

THE ICC AT 10

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INTRODUCTION

It is a pleasure to be back at Washington University Law School at the invitation of the Whitney Harris Institute. Leila Sadat's leadership on the International Criminal Court over many years has been an inspiration, and this conference is the latest demonstration of her vision.

As many of you know, in ten years the International Criminal Court has opened investigations in seven different country situations. It is worth noting that the Court has issued arrest warrants against a sitting head of state and a minister of defense. It is conducting proceedings against a former head of state, a former vice president, and several presidential candidates. Certainly, 15 years ago when we left the FAO Building in Rome in the early morning hours of July 18, 1998, a court with this extensive docket would have seemed like science fiction. The ICC has succeeded in heightening expectations for justice, and it has become the address for justice when the national authorities fail to do their job prosecuting the most serious crimes.

Not surprisingly, given the Court's daunting mandate, there have been problems. As strong supporter of the ICC, I believe that when there are shortcomings in implementing its mandate, it is important to identify those in a principled and constructive manner to assist the court in doing better. As it begins its second decade, all parts of the Rome Statute system, including court officials in all organs, states parties individually and collectively as the Assembly of States Parties, and civil society need to "up our game." Challenges the ICC has faced so far include the slow pace of the first and only completed trial; the difficulty of the court making its proceedings relevant in the communities most affected by the crimes thousands of miles from The Hague; flaws in prosecutorial strategy in investigating and selecting cases; and most recently, intense budget pressure from the largest paying states parties. Some of these problems flow from the court's daunting mandate, while others are more self-inflicted injuries.

I want to focus on a fundamental problem—specifically, the intersection of the court's limited jurisdictional reach with the unevenness of the political terrain on which it carries out its judicial mission. By unevenness I mean the reality that the leaders of more powerful states and those they protect elsewhere are so much less vulnerable to ICC prosecutions than the leaders of smaller, weaker states. In other words, the

Court's writ does not apply equally to all. Unfortunately, the ICC has yet to realize the potential to minimize unevenness in accountability and this is a problem. Court critics use that failing to condemn it harshly and, I believe, unfairly. I think the roots of this failure need to be clearly understood in order to change it.

I. THE ANALYSIS

In part, the shortcoming lies in the jurisdictional bases of the Rome Statute itself. At the Rome Diplomatic Conference, negotiators created a conservative consent-based jurisdictional regime that left the potential for large gaps in the court's reach, and those gaps have made themselves apparent in practice over the ICC's first decade. The court's jurisdictional infrastructure is rooted in very traditional international law principles. Its authority is based on a regime of state consent that is fully respectful of national sovereignty. For the court to open an investigation, either the country where the alleged crimes occurred or the country of nationality of the accused must be a party to the Rome Statute. In addition, consistent with its consent-based structure, a state that is not a party can declare its acceptance of the court's jurisdiction.

Not surprisingly, the most lawless states have shielded themselves by not ratifying. Iran, Sudan, Syria, Pakistan, Burma, North Korea and Sri Lanka have not joined. And three of the world's most powerful nations—the US, China and Russia—have remained outside as non-states parties.

II. THE EXCEPTIONS

There are, however, two exceptions to the Rome Statute's consent structure. I am going to focus on the second of these two exceptions, referrals by the Security Council, but it's worth saying a word about the first exception. This comes into play where a national of a non-state party is alleged to have committed Rome Statute crimes on the territory of a state party. For the U.S. government, the prospect of an American citizen being tried by a "foreign judge" at the ICC generated intense US government opposition before and during the negotiations in Rome. This became the peg for the United States' frequent demand for an "ironclad guarantee" that no US citizen would ever appear before the court. This potential for criminal liability was a significant factor in the US delegation's vote against the treaty at the end of the Diplomatic Conference and the basis of Washington's refusal to consider joining ever since.

The second exception involves the role of the United Nations Security Council. This departure from the statute's overarching consent regime authorizes the Council, acting under its authority to maintain international peace and security, to refer the situation in a non-state party to the court. While Security Council referrals extend in a positive way the court's authority to victims of mass atrocities where it would otherwise be barred, Council referrals also mirror the underlying unevenness, and this authority (as well as the authority to suspend ICC proceedings for a year) has become a source of controversy. In the eyes of some, it casts a political taint on the court's subsequent investigations.

It's important to note that when a state party refers a situation to the court, there is also the danger of interference by that state political actor. With both these "triggers," the court's prosecutor and judges have to use their independent judgment in applying the statute's provisions to the facts of the referred situation.

III. THE P5 ROLE

Unevenness and the danger of political instrumentalization is compounded by the dominance of the council's five permanent members—the world's most powerful states. The unevenness is rooted in the underlying disparity of economic, political, and military power. While there are certainly important distinctions between the US, Russia, and China, none of them have joined the court. Through their non-ratification and veto power, they have insulated themselves from the ICC. These three have also shielded the leaders of certain "client states." While the Security Council has referred Sudan over the situation in Darfur and Libya to the ICC, Russia has rendered Bashar al-Assad immune from ICC prosecution. Of course, the list of Security Council-guaranteed "accountability-free zones" extends further to include US ally Israel and Sri Lanka which is protected by China.

The resulting selectivity scars the global terrain on which the ICC works with an ugly double standard, which drains the Court's legitimacy. All too often the Court is blamed for the limited jurisdictional authority that the states negotiating in Rome were willing to confer on it. The ICC's patchy and selective coverage has become evident as the Court has proceeded with its work over the past decade. This has fed criticism from different quarters—some disingenuous, some grounded in genuine frustration.

IV. STEPS GOING FORWARD

What can be done to change or at least minimize this? Because of its deep roots, unevenness will not lend itself to quick change. We have to play the long game here, but that said, we need to be in the game and work smartly to change it. This has several components.

A. Assert Article 12(3) Acceptance of Court Jurisdiction

States parties can urge countries in transition from armed conflict or repressive rule to assert a declaration accepting the court's jurisdiction. Cote D'Ivoire did this both under Laurent Mbagbo (2003) and twice under the current president, Alisane Ouattra (2010, 2011). The Palestinian Authority attempted this, though Prosecutor Moreno Ocampo demurred. These declarations would broaden the court's reach and send a strong symbolic signal on behalf of the rule of law and the court. An ad hoc acceptance would not take the place of ratification. Rather it would be an immediate measure to assert the rule of law pending the entry into force of an instrument of ratification.

B. Strategic Moves to Increase Ratification

States parties should press strategically to increase the number of ICC states parties. This too would extend the court's reach and could heighten pressure on selected non-states parties to accede to the Rome Statute as good state practice. While it will not be easy to go far beyond the current 122 states parties, progress on strategically important states would be valuable, especially in regions where ratification has been so low: the Middle East and North Africa, as well as Southeast Asia.

C. At the United Nations

At the UN, there have been some noteworthy developments. On October 17, 2012 Guatemala, as Security Council President, convened an open thematic debate at the Council on the relationship between the Security Council and the International Criminal Court. This was the first time in ten years that the Security Council had discussed its relationship with the Court in general terms as distinct from the Prosecutor's twice-yearly reports on Darfur and Libya.

This initiative has important potential to:

- i. Criticize the double standard in the Council's very selective and inconsistent approach to accountability and ICC referrals
- and
- ii. Bolster diplomatic support for the Court from its states parties at a high profile political forum.

ICC state parties weighed in with serious, thoughtful interventions that were substantively focused and contained concrete proposals laying a basis for moving forward. Several themes emerged:

- The need for greater coherence if not consistency in decisions on referrals;
- The call for more cooperation following any future referrals, the view that a referral is only the beginning, criticism of the lack of back up support by the Council regarding arrests and judicial findings of noncooperation;
- Calls for UN funding on future referrals since these crimes are concern to the international community and the UN as a whole, and not just the 121 ICC states parties;
- Some, but not all, called to end the exemptions for nationals of non states parties contained in both SC referrals;
- Some called for a caucus of states parties on and off the Council;
- Some called for the debate to be more than a one-off event and recommended more of a dialogue and a Council Working Group to deal with referrals.

With three Russian and Chinese vetoes of Security Council resolutions that would have imposed sanctions and travel bans on selected Syrian leaders, the slope for change at the council has become steeper. In addition, Rwanda, which joined the council as an elected member on January 1, 2013, has brought a relentlessly regressive approach to council negotiations referencing the ICC. Given Kigali's active and extensive support for the M23 rebel group responsible for widespread atrocities in eastern Congo, Rwanda may be acting out of ample self-interest in denigrating an international court before which there is potential criminal liability. Taken together, these factors have made the landscape for change on accountability and the ICC at the Security Council more difficult.

On the positive side, 23 UN member states representing an interesting regional diversity have launched a new group—Accountability, Coherence and Transparency [ACT]. ACT's *raison d'être* is reforming the working methods of the Security Council with a specific cluster devoted to accountability and the ICC.

On this more difficult landscape, the challenge for ICC member states is to identify and achieve key steps that can maintain momentum. These could include:

- i. Close, ongoing coordination among ICC states parties on the Security Council regarding accountability issues, possible referrals and follow up after referrals;
- ii. ICC states parties not on the council, through ACT or other organizational vehicles, finding ways to take and exert increasing ownership and responsibility for ICC issues;
- iii. Convening a second Open Debate on the Council-Court relationship;
- iv. Obtaining Council response to the ICC judicial findings of non cooperation on the Darfur referral;
- v. Moving ICC cooperation matters arising from referral resolutions to an informal Security Council Working Group such as exists for the ad hoc tribunals.

CONCLUSION

There is tension between the Court's mandate to apply the norms of international criminal justice, on the one hand, and the ICC's limited jurisdictional on the other hand. This tension is exacerbated by the Security Council's essential role as a political body. The court is not responsible for the latter, but is certainly affected by it. There is no silver bullet solution to quickly resolve the problem. The key now is to realize short-term goals towards the longer term objectives. Addressing this in the court's second decade will be crucial to the ICC's ability to fulfill its mandate to limit impunity for the most serious crimes.