2021, on the grounds that the imposition of sanctions against the ICC personnel was "inappropriate and ineffective." It too objected to the exercise of ICC jurisdiction over US nationals. However, it considered that its concerns can be "better addressed through an engagement with stakeholders of the ICC process" rather than through sanctions.

The UN Security Council's referral of the Sudan situation to the ICC in 2005 contained a clause that "nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan…"

The UN Security Council's referral to the Libya situation to the ICC in 2011 contained a sim
circumscribe the limits of ICC's
nationals of Libya and no one el
clause is an attempt to shield US nationals from an ICC probe. Perhaps the clause was a necessary inclusion by the Security Council to prevent the US from vetoing the referral of the two situations to the ICC.

It does not appear that the UN Security Council has the legal right to dictate to the ICC as to whom it should prosecute and whom it should not, when it refers a situation to the court. No ruling on the legal validity of such an exclusionary clause is in sight. In November, 2011, the ICC prosecutor announced that the alleged crimes caused by NATO bombings on Libya "would be investigated impartially and independently." The Prosecutor ignored the restrictive clause contained in the referral. Subsequently, no known report on NATO's actions has been released by the prosecutor.

Accountability for UK's war crimes

A valid critique of the ICC is its reluctance to take on and confront powerful countries. Since China, India, Israel, Russia, the United States and other such powerful countries are not state parties to the ICC statute, it is difficult to subject those country situations to a probe by the ICC.

The closure of a preliminary examination into the Iraq/United Kingdom situation is of immense relevance to this discussion. In May, 2014, the Office of the Prosecutor (OTP) of the ICC re-opened a preliminary examination into alleged war crimes committed by UK armed forces on Iraqi civilians who were detained and within their custody in 2003, in the context of the invasion of Iraq by the United States and United Kingdom. This was on the basis of a report submitted by the European

Centre for Constitutional and Human Rights (ECCHR), and public interest lawyers.

During its examination, the OTP
that the UK's armed forces committed war crimes, including wilful and unlawful killings, torture and inhuman/cruel treatment, outrages upon personal dignity, rape and other forms of sexual violence against Iraqi civilians. These were mostly when they were detained at Camp Breadbasket in 2003. This aligned with a wider body of findings about inhuman and degrading treatment meted out to the Iraqi detainees by the UK's armed forces.

The OTP, in its statement explaining the decision not to investigate the situation, said that it found that there was reasonable basis to conclude that these crimes had indeed been perpetrated by the UK armed forces – wilful killings in at least seven cases, torture in at least 54 cases and sexual violence in at least seven cases. It further concluded that these crimes were sufficiently grave to warrant an investigation by the OTP. However, the ICC can have jurisdiction over these crimes only if the UK authorities were unwilling or unable to genuinely carry out relevant investigations and/or prosecutions, or if the decision to not prosecute emanated from an unwillingness to prosecute in order to shield the alleged perpetrators.

The OTP concluded, after a detailed examination of the processes of investigation and prosecution undertaken by the UK authorities, that there was no unwillingness to do so and that the UK government is genuinely interested in investigating and prosecuting these crimes.

While the OTP's 184-page report , released in December, 2020, was damning in finding the commission of war crimes by the UK armed forces, the OTP effectively chickened out of catching the 'big fish' in the name of complementarity.

Needless to say, the decision of the ICC prosecutor to close the preliminary examination was met with public condemnation and scathing criticism. Human Rights Watch said that the UK has a "lamentable record of failing to prosecute war crimes committed by its nationals overseas" and that throughout the report, the OTP had ignored the larger picture of UK's failings on investigations and prosecutions for crimes committed in Iraq, its active obstruction of justice and that the OTP "bends over backwards to give the UK government the benefit of doubt."

On 1 July 2021, the ECCHR called upon the prosecutor to review the decision not to open an investigation into the UK's war crimes in Iraq.

It is ironic that, even as the ICC prosecutor decided to close the preliminary examination, the Overseas Operations (Service Personnel and Veterans) Bill was mooted in the UK in January 2021, which would make it much more difficult to prosecute British military personnel for crimes committed during their operations abroad. The Bill introduced three major obstacles to making UK's armed forces accountable in law, if the alleged crime was committed more than five years ago: the prosecutions can only be in exceptional circumstances; it must have the previous sanction of the

Attorney General; and the prosecution is duty bound to give serious consideration to all the e

The existence of this Bill is proc
sincerity of the UK in investigating and prosecuting its officials for war crimes committed in Iraq and its intention to shield potential perpetrators. This was obvious to everyone except the ICC prosecutor who decided not to open a formal investigation into the situation.

Also read: UNSC Watch: On Afghanistan, a Shaken Council Took Stock, But Deferred Concrete Steps

The ICC prosecutor's decision has led to a missed opportunity for the ICC to take on a powerful country from the developed world, and has not only dealt a death blow to thousands of victims, but has also severely undermined its own credibility. Those who escaped ICC scrutiny are not merely the armed forces personnel who were directly involved in perpetrating the war crimes; thousands who were silent supporters, who looked the other way, ordered, directed, aided, abetted and facilitated the crimes also escaped with impunity. As a result, the institutional and structural arrangements that provide a fertile breeding ground for the commission of such war crimes have not been dismantled.

In November, 2020, a damning report in Australia – the Brereton War Crimes Report – found credible evidence to conclude that 19 soldiers within an elite Special Air Services and commando regiment of the Australia Defence Forces had unlawfully killed at least 39 Afghan civilians and detainees, including children, in 23 incidents. The contents and ramifications of this report are discussed more elaborately in the article on Afghanistan in this series here.

The report led to the subjecting of 19 soldiers to criminal investigation under Australian la
is this: if Australia could inquire
Afghanistan and indict its soldie
the UK from undertaking a similar exercise in its treatment of Iraqi detainees?

ICC prosecutor's efforts in the context of Afghanistan and Palestine

A partial redemption by the ICC prosecutor is the stance taken on Afghanistan, where an investigation was sought and authorised by the appeals chamber of the ICC for alleged crimes committed by all parties. This includes crimes committed not only by the Taliban and Afghanistan's security personnel, but also those allegedly committed by the US armed forces and the Central Intelligence Agency (CIA) in Afghanistan as well as in CIA's detention facilities in Poland, Romania and Lithuania.

The ICC prosecutor's investigation into the Palestine situation, commenced in March, 2021, also holds the promise of making accountable the powerful leaders of Israel who were responsible for the commission of heinous crimes against Palestinians. While these recent initiatives of the ICC prosecutor have angered the US and Israeli governments alike, supporters of international justice rejoice in the possibilities of justice that the ICC brings.

Role of the permanent members of the UN Security Council: who will bell the cat?

Situations can be examined by the ICC through three routes, known as "trigger mechanisms". State parties may self-refer their situations due to an inability to investigate and prosecute the suspects within their domestic laws. The ICC prosecutor could also, upon their own initiative, conduct a preliminary

examination into situations where ICC crimes are suspected to have taken place. These two rou
detail in the article titled 'Interna
Report Card for South Asia' in t

It is the third trigger mechanism for referral of situations to the ICC that continues to be contentious ever since the inception of the ICC. The UN Security Council is vested with the responsibility of restoring and maintaining international peace and security under Chapter VII of the UN Charter. Since ICC crimes are often committed in contexts that threaten international peace and security, a role for the Security Council had to be carved out within the ICC statute. This role is two pronged – it can refer situations to the ICC or defer the ICC from examining a situation already before it for a period of one year.

Exercising its power of referral, the Security Council referred the situation of Darfur (Sudan) and Libya to the ICC in 2005 and 2011 respectively. Both the countries are non-state parties to the ICC treaty and hence it would have been difficult for the ICC to intervene in those situations but for the Security Council's referral.

On one hand, the US has been actively shielding its nationals from possible investigation and prosecution by the ICC, as well as undermining the efficacy of the ICC through BIAs while also taking little effort towards accountability domestically. On the other hand, its hypocrisy has been exposed as it has, as part of the UN Security Council, referred the situations of Darfur (Sudan) in 2005 and Libya in 2011 to the ICC, thereby subjecting those countries' nationals to an ICC investigation. This makes its claims of respect for rule of law and justice hollow and suspect.

In a blatant violation of the principles of natural justice and a gross display of double standards, the US, Russia and China are in a position to influence key decisions on the referral of situations to the ICC, veto such referrals or defer ICC investigations, while not being state parties to the ICC treaty themselves. At the very least, non-state parties of the ICC statute who are on the Security Council ought to recuse themselves from decisions related to referral and deferral.

If a permanent member of the Security Council (China, France, Russia, United Kingdom and the United States of America – P5 in short) vetoes the referral of a situation to the ICC, the ICC cannot examine or investigate the concerned situation. Such veto power has been used in recent times to block ICC's examination of situations where serious crimes have been allegedly committed.

For example, in 2014, Russia and China vetoed the resolution to refer the Syrian situation to the ICC. Syria is not a state party to the ICC. The veto was disgraceful and whittled away the hopes of Syrian victims for justice and accountability. In the same year, a UN Commission of Inquiry report detailed the heinous crimes that were perpetrated in North Korea and recommended a Security Council referral to the ICC. However, this recommendation was not acted upon.

Additionally, the United States has a track record of resisting the Security Council's actions or
on Palestinians. In the context in
defended the same through the f
was exercising its right to self-defence. It is another matter that the state of Palestine self-referred the situation to the ICC in 2015.

In another instance, given the fact that China is a close ally of Myanmar and a permanent member of the UN Security Council, a Security Council referral of the situation to the ICC was not possible. This is despite an Independent International Fact Finding Mission on Myanmar recommending the Security Council's referral of the situation to the ICC in 2019. Instead, the erstwhile ICC prosecutor commenced preliminary examination of the situation on her own initiative.

China is also likely to veto any referral for ICC's scrutiny of its own alleged crimes against humanity, perpetrated on approximately one million Uyghurs and Turkic Muslims. Reportedly, the Parliaments of Canada and the Netherlands have declared China's acts as genocide. Sanctions have been imposed against China for its treatment of the religious and ethnic minorities.

Recently, the United States reportedly condemned China for subjecting Uyghurs and Tibetans to heinous crimes, terming them genocide and crimes against humanity. However, with China not being a state party to the ICC Statute, and being a member of the P5, international criminal justice for the situation looks difficult, if not bleak.

Russia – the third P5 member of the Security Council who is not a state party to the ICC – signed the Rome Statute in 2000, but did not join the ICC as a state party. In November, 2016, the ICC prosecutor filed a report of preliminary investigations, including the Russian forces' alleged crimes committed in

Ukraine and Crimea. It termed Russia's actions over Crimea as 'a state of occupation.' Two d
withdrew its signature from the I

Russia's 'unsigning' of the ICC treaty was symbolic in nature and had no legal ramifications, similar to the US action in 2002. However, it spoke volumes about Russia's commitment to international justice.

In September 2020, a group of experts released a report asking the Security Council to refer to the ICC the heinous crimes committed in the Yemen conflict. They concluded that the governments of Saudi Arabia, Southern Transitional Council, United Arab Emirates and Yemen were responsible for serious crimes, including enforced disappearances, torture, arbitrary detention, sexual and gender-based crimes and the recruitment and use in hostilities of children. Yemen is not a state party to the ICC.

Incidentally, three of the five permanent members of the Security Council – the United States, United Kingdom and France – are allegedly supplying arms to parties to the conflict and are unlikely to refer the situation to the ICC. Groups have emphasised the importance of probing European responsibility for the Yemen conflict – what is termed as 'Made in Europe, Bombed in Yemen.'

As these numerous instances illustrate, the P5 in the Security Council have a stranglehold on international justice, which should not be the case. The UN Charter vests the Security Council with the responsibility to maintain international peace and security. Neither the UN Charter nor the ICC Statute gives any right to the P5 to scuttle or subvert processes of international justice. But the question is – who will bell the cat?

Universal jurisdiction: the way forward?

Powerful countries have posed numerous obstacles to the ICC's investigations and prelimi
attempt to shield their nationals
accountability. The veto power c
referral to the ICC of a situation in their own countries, or in those of their allies, poses a formidable challenge to ICC's work. One way to circumvent these challenges is by using the principle of universal jurisdiction.

The principle allows for any country to prosecute suspects in its national courts for serious crimes under international law, irrespective of the fact that the crime was neither committed in its territory nor by its nationals. This is based on the fact that the crime in question is so serious and heinous in the eyes of international law (such as the ICC crimes) so as to shock the conscience of humanity. This, in turn, leads to a responsibility of every country to make the suspects accountable under their domestic law.

In June, 2020, an Argentinian court admitted a petition to investigate the role of Myanmar's leaders in committing heinous crimes against the Rohingya community. In February, 2021, a German court delivered a landmark judgment against a former Syrian intelligence officer, sentencing him to four and a half years in prison for complicity in tortures and illegal killings; crimes against humanity. The trial of another Syrian official remains pending in the German court.

In June, 2021, a Swiss court convicted a Liberian rebel leader for 21 charges of war crimes including rape, use of child soldiers and an act of cannibalism. He was sentenced to 20 years in prison. In 2020, there were 30 ongoing trials involving at least 144 suspects all over the world that invoked universal jurisdiction, out of which 18 charges were for genocide, according to Universal Jurisdiction Annual Review 2021.

Universal jurisdiction is not a panacea and has many limitations. Investigation and prosecution of suspects from another country, with victims, witnesses and evidence not available within the prosecuting country, pose challenges. The country exercising such a jurisdiction is often subjected to diplomatic pressures and other forms of bullying tactics by the country whose nationals are to be prosecuted. At the same time, its potential remains.

Investigation and prosecution of serious crimes under international law need not be undertaken only by the ICC. Given the time and expenses involved, an exercise of universal jurisdiction by an increasing number of countries could complement the work of the ICC. Since countries' exercise of universal jurisdiction would reduce the number of countries that may be safe haven for suspects alleged to have committed ICC crimes, it is an increasingly important tool in the global fight against impunity, particularly of actors from powerful countries – the big fish.

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