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The International Criminal Court: Capturing Public Attention

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On April 3, 2009, the International Criminal Court issued an arrest warrant against President Omar Al Bashir of Sudan for crimes against humanity and war crimes centering on Darfur. It is the first warrant issued by the ICC for a sitting head of state. As noted in the ICC press release announcing the warrant, "Omar Al Bashir's official capacity as a sitting Head of State does not exclude his criminal responsibility, nor does it grant him immunity against prosecution before the ICC...." President Al-Bashir is accused of seven counts of individual criminal responsibility involving crimes against humanity and war crimes.

For those who spent years working and campaigning for an international criminal court, this was a long-awaited event – to see a permanently established court undertake a systematic investigation to hold personally and legally accountable individuals who had committed serious crimes against the international community – those of genocide, crimes against humanity, war crimes, and the crime of aggression. Article 27 of the Court's statute specifically stated that an individual's official capacity would not exempt him or her from criminal responsibility. A Review Conference is scheduled for 2010 to review the crimes under the Court's jurisdiction with an opportunity to amend the Statute to include new crimes. Any amendments to the Statute will require separate acceptance and ratification by the States Parties and come into force only after the ratification of 7/8 of the States Parties.

The idea of creating a permanent international court to prosecute serious crimes of concern to the international community grew directly out of the post-world War II Nuremberg and Tokyo war crimes tribunals. In 1948, the UN General Assembly placed creating a permanent international criminal court on the agenda of the International Law Commission. The project came close to reality, but was stunted by the Cold War that moved it to the back burner. With the end of the Cold War in 1989, the idea was revived at the request of Trinidad and Tobago and the International Law Commission was once again asked to prepare a draft statute for a permanent international criminal tribunal. The mass killings that occurred in the former Yugoslavia and Rwanda that caused the UN Security Council to create the ad hoc tribunals (International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda) to prosecute crimes that had taken place in these two conflicts highlighted the ongoing need for such a court.

By 1994, the International Law Commission had adopted a draft statute and recommended an intergovernmental diplomatic conference to establish an international criminal court. The conference was held in Rome, Italy from June to July 1998 and concluded with the adoption of a statute to establish an International Criminal Court. To refine the ILC draft, the UN General Assembly created a Preparatory Committee to work further on the draft statute. The Preparatory Committee met six times between 1996 and 1998 and attracted widespread attention from the

non-governmental community. This attention has continued as the Court set itself up and prepared for its first trials following the entry into force of the Rome Statute in 2002. The Court is an independent judicial body that maintains close ties to the United Nations. Relations between the ICC and the UN are governed by a Relationship Agreement between the International Criminal Court and the United Nations (1/58/874, annex). The ICC is based in The Hague, The Netherlands and relations between the ICC and The Netherlands are governed by a Headquarters Agreement that came into force in March 2008.

Given this background, it is not surprising that the International Criminal Court has given special attention to public outreach particularly in countries where conflicts or situations have given rise to the crimes either under investigation or prosecution by the International Criminal Court. The Court's annual report to the UN General Assembly, for example, provides a section on outreach efforts to explain the proceedings as well as the nature of the crimes to those populations principally affected. Outreach, however, is not always possible in areas of active conflict. Where this is the case as in Sudan today, efforts are undertaken to reach refugees in order to plan effective outreach strategies for the future once security can be assured.

This conscious effort to engage the public from the very beginning of the ICC's existence partially explains the broad and widespread interest in the work of the International Criminal Court. Of equal importance was the sustained effort of such individuals like Cherif Bassiouni to build a network and community of interest in international criminal law. Professor Bassiouni's direct involvement in the creation of the International Criminal Court as a Vice-Chairman of the Rome Statute's Preparatory Committee, further bolstered the credibility and visibility of this network. Through more than thirty years of training programs on aspects of international criminal justice, Professor Bassiouni and the International Institute of Higher Studies in Criminal Sciences (ISIS) based in Siracusa, Italy, created an influential network of more than 27,000 individuals drawn from government ministries, judiciaries, law enforcement, the academy and the general public. This multifaceted network provided a solid base of individuals who could readily address issues related not only to the creation of an international criminal court, but also to its operation. These individuals also became key players in addressing the ICC's relationship to national and local legal systems including law enforcement after the adoption of the Rome Statute.

The community of interest supporting the work of the International Criminal Court also includes those judges, prosecutors, and attorneys who had worked at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). A prominent example of such an advocate is Judge Patricia M. Wald who spent two years in The Hague at the ICTY following her retirement from the U.S. Court of Appeals for the District of Columbia. In this connection, see the March 2009 report produced by an Independent Task Force of the American Society of International Law co-chaired by Judge Wald and William H. Taft, IV who served as Legal Adviser of the U.S. Department of State during the first George W. Bush administration.

Titled, "U.S. Policy Toward the International Criminal Court," the report does not recommend U.S. ratification of the Rome Statute at this time, but does urge "engagement with the ICC and the Assembly of States Parties in a manner that enables the United States to help further shape the Court into an effective accountability mechanism. The Task Force believes that such engagement will also facilitate future consideration of whether the United States should join the Court." The Task Force recommended that the United States should announce a policy of positive engagement with the Court that is "reflected in concrete support for the Court's efforts and the elimination of legal and other obstacles to such support."

The removal of such obstacles has provided additional opportunities of the Court to engage those working in national and local legal systems as officials seek to bring their systems into compliance with the Rome Statute. One such regional effort has been mandated by the Inter-American Juridical Committee, an organ of the Organization of American States, that has adopted an agenda item on "Promotion of the International Criminal Court." Under this agenda item, the Inter-American Juridical Committee has asked member states to report on where they might encounter problems in implementing the provisions of the Rome Statute that would require constitutional amendments or interpretations. Examples of such problem areas are on length of sentences and extradition of nationals as well as immunity for certain persons.

The combined forces of public interest in seeking accountability from those responsible for perpetrating atrocities, strong networks, and the ongoing addition of individuals with actual experience in judging international crime have generated an unusually diverse base of interest in the work and development of the International Criminal Court. This has included academic interest outside the legal community. In its public, but very focused and deliberate approach to addressing international crime, the International Criminal Court has not only captured, but is also cultivating the public's attention in a way that will help to make impunity for international crime something of the past. This experience points to the important and ongoing role communication plays in the development of effective legal processes and law.