

ICC Moot Court Competition 2018: Reflections on Three Ground-Breaking Issues by University of Ottawa Advocates

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Research skills. Teamwork skills. Written advocacy skills. Oral advocacy skills. These are essential for a moot competition where teams of law students face-off as adversaries in a mock trial or appeal. Judges score the parties on their factums and oral arguments. The rewards are tremendous for those who invest the effort. Employers respect the countless hours of preparation underlying any team's success.

Not all moots are created equal, however, and the International Criminal Court Moot Court Competition has quickly established itself as belonging in the top tier. It brings together teams of law students from universities around the world and simulates an interlocutory appeal proceeding before the ICC. Each year, teams wrestle with emerging issues of substantive and procedural international criminal law. Teams compete in regional and national rounds to qualify to represent their countries at the six-day international round in The Hague. Throughout this process, future international lawyers develop the skill-sets that will serve them throughout their careers.

The 2018 edition of the ICC MCC brought together sixty teams from forty-six countries, and the team from the University of Ottawa enjoyed hard-earned success. At the Regional Round for the Americas and Caribbean held in New York, they placed second among Canadian universities. This qualified them to represent Canada at the International Round in The Hague. There, they ultimately advanced to the semi-finals of nine teams following six preliminary rounds, and two main rounds against teams from Africa, Asia, Europe, and the Middle East. At both the Regional and International Rounds, they received several awards for their written and oral advocacy skills.

All sixty teams in the 2018 edition of the ICC MCC tackled the following three precedent-setting issues: (1) whether the ICC can prosecute human trafficking as a crime against humanity; (2) whether the ICC can prosecute corporate officers for the criminal acts of their companies; and (3) whether the ICC can prosecute an individual after an acquittal by a domestic court resulting from bias or error. These three issues and the legal arguments in favour of a broad interpretation of the *Rome Statute* are explored below.

(1) Whether the ICC can Prosecute Human Trafficking as a Crime Against Humanity

Human trafficking transforms people and their capacity for labour into a valuable and profitable 'product' on the world market. Human trafficking reduces individuals into merchandise, stripping them of personhood and dignity. Unfortunately, it is a growing criminal industry targeting vulnerable populations. Prosecuting the perpetrators, however, is challenging in an environment populated with black market transactions, sophisticated criminal organizations, transnational movement, ineffective governmental policies, and diverse contexts in which trafficking occurs.

Despite the international community's efforts to control, prevent, and counter human trafficking, it remains a widespread practice. Moreover, the status and treatment of human trafficking as a crime against humanity before the ICC remains unclear. Last year, while briefing the United Nations Security Council, the ICC's Prosecutor noted her office is considering launching an investigation into alleged migrant-related crimes in Libya, including human trafficking.[1] But, before the ICC can successfully prosecute any alleged human trafficking crimes, it must first address some foundational issues.

The primary challenge is the definition of human trafficking as a crime against humanity. Article 7(1) of the *Rome Statute* enumerates acts that constitute a crime against humanity. The *Rome Statute* includes the words "trafficking in persons" within the provision and definition of enslavement in article 7(1)(c) and footnote 11 of the *Elements of Crimes*.[2]

Yet, the *Rome Statute* lacks a precise definition of trafficking. Instead, the reference to trafficking in persons conflates and expands the definition of enslavement from the 1926 *Slavery Convention*; namely, "the exercise of any or all the powers attaching to the right of ownership over a person." The problem, however, is traditional formulations of trafficking and slavery may not necessarily be the same. For example, if individuals other than the traffickers exploit the victims, then the traffickers may not be exercising ownership as it has been transferred. Consequently, these traffickers cannot be

prosecuted as the crime of trafficking can no longer be considered slavery.

This situation creates an unacceptable impunity gap. The first step in addressing this gap is to adopt a concrete legal definition of human trafficking. This could unravel the conflation between enslavement and human trafficking. Such a definition would allow the ICC to address modern forms of slavery with legal certainty. The *Palermo Protocol* (the "Protocol"), which entered into force after the *Rome Statute*, provides a practical and workable definition of human trafficking, requiring three elements: the means, the action, and an exploitative purpose.[3]

The strength of this definition lies in its broad reach and enumerated list of exploitative purposes. The Protocol is the first binding legal instrument with an agreed-upon definition of human trafficking. 173 parties have ratified the Protocol, demonstrating the definition's acceptance in the international community. Before delving into whether human trafficking meets the requisite chapeau elements of crimes against humanity, we must first understand the elements of the underlying act. Without understanding the elements of human trafficking, it is impossible to achieve justice for victims. Thus, the ICC must first define the crime of human trafficking it seeks to address—ideally incorporating the practical and workable definition from the *Palermo Protocol*, either by amending 7(1)(c) of the Rome Statute or by an innovative interpretation by the ICC judges.

(2) Whether the ICC can Prosecute Corporate Officers for the Criminal Acts of their Companies

Article 25(1) of the *Rome Statute* is clear: the ICC's jurisdiction is limited to natural persons. Corporations, as legal persons, cannot be prosecuted by the Court. However, corporate officers may be liable for crimes committed by their corporations. To hold a corporate officer liable as a perpetrator under article 25(3) for crimes committed by, with, or through a corporation, the ICC must recognize that corporations can commit crimes.[4] This does not mean the corporation is liable; criminal responsibility and criminal liability are distinct concepts. As crimes within the Court's jurisdiction often concern collective or mass criminality, the Office of the Prosecutor will consider any number of individuals, structures or organizations to build the necessary evidentiary foundation to hold the accused person liable.[5] Treating the corporation as an unindicted perpetrator, therefore, allows the prosecution to build the evidentiary basis to prosecute the corporate officer.

Framing the corporation as an 'organization' fits conceptually within the *Rome Statute*. For example, crimes against humanity must be committed as part of a state or organizational policy.[6] The ICC Trial Chamber in *Katanga* recognized that crimes against humanity, in pursuit of an organizational policy, can be committed by a private entity.[7] Further, although somewhat controversial, the Pre-Trial and Trial Chamber in *Ruto* recognized that perpetrators may be liable for control over an organization that commits crimes.[8]

Looking at the corporation, rather than individual employees, acknowledges that a corporate officer can exercise control over the corporation.The notion that corporations can, and do, commit crimes is not novel to the ICC. The drafters of the *Rome Statute* considered including legal persons within the Court's jurisdiction. At the Rome Conference, delegates recognized the merits of holding corporations

accountable, but considered the issue to be premature. At that time, many states did not recognize corporate criminal liability and being unable to pursue domestic prosecutions would undermine the Court's complementarity regime.[9] These concerns are no longer valid. Many states provide for some form of corporate liability in their domestic systems, and it is well-recognized that corporations, as legal persons, have rights and obligations under international law and human rights instruments.[10]

Further, there are compelling policy reasons to treat corporations as unindicted perpetrators to prosecute corporate officers. The ICC is intended to be a permanent court to end impunity for perpetrators of the most serious crimes of international concern.[11] Corporations are increasingly powerful actors, with global supply chains and revenues that exceed the economies of some countries.[12] Corporate officers that exercise control at the highest decision-making level must take active steps to identify and prevent crimes perpetrated through the supply chain.Interpreting the *Rome Statute* in a manner that reflects both emerging crimes of international concern and progressive developments in international law prevents an unacceptable impunity gap for corporate officers who use their power and influence to further the corporate bottom line, which at times results in criminal activity.

(3) Whether the ICC can Prosecute an Individual after an Acquittal by a Domestic Court Resulting from Bias or Error

The principle of *ne bis in idem*provides individuals with legal certainty and prevents persons from being continuously tried for the same conduct.[13] This principle does not, however, prevent a person who was tried domestically for a domestic crime, such as murder, from being tried at the ICC for the international crime of murder as a crime against humanity. In such a case, the conduct of these two crimes is sufficiently different.

Broadly, when a person is tried domestically for an international crime and is either acquitted or convicted, that person cannot be tried again at the ICC. This principle is outlined in article 20 of the *Rome Statute*. Although the ICC has never fully canvased article 20, the *Rome Statute* itself dictates the ICC is premised on a system of complementarity. Unlike the statutes of past *ad hoc* tribunals, the *Rome Statute* gives primary jurisdiction over international crimes to domestic states. In doing so, the Court retains jurisdiction while encouraging domestic prosecutions of these crimes. The ICC has insufficient resources to prosecute every international crime; it must rely on domestic participation—not only to refer cases, but to prosecute them.

Despite this respect for state sovereignty when interpreting *ne bis in idem*, one cannot ignore the *Rome Statute*'smandate of ending impunity for international crimes.[14] The *Rome Statute* drafters considered this balancing and enumerated limited exceptions to *ne bis in idem*. This permits the ICC to re-try a person despite a domestic trial. These exceptions include lack of impartiality and independence at the domestic trial level, and domestic trials conducted to shield a person from

criminal liability.[15]

The exceptions to *ne bis in idem* prevent domestic "sham trials" from protecting perpetrators of international crimes from prosecution before the ICC. Article 17, the admissibility provision, should be considered in conjunction with article 20 to implement the ICC's system of complementarity. This allows the ICC to override the presumption of domestic jurisdiction in specific scenarios,[16] related to domestic states being unable or unwilling to carry out a prosecution.

The *Rome Statute* provisions relating to admissibility of cases and *ne bis in idem* demonstrate the drafters' intentions to preserve state sovereignty and encourage universal ratification of the *Rome Statute*. Unlike the statutes of the *ad hoc* tribunals, the *Rome Statute* was drafted with an understanding of the ICC's unique position as a permanent court and the dangers of intruding on domestic jurisdiction. The case of re-trying a person before the ICC following a domestic acquittal has not been considered and ruled on by the ICC. In a future case, the ICC would have to consider the fairness of the domestic trial in assessing admissibility, without passing judgment on the domestic court.

Conclusion

The ICC MCC allows future international lawyers to craft legal arguments at the ICC about issues, which so far, have been untested by the Court. We hope that the thoughtful arguments advanced by the University of Ottawa team on these novel issues may well assist the Court when faced with these questions in the future.

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References

1. See paragraph 26 of the Thirteenth Report of the Prosecutor of the ICC to the UNSC pursuant to UNSC Res 1970 (2011), May 8, 2017.
2. International Criminal Court. *Elements of Crimes* (The Hague: ICC, 2011).
3. *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, 15 November 2000, 2237 UNTS 319; article 3(a) of this Protocol says: "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."
4. See Annika Weikinnis, "Towards Greater Accountability for Corporate Involvement in International Crimes" (2018) 2 PKI Global Just J 24.
5. Office of the Prosecutor, "Strategic Plan 2016-2018" (The Hague: ICC, 2015) at para 34.
6. International Criminal Court. *Elements of Crimes* (The Hague: ICC, 2011) at art 7.
7. *Prosecutor v Katanga*, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute (7 March 2014) (TC II) at para 1119.
8. *Ibid* at 1404; *Prosecutor v Ruto et al*, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute (23 January 2012) (PTC II) at paras 315, 317.
9. Schabas, William. *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed (Oxford: Oxford University Press, 2016) at 564–66.
10. *Prosecutor v New TV SAL et al*, STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning
11. *Rome Statute*, art 1.
12. Green, Duncan. "The World's Top 100 Economies: 31 Countries; 69 Corporations" (20 September 2009) *World Bank (blog), https://blogs.worldbank.org/publicsphere/world-s-top-100-economies-31-countries-69-corporations*
13. Kai Ambos, *Treatise on International Criminal Law*, vol I (Oxford: Oxford University Press, 2016) at 398.
14. *Ibid*, at preamble para 5.
15. *Ibid*, art 20(3).
16. *Ibid,* art 17.