

Small – but not always weak How the International Criminal Court was created by a coalition without the powerful

After several years of preparations in the United Nations, a UN Conference of Plenipotentiaries in Rome laid the foundations for an International Criminal Court (ICC). The court can try individuals who committed massive crimes: genocide, war crimes, crimes against humanity and aggression. It came into being not upon the initiative of the most powerful states but rather by the efforts of a coalition of small and middle powers: most EU member states, Canada, Australia, developing and emerging countries, democracies in Latin-America, Asia, and Africa. During the Rome negotiations, two of the five Permanent Members of the UN Security Council, the P 5, gave up their resistance to an independent court and to a prosecutor who can initiate an investigation into crimes without the permission of the Security Council. The Security Council can defer a trial only by a unanimous vote. The Rome Statute which resulted from the conference in 1998 has since been ratified by 119 states, with the U.S., China and Russia among those who do not recognize its jurisdiction. Paul Stoop spoke with **Autumn Lockwood Payton** about the power of less powerful states and how they were able to establish the court ICC that is in operation in The Hague, Netherlands, since 2002.

It was not really a major power that started a new attempt to establish an International Criminal Court in 1989/90: Trinidad and Tobago. What was its role?

Trinidad and Tobago was the agenda-setter. This first-mover power comes from a structural position rather than from power in the classical sense. A small country exercised latent power by getting other states and nongovernmental actors to take on the issue of a permanent court, an idea that lay dormant during the Cold War.

And this small country had its wish fulfilled?

Ironically, the initiator was not successful in the end. Trinidad and Tobago primarily wanted a court to try drug trafficking. This crime does not fall under the jurisdiction of the ICC that was created in Rome in 1998. But at least they got the ball rolling. The suggestion of creating an ICC would have come at some point from someone, probably from some other weaker developing country, but certainly not from one of the Permanent Members of the UN Security Council.

So exercising power may depend on timing, on the situational context?

There was really an important timing element. Agenda-setting does not only depend upon being the first mover but you have to be the first mover at an opportune time. This is what less powerful states have to seize upon. The playing field is not likely to become more even very soon, but I do see that they are getting more creative to get their issues on the agenda.

Over the course of the years smaller states and middle powers formed a coalition, the group of so-called like-minded states. How did its members exercise power

during the long negotiations leading to Rome?

Members of this broad coalition headed committees and worked on compromise proposals. Experts of smaller nations played crucial roles, not the least the head of the Preparatory Committee (1996 to 1998) and the presidency of the Committee of the Whole during the Rome Conference. This kind of power lies within the institutions. Powerful states are sometimes not so good at using this kind of power. They usually swing things their way differently. We saw that the P 5 were taken by surprise when the very diverse group of like-minded states started to coalesce. This group was able to say: let's not be stopped by our smaller differences. Instead, we try to agree on a core set of issues that are essential for all of us.

What were the core issues that were decisive for the like-minded states?

Which crimes are going to be tried by the court? What is the role of the Security Council? Most important – and the issue they coalesced around – was the independent prosecutor who would be able to start an investigation as a first step to a trial, independent especially from the Security Council. To make progress around these core issues, they ignored smaller differences of which there were plenty.

When did this coalition gain momentum?

When these cooperating small and middle powers and developing countries realized that the draft statute for the ICC, presented by the Geneva-based International Law Commission, a standing UN commission, did not address these core issues the way they preferred. Then they started to play an active role in the preparatory sessions of 1996 to 1998 which lead to the Rome Conference in the summer of 1998. The fact that these countries had a clear position and were almost ready to go gave them a clear advantage.

What about the traditional strength of the P 5?

We tend to think of the P 5 as a solid block, which it is in a way, since they play a privileged role in world politics. They, for instance, can establish ad-hoc tribunals to try massive crimes. But the P 5 had no intention whatsoever to work together, except for maybe the US and the UK on some issues. This potential powerful block exercised little of its power.

Was the European Union a powerful actor?

It did not negotiate as a political unit. Most of its members joined the like-minded group, but two of its large member states, France and Britain, were sceptical about an ICC beyond control of the Security Council.

Why did the United Kingdom and France change their mind during the Rome Conference?

Of course there were compromises negotiated in Rome: the UK and France got things other members were reluctant about, like the possibility for the Security Council to defer a trial if decided by a unanimous vote – this gives power to the Security Council but actually no veto power for a single member of the P 5. And France got its way with an opt-out clause for a category of crimes over a seven-year period. But overall, these powers had to sacrifice something they really wanted, and that was more Security Council control over the court.

What made the UK move toward accepting a strong court?

The UK came to the Rome Conference presiding over the EU. There is the expectation that the presidency will push for the position the majority of the Union



[Foto: Udo Borchert]

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has. The presidency is not completely bound by it but does take a risk. Insisting on its own position could mean that others might be not so accommodating in the future when negotiating EU issues. The UK's negotiation space was somewhat restricted. Here again we see the power of an institutional setting. Especially if we look at what happened in the EU: the Rome Conference took place right after the Treaty of Amsterdam set forth a common foreign and security policy of the Union – but before the treaty went into force. It would have reflected badly on the presidency if it had blocked the road to a court so many EU members and a worldwide coalition wanted to establish.

Why did France change its position?

France, not being bound by serving as the presidency, was in a better bargaining position than the UK to extract a deal. There were a number of EU negotiations going on at the time: the Agenda 2000 as an attempt to reshape the EU budget, the conclusion of the common agricultural policy and the attempt to trim the agricultural subsidies, talks about the presidency of the European Central Bank with Jean-Claude Trichet as one of the two candidates. France had stakes in all these debates, and in the end, these things were much more important to France than sticking to its original position on the ICC. Also, France wanted to avoid looking like a bad team player in the EU and decided to be more flexible on the ICC and accept a strong, independent court in change for negotiation gains on the European front.

Was there an overt issue linkage?

Issue linkage is very difficult to prove. Governments cannot easily admit giving up a position in change for gains on other issues. So you have to conclude from the larger context and find plausibilities. We also should not forget that public opinion in France was clearly in favor of a strong ICC. This made it easier for France to give in. There definitely can be power in polls and public opinion.

Did the NGOs play an important role as well?

There was a network of cooperating NGOs under the label Coalition for an ICC (CICC) that also was powerful. Not so much in getting the UK and France on board, but rather as a valuable resource for expertise and information, especially for smaller delegations in Rome that were not able to attend parallel sessions of committees and working groups. Information is power, so the legal expertise and the sheer amount of man- and womanpower the NGOs offered the smaller delegations definitely were factors of strength.

Do individuals matter?

They can matter, in the context of institutions, procedures, and situations. They matter in their capacity to build coalitions, to negotiate deals, to reach compromises. We talk about people like the Chairman of the Committee of the Whole during the Rome Conference, Canadian legal expert Philippe Kirsch, or about Cherif Bassiouni, Vice-Chairman of the UN General Assembly's Ad Hoc and Preparatory Committees on the Establishment of an ICC in 1995 and from 1996 to 1998.