

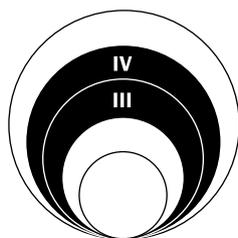
Overview of the International Criminal Court (ICC): The Statute of the ICC (the “Rome Statute”) was completed in 1998 and the Court itself began its work in 2002. The crimes within its purview include genocide, war crimes, crimes against humanity and the crime of aggression (this last has been recently formalized but is not yet in effect). The ICC serves as a *standing* court for these international crimes, as opposed to the similar but *ad hoc* institutions of the *International Criminal Tribunal for the former Yugoslavia (ICTY)* and the *International Criminal Tribunal for Rwanda (ICTR)*.

The ICC operates on a **principle of complementarity**, such that individual States bear the primary responsibility for the investigation and prosecution of atrocity crimes within their jurisdiction, and the ICC will only prosecute in cases where it judges national institutions are not fulfilling this responsibility.

Unlike the ICJ, the ICC is not an organ of the United Nations; it is treaty-based. **The Court does not have universal jurisdiction**, only exercising jurisdiction over cases performed by nationals of, or committed in the territory of, a state party to the court (of which there are 119 as of beginning 2012), or when referred to a situation by the Security Council.

§4.2.d International Criminal Court

International Criminal Court: R2P



There are important normative links between R2P and the ICC:¹¹⁵ most obviously, R2P’s atrocity crimes are given legal form in the Rome Statute of the ICC. Further, R2P as a principle and the ICC as an institution both aim to bulwark and extend the development and promotion of international law. While not a legal institution such as the ICC, the principle of R2P nevertheless reflects a tight connection with the rule of law through its use of stable, consistent processes to respond to atrocities, rather than *ad hoc* political ventures. More generally, both the ICC and R2P follow the structural logic of “sovereignty as responsibility,” with both locating primary responsibilities (for prosecution and protection respectively) in the State, and with this responsibility shifting to the international community only when the State demonstrates it is unable or unwilling to fulfill its responsibilities.¹¹⁶

The institution of the ICC plays a significant R2P role in several respects.

ICC AND R2P PILLAR ONE

The most important role of the Court is in ending impunity for those who commit

115 See Ramesh Thakur and Vesselin Popovski, “The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty and Impunity,” in Giuliana Ziccardi Capaldo, ed., *The Global Community: Yearbook of International Law and Jurisprudence 2007*, Vol. 1 (New York: Oxford University Press, 2008), pp. 39–61.

116 Markus Benzing, “Sovereignty and the Responsibility to Protect in International Criminal Law,” in D. König, et al. (eds.), *International Law Today: New Challenges and the Need for Reform?* (Berlin: Springer, 2008), 17-50.

Secretary-General 2009 R2P Report (A/63/677):

¶18 “By seeking to end impunity, the *International Criminal Court* and the *United Nations-assisted tribunals* have added an essential tool for implementing the responsibility to protect, one that is already reinforcing efforts at dissuasion and deterrence.”

atrocity crimes, and in so doing creating a larger environment where State leaders and non-state actors have incentives not to engage in or sponsor the use of atrocity crimes. The threat of future ICC prosecution – perhaps through Security Council referral if the State is not itself a party to the Rome Statute – is aimed to impact upon the decision-making of key actors and provide legal and institutional force to State’s Pillar One responsibilities to their own populations. Through this mechanism of deterrence through accountability, the ICC is an institution of R2P structural prevention of atrocity crimes. The Court’s principle of complementarity may also provide motive for States to take increased responsibility for prosecuting atrocity crimes within their jurisdiction, and of building the capacity to do so, in order to obviate the need for the Court to intervene. This building of national capacities for accountability comports with R2P *Pillar One*.

ICC AND R2P PILLAR TWO

The Court as an institution provides one method by which States and actors can encourage other States to fulfil their *Pillar One* responsibilities – namely, by encouraging them to become parties to the Rome Statute. Also, the Court’s investigative processes may alert the international community to regions

where R2P atrocities require preventive action. However, it requires emphasis that international prevention activities should not wait upon such a determination: the ICC by its nature must focus on evidence of deliberate criminal actions by individuals, and these will usually not emerge until atrocities are occurring or at least imminent.

ICC AND R2P PILLAR THREE

It is at Pillar Three where the relationship between R2P and the ICC becomes both promising and challenging. On the one hand, **the Court has the capacity to make an authoritative legal determination that a situation is one where atrocity crimes are occurring**, or that there is great risk of imminent atrocity. It may be expected that such a determination would imply, or at least create political pressure for, Security Council consideration of the matter through an R2P *Pillar Three* lens (keeping in mind that such a determination does not necessarily imply the Council should authorize military force). While the ICC has not yet satisfactorily developed fully consistent criteria with regard to such determinations and cannot be thought to be entirely apolitical, its process are formal and legal, and promise more automaticity than the flexible and political approach used by many other R2P actors. As such, the Court's determination carries weight.

Equally, it may be expected that Security Council determination of the need for action in the face of imminent atrocities would, in most cases, imply a referral of the situation to the ICC. If atrocities are occurring to the extent that international military intervention for protective

Luis Moreno-Ocampo Chief Prosecutor, International Criminal Court, 2006: "The International Criminal Court could add legitimacy to the Security Council's decision to apply the Responsibility to Protect concept."

Resolution 1970. The UN Security Council: "...Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court..."

purposes is required, then international judicial intervention in the form of ICC jurisdiction seems a milder and for this reason requisite response. The situation in Libya in 2011 reflected this, with the Council referring the situation to the ICC in *Resolution 1970* and only later – with the situation deteriorating – authorized military action in *Resolution 1973*.

Rome Statute: Article 8(1): War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

International Criminal Court: POC

The ICC plays an important POC role. It is the only standing international court that can prosecute individual criminals for serious breaches of IHL and hence

violations of *Narrow POC*, as well as atrocity crimes that can happen in the most extreme cases covered by *Broad POC*.

The ICC's jurisdiction is wide, though not universal. As well as having jurisdiction over its 119 States Parties, it can through Security Council referral prosecute crimes performed in or by States that are not signatories of the Rome Statute. As such, it is the premier international institution for the implementation of the legal core of POC and for creating accountability for violations of IHL. This ending of impunity for criminal violations of POC was one of the **five core challenges** for POC described by Secretary-General Ban Ki-moon in his 2009 POC Report.

The ICC's definition of War Crimes, as provided in Art. 8 of the Rome Statute, closely tracks IHL, following its distinction between international and non-international armed conflicts, with the more comprehensive list of crimes accruing to the former. Art. 8 does have a substantiality requirement, responding only to "grave breaches" of IHL, particularly when committed deliberately and as a part of a larger policy. Thus, the Court's scope is more restrained than the overall ambit of POC situations and the Geneva Conventions, which can, in principle, apply to isolated actions by particular individuals.

Secretary-General 2009 POC Report:

"Member States should..."

(c) Ratify the statute of the *International Criminal Court* without delay;

(d) Cooperate fully with the *International Criminal Court* and similar mechanisms."