

THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT:

A GAME-THEORETIC APPROACH

(CASE 258)

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## **Introduction and Background**

In the 20<sup>th</sup> century, the world witnessed a multitude of wars and humanitarian issues. Starting with the genocide of the Jewish population at the hands of Hitler's Third Reich, an unprecedented number of such acts of genocide have reached the eyes and ears of the global community. As late as 2005, the world witnessed the Darfur crisis in Sudan. Clearly, even though many lessons were learnt in the aftermath of World War II, the overall message had yet to truly hit home with the global community.

According to the literature, the first event that established the need for an International Criminal Court was due to the aftermath of WWII. In 1945, the first ad-hoc tribunal was established to try various individuals with an active participation in war crimes at Nuremberg and Tokyo. It was at this point where the need for a global legislative body was felt, for trying individuals guilty of human rights violations. However, establishment of a global body was delayed for quite some time due to disagreements regarding the actual definition of "aggression"<sup>1</sup>. It was then brought up again once the world witnessed further human rights atrocities at the hands of Slobodan Milosevic in the former Yugoslavia and the ethnic Hutu tribe militia groups in Rwanda in the 1990's. Again, in order to bring the criminals to justice, the world turned to ad-hoc tribunals to deal with the situation. This underscored the stark need for a judicial body to formalize the International Criminal Court (ICC), both as a preventative measure and as a formal forum for conducting these tasks. Negotiations then began in Rome for establishing such an International Governmental Organization.

The next sections of this paper will be as follows. First, we will identify the key players to this negotiation. Next, we outline the salient interests of each party in order to provide a background for their issues. Third, the opposing interests for each party lend us an insight into

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<sup>1</sup> See page 161-2 in the Custom Case Book for International Negotiations

the bargaining points that were discussed under the negotiations. We can use these issues then, to set up the game-theoretic model in order to identify the preferences for each party and thus show how the outcome came about.

### **Key Players**

Negotiations for the establishment of the ICC were formally conducted in the “Rome Conference” in 1998.<sup>2</sup> The main parties to the negotiations were indeed all the nations of the world, since they were all to be potentially impacted by the ICC. However, given the various positions of nations on this issue, they may be grouped into four main categories, namely the “Like-Minded” group (led by the Western European countries), the “Nonaligned Movement” (led by India and the Gulf nations), the P-5 (led by the United States), and the “Nongovernmental Organization Coalition for an International Criminal Court (CICC)”, which was led mainly by humanitarian-work based international organizations.<sup>3</sup>

### **Interests**

At the time of the Rome Conference, all the groups stated positions were unanimously in favor of the establishment of the ICC. However, while the Like-Minded group and the CICC were clearly in favor of a supranational body, the nonaligned nations and the P-5 had concerns over granting the body too much power. The main reason for the P-5’s hesitation was that of state sovereignty wherein they claimed that an all-powerful judicial body could be misused as a political tool and thus must not be allowed to interfere with the internal workings of states. Similarly, the nonaligned movement had their doubts due to the potential control the United Nations Security Council would have over the ICC. Clearly, they could not trust the veto-power states of the Security Council with overseeing the court. Furthermore, they also wanted nuclear weapons prohibited as well, which directly went against the interests of both the P-5 and the

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<sup>2</sup> Pg 162

<sup>3</sup> Pg 165-6

Like-Minded groups. Eventually, however, the nonaligned movement dissolved as most of the countries in question decided to abstain from voting for the court. Finally, while the CICC had no direct role in the vote for the establishment for the ICC, their support was nevertheless quite valuable to the Like-Minded states. The trusted NGO's not only provided technical expertise (though it was biased in favor of establishing the courts), they were also in a clear position to sway the opposing nations voting decision on this issue by mobilizing grass-roots movements in the democratic countries.<sup>4</sup>

### **Issues and Bargaining Points**

At this point it would be prudent for this analysis to distill the actors into two main camps. As mentioned earlier, the nonaligned movement soon dissolved, and thus they ceased their active participation in the negotiations. Also, since the CICC did not directly influence the proceeding (though they were effective through indirect means), we can also exclude them from this discussion for now (I will return to them later). This would leave us with the main rival camps of the Like-Minded group and the P-5.

The first issue outlined in the literature is that of the ICC's jurisdiction and defining the types of cases that would call it into action. The four main crimes that fall under the auspices of the ICC are "the crime of genocide, crimes against humanity, war crimes, and the crime of aggression", collectively referred to as "the core crimes of international humanitarian law." The negotiating issues for this point lay solely on the inclusion of nuclear weapons and internal conflicts (under war crimes) and the definition of a "crime of aggression". Consensus was reached on the war crimes issues but a definition of the latter is still pending.<sup>5</sup>

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<sup>4</sup> Pg 163-7

<sup>5</sup> Pg 168-9

Secondly, the issue of “Trigger Mechanisms” was addressed, wherein who would have the authority to issue an investigation into a possible crime. The Like-Minded group (though not all of the member states) were in favor of granting the court “universal and inherent jurisdiction” meaning the court itself and the prosecutor would decide who would go on trial. This went directly contrary to the interests of the P-5, who saw this as a blatant reduction in state sovereignty. The issue of “Complimentarity”(wherein the ICC would work with the domestic legal structures of the state in question) was another point of contention that the P-5 believed that the absence of which would undermine state sovereignty. The Like-Minded group, then, were of the opinion that this would encroach upon the establishing of the ICC as an independent body and must be able to intervene upon failure of the domestic courts (at the very least).<sup>6</sup>

### **The Model(s)**

In order to establish the necessary equilibria needed for the two major parties of the negotiation (i.e. the Like-Minded group and the P-5), we must first define the preferences of each actor in the negotiation itself. Each party faces a choice of three possible decisions in this game, namely (1) to harden their stance on the issues, (2) to concede to the demands of the other player or (3) to reject the idea of the ICC entirely. Since the stated position of all involved parties was that the creation of the ICC was necessary, rejecting the idea entirely (3) would not be feasible. This is especially true since the interested parties would much rather formulate the agreement rather than abstain from the negotiation. Indeed, it serves as a plausible BATNA for both parties, however, light of the events leading up to the creation of the ICC, a delay would be a more plausible option. Therefore, for the overall negotiation, the model would be as follows in figure 1 below.

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<sup>6</sup> Pg 170-1

		Like Minded Group	
		Create Court	Abstain
P-5	Create Court	1,1	0,1
	Abstain	1,0	-1,-1

Figure 1: Overall model

Clearly, the equilibrium point for both parties is to create the court. However, now we turn to each issue in isolation to see where the compromises were reached. As stated earlier, two main issues were at the heart of the negotiations, namely defining crimes of aggression, and individual state sovereignty. While the issue of defining aggression is still pending, the other issue of sovereignty had been negotiated upon and resolved. For the aggression case, any country that would take action against a (seemingly) uncooperative state (as is the current case of the US and Iraq) would then undergo an investigation by the ICC. This would reduce the payoff for any nation engaging in war. With the US involved in negotiations with North Korea, the P-5 would be understandably quite cautious in accepting a definition of aggression. Clearly, any country with strong military capabilities would be concerned. Since the strong military powers included countries in the Like-Minded group, the game is set up in figure 2. The optimal position for both groups is to reject the existing definition of aggression, but since the overall goal is to bring this type of crime into the courts' jurisdiction, the debate is still open.<sup>7</sup>

		Like Minded Group	
		Accept Definition	Reject Definition
P-5	Accept Definition	-3,-3	-2,-1
	Reject Definition	-1,-2	-1,-1

Figure 2: Defining aggression game

The final issue analyzed is that of state sovereignty. This particular problem manifested itself in the overall negotiations in various ways and was, by far, the most important one. The two important bargaining points that addressed the issue of sovereignty were the trigger

<sup>7</sup> Pg 165 and verified issue pending at [www.icc-cpi.int](http://www.icc-cpi.int)

mechanisms of the ICC and the complementarity problem. Taking each of these points in isolation yields the games in figure 3 and 4. What is important to note here is that no decisional equilibrium exists of each of the two games; hence, a stalemate is expected to occur on these points. Furthermore, an agreement on these issues had to be reached or the ICC would have not been created. Therefore, the payoffs for taking decisions counter to the other party are dually negative.

		Like Minded Group	
		Universal + Inherent	Checks and Balances
P-5	Universal + Inherent	1,-1	-1,-1
	Checks and Balances	-1,-1	-1,1

Figure 3: Trigger mechanism game

		Like Minded Group	
		ICC Intervention	No Intervention
P-5	ICC Intervention	1,-1	-1,-1
	No Intervention	-1,-1	-1,1

Figure 4: Complimentarity game

So, given these two games, how did the Like-Minded and P-5 groups come to an agreement? Figure 5 represents the compromise game wherein each player chooses to compromise between the two issues, but the choice set is such that each player chooses to compromise on a single issue but not both. From the earlier discussion, the major issue for the P-5 was state sovereignty, whereas the Like-Minded group was more concerned with being able to grant the court power to take action. Thus, the game shows an equilibrium at the P-5 compromising on the Complimentarity issue whereas the Like-Minded group compromised on the trigger mechanisms.

		Like Minded Group	
		Trigger mechanism	Complimentarity
P-5	Trigger mechanism	-2,-2	-3,-3
	Complimentarity	-1,-1	-2,-2

Figure 5: Compromise game

This is an optimal solution given the payoff structure because here the ICC has the checks and balances needed to pursue a certain case, but once that has been done, it can

intervene in cases where the offending country is unable to unwilling to handle the issue domestically. Thus, state sovereignty is preserved (to a certain extent) as well as the operational power of the ICC. The literature states that the exact relationship between the UN and the ICC had not been formalized, but at the time of this writing the ICC has been confirmed as an independent body.<sup>8</sup>

One final point that needs to be addressed is the ranking of the preferences. For each of the models above, the preferences were ranked solely on the stated positions of the two camps (as discussed in the literature). For game where the preferences were clear, the choices are bounded by [-1, 1]. For more complex games (as in figures 2-5), a rank ordering scheme was used based on the perceived positions of the actors. Most games show a negative payoff in order to underscore the fact that the overarching goal of creating the ICC was seemingly more important in this negotiation as compared to the alternatives, and thus concessions were made in order to achieve the ultimate outcome.

## **Conclusion**

According to our model above, I have shown how decisions and trade-offs were made on competing issues in order to ensure the creation of the ICC itself. As of this writing, no definition for the crimes of aggression has been agreed upon. However, the ICC is in operation and currently has 104 full members (states that have signed and ratified the agreement) with 41 members signed but not ratified (including the US).<sup>9</sup> It is also important to mention the other two players in the negotiation (namely the CICC and the nonaligned movement), and to be sure, they both had a hand in the outcome, but with the nonaligned countries removing themselves early on, and with the CICC's indirect influence on the proceedings, they have been removed from the

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<sup>8</sup> Complete document retrieved from the ICC website [http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf) on March 15th 2007.

<sup>9</sup> Information retrieved from the ICC website [www.icc-cpi.int](http://www.icc-cpi.int) on March 13, 2007.

abstract game theory model. Both these events, however, led to a balance of power between the remaining parties since the Like-Minded group clearly had the support of the CICC and the nonaligned movement could have been a key ally for the P-5, but was neutralized early on. Furthermore, there were more issues in contention than the ones listed above, however they have also been removed because they were not issues where the parties were directly at opposition with each other. What this model does do, however, is highlight the important points of the negotiation and displays how compromises were established in issues where no direct consensus could be reached.

**Reference:**

Leonard, Eric K. (2002). "Establishing an International Criminal Court: The Emergence of a New Global Authority?" *Institute for the Study of Diplomacy*: 162-179.