

Growing Pains: Assessing the First Seven Years of the International Criminal Court

Michael Struett is Assistant Professor of Political Science at North Carolina State University and author of *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan Press, 2008)

This July the International Criminal Court (ICC) will celebrate its seventh birthday.

With the issuance of an arrest warrant for the sitting President of Sudan Omar Al-Bashir, on March 4th of this year, the ICC is making waves across the global governance system. That action was welcomed by many human rights activists, who see this as a critical step in bringing an end to the culture of impunity for the perpetrators of crimes of mass violence. The Bashir case is particularly important for reinforcing the norm that even those who act from the highest levels of state power can be charged with crimes under international law. On the other hand, the arrest warrant had immediate consequences for 13 humanitarian groups expelled by Bashir's government from the Darfur region following the court's action. Sudan accuses these groups of acting as "spies" for the International Criminal Court. The UN Office for the Coordination of Humanitarian Affairs estimates that these groups were responsible for delivering over half the humanitarian aid in the Darfur region. One consequence of their expulsion will be an increase in suffering and mortality in the region, since these aid groups were the major providers of basic medical services. An ongoing cholera outbreak in some of the largest Darfur refugee camps is expected to be much more lethal because of the absence of services previously provided by these groups; including the International Rescue Committee, CARE, Oxfam, Save the Children, and Doctors Without Borders. So at age seven, the International Criminal Court is already a major player in world politics, and its actions have serious real world consequences. How can we assess the trajectory of this new institution of global governance?

A bit of perspective and humility is in order before we undertake this task. After all, a "seven year review" of the US Supreme Court undertaken in 1796 would have predated *Marbury vs. Madison*. An evaluation of the US Supreme Court's development at that point would almost certainly have wildly underestimated its ultimate importance to the US constitutional framework, and its larger influence on national and global affairs. So while recognizing these are early days, this essay examines three sets of major challenges the court has faced thus far, and offers an assessment of the ways in which the ICC has managed those challenges. The areas examined include the use of the Court's discretionary powers in case selection; the development of the Court's basic operating procedures; and future issues with expanding the subject matter jurisdiction of the ICC to include aggression or other international law crimes. In the main, I conclude that both the challenges and successes the ICC have confronted thus far stem from the fact that it is now one of the most comprehensively developed institutions of global governance. The court's legal powers and authorities within its sphere of competence are far more developed than what is the case for most global institutions. This fact creates challenges and opportunities for the court.

The ICC is a carefully designed international criminal judicial body, bound by law in a world where most political relationships are still characterized by a substantial degree of anarchy, or

the loosely coordinated actions of independent states. This reality is highlighted when we see the court issue carefully crafted arrest warrants following extensive investigations and judicial review; mostly followed by inaction on the part of states that have the legal duty and executive authority to carry out those warrants.

Prosecutorial Discretion in Case Selection

At the time of the court's founding, one of the most controversial issues surrounding the court's design was the unusual amount of autonomy granted to the Court's officers compared to those of other international institutions. We are now in a position to offer a preliminary assessment of the ways in which both the prosecutor's office and the chamber of judges have chosen to use their discretionary powers. The ICC statute allows member states, or the United Nations Security Council, to refer situations for investigation by the prosecutor's office when there is reason to believe war crimes, crimes against humanity, or genocide may have been committed. Once such a referral has been issued however, the prosecutor's office must choose which individuals to prosecute in a given situation. For instance, in a civil war situation, the prosecutor's office has the discretion to bring charges against members of rebel groups, or state officials. They may conceivably choose to focus on rank and file soldiers, or their superiors at the highest level of the chain of command, or both. The most important guidance in the 1998 Rome Statute says simply that the prosecutor and judges should focus on "the most serious crimes of concern to the international community as a whole" (Preamble, Paragraph 10; See also Article 1, and Article 17).

Thus far, the ICC has issued arrest warrants with respect to alleged crimes committed in four conflict situations: Uganda, the Democratic Republic of Congo, Sudan, and the Central African Republic. This fact has led to charges of neo-colonialism or racism grounded in the perception that the ICC is deliberately targeting Africa for prosecutions. A wide variety of conflicts in the world have produced war crimes, crimes against humanity, and even instances of genocide since the ICC's temporal jurisdiction began in July 2002. Indeed, the prosecutor's office has acknowledged receiving tens of thousands of communications of allegations of crimes from dozens of different conflict situations.

Tragically, there is no shortage of alleged international law crimes that one might investigate. So why have all of the ICC investigations thus far focused on Africa? First, the jurisdiction of the court is limited by which states have chosen to ratify the Rome Statute. Nearly half of the ICC member states are in Africa. The prosecutor's office has noted that the vast majority of complaints it receives actually involve alleged crimes that took place outside the territorial, temporal or subject-matter jurisdiction of the ICC. For example, any crimes that may have been committed by Americans in Iraq are not subject to the ICC's authority because neither the US nor Iraq have yet ratified the Rome Statute.

Second, an objective case can be made that the atrocities spelled out in the ICC indictments with respect to these four situations rise to a level of barbarity that does distinguish them as the "most serious" crimes since 2002. Third, in all four of the Africa situations, the prosecutors office did not open the investigation on its own initiative. In three of those four cases the government involved issued the referral of the situation to the ICC, so the court's involvement was requested

The Academic Council on the United Nations System

Informational Memorandum

No.78 • 2009

by the state where the crimes took place. In the case of Sudan, the ICC initiated its investigation following a conferral of jurisdiction by the UN Security Council under its Chapter VII powers. Finally, the Prosecutor's office has already announced that preliminary investigations of very serious crimes within the jurisdiction of the ICC are underway with respect to Colombia, Afghanistan, and Georgia, amongst other places. It will likely not be long before the ICC issues arrest warrants targeted outside of the African region.

Within the context of particular situations, the prosecutor's office also has considerable discretion about whom to charge and for what crimes. In the court's first case, a great deal of attention was paid to the decision to focus primarily on charges of the war crime of recruiting child soldiers against Mr. Thomas Lubanga, a militia leader from the D.R.C. Was the prosecutor trying to send a political signal by focusing the court's first action on the relatively newly established crime of recruiting child soldiers? If that were the case it would be disturbing to many court watchers, because it would suggest that political considerations may play a large role in shaping the actions of the court, thus confirming the worst fears of ICC skeptics who fear it will be a rogue court with little accountability. In fact, the official, public, and academic statements of people involved in the ICC prosecutor's office internal deliberations all point in the opposite direction. The opportunity to arrest Lubanga arose suddenly, and they faced a problem of proceeding to trial or losing the likely possibility of bringing Lubanga to trial at all. Their investigation had produced the most compelling evidence with respect to the allegations of recruiting child soldiers, so that is the evidence they took to the judges in order to get an arrest warrant issued. Observers should be impressed by the legal scrupulousness with which the ICC has used its discretionary authority thus far.

Developing Court Procedures

The ICC has made a great deal of progress in establishing and testing its own internal procedures for investigating crimes, prosecuting cases, ensuring due process, and relating with victims and protecting their rights. The few examples discussed here are illustrative. While it is true that the first criminal trial only got under way in 2009, that does not mean that the judges at the ICC have been inactive. Instead, a significant number of preliminary questions about how the court will operate in practice have been litigated at the pre-trial, trial, and appellate levels of the court, with full participation by the prosecutor, defense, and representatives of alleged victims. Any new legal system must do a great deal of work to develop its procedures during its first cases. This was the experience of the International Criminal Tribunal for the former Yugoslavia in its first trial. The need is particularly great when the institution is determined to guarantee every due process right to its very first defendant.

One serious procedural issue threatened to derail the ICC's first trial against Lubanga. In brief, the ICC statute allows the prosecutor's office to take confidential statements from witnesses to crimes in order to build its case with non-confidential evidence that can be used at trial. The Office of the Prosecutor is legally mandated not to share such evidence received in confidence. However the Prosecutor's office faces a conflicting mandate in the statute to reveal to the defense any information which is potentially exculpatory. As a result of a complex series of rulings over the last year and a half, the appeals division of judges has now developed a workable solution to this problem. In essence, the decision about whether or not evidence goes to

the innocence of the accused is subject to review by the judges at all levels, but those judges are also subject to the initial confidentiality agreement. Through the newly elaborated procedures, the judges, rather than the prosecutor, will have the final say about whether or not confidential information would exonerate the accused, and since such information cannot be shared with the accused, its existence would result in the dismissal of a charge.

Also, in the confirmation of the Bashir arrest warrant, there was a split decision about the threshold requirements for establishing the basis for a charge of genocide, with 2 of 3 judges ruling to reject the prosecutor's application to file genocide charges in this case. At issue is the extent to which the prosecutor must show a genocidal intent at the indictment phase, or if instead that is an issue best left for the trial court after a complete review of the evidence. The prosecutor's office strongly agrees with the view of the dissenting judge, and has asked leave to appeal as this ruling has the potential to shape all future efforts to prosecute genocide at the ICC.

Issues for the Future

While the world is now accustomed to international trials for war crimes, crimes against humanity, and genocide, there is no inherent reason that only these three classes of crimes should be punished internationally. Many other crimes are also already recognized under international law, including certain acts of terrorism, piracy, drug trafficking, and perhaps most importantly, the crime of aggression. The Rome Statute itself gives the ICC jurisdiction over aggression, but forbids it from using it until the ICC state parties agree on an enforceable definition of that crime. The ICC Assembly of State parties has been considering that very issue, and further discussions are scheduled for the coming year.

Ultimately, the ICC is a judicial body, and its decisions must be driven by legal and evidentiary criteria, and not political ones. States remain the legislative and executive authorities in the international legal system, and it falls on them to consider the political ramifications of setting the rules for which crimes should be prosecuted, and when and where particular warrants should be enforced. That state parties to the ICC statute have a legal obligation to enforce such warrants cannot be denied. The moral responsibility also falls on states when they deliberately contribute to or simply ignore the continuation of serious international law crimes. Only universal ratification of the Rome Statute will ensure that the ICC can be territorially neutral in determining which cases are the most serious crimes of international concern.