

ESSAY

THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN ENFORCING INTERNATIONAL CRIMINAL LAW*

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I have found for a very long time that one of the best ways to ensure that the International Criminal Court (“ICC”) has the support it needs to succeed in its mission is through providing accurate and as complete as possible information about the Court. So I am really very grateful to the Academy on Human Rights and Humanitarian Law for including the ICC in its prestigious program. I will focus my remarks on the ICC on four elements: the need for an international criminal court; the features of the ICC; the Court today; and what we should expect from the Court in the future. I will start first with the need for the Court.

* This piece is based on remarks given by President Kirsch at the American University Washington College of Law on June 1, 2006.

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I. THE NEED FOR AN INTERNATIONAL CRIMINAL COURT

For experts on human rights it is clear that the protection of individuals from violations of human rights and humanitarian law requires appropriate mechanisms to enforce the law. For decades, international law lacked sufficient mechanisms to hold individuals accountable for the most serious international crimes. Naturally, like any other crimes, punishment for grave breaches of the Geneva Conventions or for violations of the Genocide Convention or the customary law of war crimes and crimes against humanity depended primarily on national courts. The problem is that it is precisely when the most serious crimes were committed that national courts were least willing or able to act because of widespread or systematic violence or because of involvement of agents of the State in the commission of crimes. If you look at the past to the best known historical events of that kind—Nazi Germany, Rwanda, the former Yugoslavia, Cambodia—the governments themselves or their agents were involved in the commission of those crimes. And so the failures of national courts in these contexts protected perpetrators with impunity. To prevent impunity in those situations, it is necessary to enforce international justice when national systems are unwilling or unable to act.

The first actions taken by the international community were to create ad hoc tribunals in such situations. The first tribunals were, of course, those of Nuremberg and Tokyo after World War II. Then, more recently, the United Nations set up tribunals for Rwanda and the former Yugoslavia. These tribunals were extremely important. They were pioneers. They showed that international justice could work, but they all possessed several limitations.

One is that only a few States participated in their creation. The Nuremberg and Tokyo tribunals were set up by the victorious Allied powers after World War II, and the Rwanda and Yugoslavia tribunals were created by the Security Council. There are also other limitations. Ad hoc tribunals are limited to specific geographic locations. They respond primarily to events in the past. Their establishment involves extensive costs and delays. Last but not least, their creation depended, every time, on the political will of the international community at the time. And so in some cases there was

action; in some cases there was nothing. As a result, their ability to punish perpetrators of international crimes and to deter future perpetrators has been limited. Eventually, a permanent truly international court was necessary to respond to the most serious international crimes and to overcome the limitations of the ad hoc tribunals.

In the summer of 1998, the U.N. General Assembly convened the Rome Conference to fill this essential need by establishing the ICC. In creating the ICC, States were particularly concerned with guaranteeing the Court's underlying legitimacy. Unlike the ad hoc tribunals, the ICC is the first and only tribunal that was created by an international treaty, which enabled all States to participate in its creation. All States were invited to participate in the negotiations of the statute and the vast majority—160—did so. There was a genuine effort to seek wide agreement among States without compromising the key values and objectives behind a fair and impartial court. Efforts towards universal acceptance were largely achieved. Eventually, on July 17, 1998, the Statute was approved by 120 States.

After the Rome Conference, a Preparatory Commission met for over three and a half years. It was charged with developing the Court's subsidiary instruments, notably, the Rules of Procedure and Evidence and the Elements of Crimes. It should be noted that the Rules of Procedure and Evidence for every other international criminal tribunal were developed by the judges in those tribunals. In the case of the ICC, they were developed by the States, again because States wanted to ensure that the system underlying the operation of the ICC would be as tight as possible. There was a very good reason for this; I will go back to that a little later. But it is clear that since the ICC would have prospective jurisdiction over then unknown situations, it was impossible for the States to know what exactly the ICC would deal with. Therefore it was absolutely vital for States to ensure that the ICC would be a purely judicial court.

Out of the desire I referred to earlier to ensure as wide acceptance as possible, all decisions taken by the Preparatory Commission were taken by consensus—by general agreement. That included the adoption of both the Rules of Procedure and Evidence and the Elements of Crimes. By this method of consensus, the Preparatory

Commission, contributed significantly to international support for the Court.

At the end of 2000, the deadline for signature of the Rome Statute, 139 States had signed the Statute, which was about twenty more than those that had voted for the Statute in 1998. To my knowledge, this is a unique case in the history of a treaty negotiation. Normally what happens is that you vote for an instrument at the time of the conference because it is easier and then forget about it because that is also easier. In the case of the ICC, the momentum to have a functioning Court in place was such that indeed, as I said, the number of signatures was higher than the number of votes at the conference.

In the eight years since the adoption of the Rome Statute, 102 countries representing broad geographical diversity have ratified or acceded to the Statute. I think it is a very good pace for a treaty establishing an international institution, in particular an international institution that requires considerable modifications in the legislation of States that have ratified the Statute.

II. THE FEATURES OF THE INTERNATIONAL CRIMINAL COURT

Having discussed the need for the Court. I turn now to the features of the Court. I would like, first of all, to dispel a common misperception about the Court. The ICC does not have universal jurisdiction. Its jurisdiction is limited to crimes committed on the territory of or by nationals of States which have voluntarily consented to its jurisdiction. These bases of jurisdiction—territory of the crime and the nationality of the perpetrator—are the most firmly established bases of criminal jurisdiction.

The Court's jurisdictional regime recognizes the special role of the Security Council in maintaining peace and security. Under the Statute, the Security Council may refer situations to the Court so that it no longer has to create ad hoc tribunals as it did for the former Yugoslavia and Rwanda. The Security Council has already used this power when it referred the situation in Darfur, Sudan, to the Court—Sudan not being a Party to the Rome Statute. The Security Council, acting under Chapter VII of the U.N. Charter, may also defer an investigation or a prosecution for a period of one year.

The Court's jurisdiction is also limited temporally. It has jurisdiction only over events since its Statute entered into force on July 1, 2002. No crime committed before that time can be dealt with by the ICC.

The Court's subject matter jurisdiction covers the most serious international crimes. In that sense, although obviously the ICC deals with the most serious violations of human rights, it is not a human rights court in the traditional sense. It is a criminal court. It is a criminal court that is limited to genocide, crimes against humanity, and war crimes. The crimes contained in the Statute are well established in customary and conventional international law as well as national laws.

The Statute also provides that the Court has jurisdiction over the crime of aggression, but the Court will not exercise this jurisdiction until both a definition of aggression, and conditions for the exercise of jurisdiction are agreed upon. This has to happen through an amendment to the Statute, agreed to by the States Parties. Such amendment could occur at the earliest at a review conference to be held in 2009. Aggression was seen by many States as a symbolic crime—a crime that certainly was central to proceedings after World War II. It was a general view among States that if aggression were not committed, many other crimes would not be committed and therefore aggression had to be part of the Statute. However, there was no agreement on how aggression should be defined and there was certainly no agreement how to move from a declaration of aggression by States as an act covered by public international law to proceedings covering individuals having been involved in their crimes under international criminal law.

Even where the Court has jurisdiction, it will not necessarily act. This is the fundamental point that has to be understood about the ICC. The ICC is a court of last resort. It is intended to act only when national courts are unwilling or unable to carry out genuine proceedings. This is known as the principle of complementarity. Under this principle, a case will be inadmissible if it is being or has been investigated or prosecuted by a State with jurisdiction. In addition, a case will be inadmissible if it is not of sufficient gravity to justify action by the Court.

There is an exception under the principle of complementarity where the Court may act. This is when the State is unwilling or unable genuinely to carry out the investigation or prosecution. For example, if proceedings were undertaken solely to shield a person from criminal responsibility—and that can take different forms, which are indeed spelled out in the Statute—or if the proceedings were carried out in a manner inconsistent with an intent to bring the person to justice.

It follows from what I said earlier, from the concern of States to ensure that the Court would be a purely judicial institution and would act in a purely judicial way, that the guarantee of a fair trial and protection of the rights of the accused have paramount importance before the ICC. The Statute incorporates the fundamental provisions of the rights of the accused or the rights of the accused and due process common to national and international legal systems.

A particular feature of the ICC, which is different again from ad hoc tribunals, is the treatment given to victims. Victims have of course participated in other international proceedings, but largely as witnesses for the prosecutor or for the defense. In the case of the ICC, victims may participate in proceedings even when not called as witnesses. The Court also has the power to order reparations to victims including restitution, compensation, and rehabilitation. The ICC has the obligation to take into account the particular interests of victims of violence against women and children.

III. THE INTERNATIONAL CRIMINAL COURT TODAY

I would like to turn next to where the Court is today. Three States Parties have referred situations occurring on their own territories to the Court and in addition, as I mentioned earlier, the Security Council has referred the situation in Darfur, Sudan, a non State-Party. After analyzing the referrals for jurisdiction and admissibility, the Prosecutor began investigations in three situations: Uganda, the Democratic Republic of the Congo, and Darfur, Sudan. The Prosecutor is also monitoring five other situations.

In March this year, the first wanted person was surrendered to the Court. Mr. Thomas Lubanga Dyilo, a national of the Democratic Republic of the Congo, is alleged to have committed war crimes;

namely, conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities. The confirmation of charges against Mr. Lubanga is scheduled for September and if the charges are confirmed, the trial will begin thereafter.

Arrest warrants have also been issued in the situation in Uganda for five members of the Lord's Resistance Army, including its leader Joseph Kony. In that case, the alleged crimes against humanity and war crimes contained in the warrants include sexual enslavement, rape, intentionally attacking civilians, and the forced enlistment of child soldiers. The arrest warrants were initially issued under seal because of concerns about the security of victims and witnesses. The warrants were only made public once the Pre-Trial Chamber was satisfied that the Court had taken adequate measures to ensure security.

This illustrates a major difference between the ICC and other international tribunals, which by and large were dealing with crimes that had been committed in the past in the course of conflicts that were over. The ICC deals with crimes that continue to be committed in the course of conflicts that are ongoing. As a result, the ICC faces many challenges in particular in relation to its field activities and security.

IV. THE FUTURE OF THE INTERNATIONAL CRIMINAL COURT

Finally, I would like to turn to what we can expect from the Court and from the wider system of international justice in the future. As investigations and trials proceed, the Court of course recognizes that it has the primary responsibility to demonstrate its credibility in practice through fair, impartial and efficient proceedings consistent with due process and proper administration of justice.

But the Court will never be able to end impunity alone. Its success will depend upon the support and commitment of States, international organizations, and civil society. The Court is complementary, as I said, to national jurisdictions and States will continue to have the primary responsibility to investigate and prosecute crimes—the Court being, as I said, only a court of last resort. There will be situations where national systems do not work properly or are unable to work. Because the Court's jurisdiction is

limited to national and territories of States Parties, continued ratification of the Statute is essential to the Court having a truly global reach.

When the Court does act, it will require cooperation from States at all stages of the proceedings, such as by executing arrest warrants, providing evidence, and enforcing sentences of the convicted. Cooperation is absolutely crucial. For example, without sufficient support in arresting and surrendering persons, there can be no trials. Not only the States where crimes were committed or wanted persons are located can help, but all States in a position to provide cooperation can assist the Court. What States wanted when they created the ICC was a strong judicial institution, but not an institution that had at its disposal the normal tools of any national court. The ICC has no army. The ICC has no police. That's what States wanted, and—having wanted that system—now States need to cooperate with the Court to ensure that the system works.

International organizations also provide critical support for the Court. The support of the United Nations is particularly important in this regard. The United Nations and the Court cooperate on a regular basis, both in our field activities and our institutional relations. In October, 2004, the Secretary General of the United Nations and I concluded a relationship agreement, which was later supplemented by an agreement with the U.N. Mission in the Democratic Republic of Congo.

The Court is also developing its cooperation with regional organizations. In April, the Court entered into a cooperation agreement with the European Union. We hope to do the same with the African Union in the near future. There is also a role for cooperation by the Organization of American States (“OAS”). The OAS has been a strong proponent of the Court. Court officials, including myself, have participated in a number of meetings of the OAS.

Then we come to non-governmental organizations (“NGOs”) and civil society more broadly, which are also instrumental to the work of the Court. NGOs have played a large role in urging ratification of the Statute. They have assisted States in developing legislation implementing the Rome Statute. Local NGOs may possess knowledge which is directly relevant to the Court's work in the field.

NGOs also continue to have a critical role in disseminating information about and building awareness of the ICC.

As I said at the outset, academic institutions such as this Academy have a particularly important role in relation to the Court. It is my experience, truly, that ignorance is one of the biggest obstacles to the success of the Court. Often, opposition to the Court is based on misconceptions which can be easily avoided. I believe that the more people understand the Court, the more it will be accepted. Of course, for that to happen there needs to be a dialogue. If there is no dialogue, the chances of mutual understanding are much lower.

In conclusion, I would say that the creation of the ICC was a truly historic achievement, more than fifty years in the making, but its creation was only the beginning. The Court now stands as a permanent institution capable of punishing perpetrators of the worst offenses known to humankind. Indeed, as early as 2004, the U.N. Secretary General stated that the Court “was already having an important impact by putting would-be violators on notice that impunity is not assured and serving as a catalyst for enacting national laws against the gravest international crimes.”¹ Indeed, we at the Court who have a system of monitoring media reports on issues of international criminal justice and a fairly broad set of related issues do know how much notice is taken of the Court in many situations—some situations which are already under the jurisdiction of the Court and many other situations elsewhere.

To be fully effective, we must continue our efforts to ensure that the Court has the support necessary to dispense justice as fairly and efficiently as possible. If there is only one thing that you should retain from this piece, it is that the Court will do whatever it can to be as credible as possible, but that it will only succeed with concrete, tangible support.

1. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 49, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004).